

Persons or Aliens?
Making Normative Sense of Non-citizens' Legal
Standing in the U.S. and Germany

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Thesis submitted in partial completion of the requirements for the
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I hereby declare that the work presented in this thesis is my own.

Rolf Johan Olsson

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Abstract:

This thesis aims to analyse the normative rationales behind non-citizens' legal standing in two liberal nation-states. The thesis takes the cosmopolitan and communitarian rationales as its theoretical starting point. Specific attention is given to the possibility of coherently combining the cosmopolitan and the communitarian rationales. The thesis analyses the actual legal standing of non-citizens in the U.S. and Germany and so links the political theoretical discourse to alienage jurisprudence. The conclusions drawn are that both the cosmopolitan and the communitarian rationales underlie non-citizens' legal standing. The treatment of non-citizens is fairly normatively coherent and in line with a weak cosmopolitan perspective. The thesis, however, identifies limited but important normative contradictions in the treatment of non-citizens and outlines, on a practical level, what is required to remedy this situation.

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Chapter One

Non-Citizens – Persons or Aliens?

According to the national ideal, the right and duty of each government is to promote the interests of a determinate group of human beings, bound together by the tie of a common nationality... and to consider the expediency of admitting foreigners and their products solely from this point of view. According to the cosmopolitan ideal, its business is to maintain order over the particular territory that historical causes have appropriated to it, but not in any way to determine who is to inhabit this territory, or to restrict the enjoyment of its natural advantages to any particular portion of the human race. (Sidgwick 1897: 308)

Thus described Sidgwick, some one hundred years ago, what he saw as the two broad philosophical alternatives to the treatment of non-citizens. These two philosophical perspectives, hereafter called cosmopolitanism and communitarianism, have together come to constitute the normative foundations for the treatment of non-citizens in liberal nation-states.¹ It is also clear, with historical hindsight, that the often uneasy co-existence of these two philosophical perspectives represents a great normative challenge for liberal nation-states:

From the vantage point of the twentieth century, there seems to be a contradiction between the all-inclusiveness of human rights and the exclusiveness of nation-states. All democratic states pledge allegiance to human rights, but at the same time they reserve certain rights (such as the right to vote) to nationals only. Human rights take humanity or world society as the context of inclusion and claim that every human being has a right to be included. *The question is included in what?* (Halfmann 1999: 379, emphasis added)

The fact that liberal nation-states are constituted by both cosmopolitanism and communitarianism hence generates the question – what rights should non-citizens be granted or denied? And it is this question that is the central focus of this thesis. The question is a political theoretical one; accordingly, the task is ‘to relate a coherent body of principles’ to the issue of the treatment of non-citizens (Plamenatz 1960: 46). More specifically, the aim is twofold: firstly, to deduce what the normative rationales behind the laws that regulate non-citizens’ legal standing in liberal nation-states actually are; and secondly, to determine if these

¹ The twofold categorisation deployed here is commonly used throughout the literature, though alternative labels such as liberal and nationalist are sometimes used (Mulhall 1992; Linklater 2002: 256–257; Vertovec 2002: 10).

rationales constitute an internally consistent position, i.e. analyse if the treatment of non-citizens is normatively consistent.

This introductory chapter will briefly outline the general framework within which this issue is situated. The chapter will subsequently spell out exactly which questions the thesis will provide an answer to, explain what the purpose of answering these particular questions is and explain why this amounts to a valuable academic contribution. It will furthermore provide definitions, establish a clear remit for the analysis, and explain the choice of case studies and the method used.

Introduction and General Framework

Liberal nation-states suffer from an internal normative tension. As liberal states, they are committed to and constituted by the idea that all human beings, as self-determining individuals, hold a universal and equal right to personhood; from this perspective, state membership/citizenship makes no intrinsic normative difference to the rights of any person. As nation-states they are, however, also committed to and constituted by the idea that they each represent a particular nation, which has a right to self-determination; from this perspective, membership/citizenship does make an intrinsic normative difference: members have special rights in virtue of their membership, which non-members do not. Liberal nation-states thus tread a fine line as they try to balance their commitment to special rights for the members of their particular nations with their commitment to universal individual rights. Liberal nation-states, by their very nature, thus stand with one foot firmly placed in normative particularism and the other foot equally firmly placed in normative universalism:

Built into the self-understanding of the national state, there is a tension between the universalism of an egalitarian legal community and the particularism of a cultural community bound together by origin and fate. (Habermas 1996b: 287)

This tension might have remained an intriguing, but purely theoretical issue, were it not for the facts that the world is finite while people (and resources) are mobile. The fact that people always have crossed – and will continue to cross – national/communal² borders means that the

² The words community and nation will be used almost interchangeably the only slight difference being that the word nation is used in a more specific sense and taken to denote a larger political community. The word nation-state will thus be used to denote a state that represents a particular political community, i.e. a nation. The reason behind connecting communities, nations and nation-states in this way is twofold: first, the thesis has a state

question of how non-citizens are to be treated becomes a very real political and legal issue. Transnational interaction is perceived as a problem by some and as an opportunity by others. Be that as it may, the fact is that ‘the ship or the camel (the ship of the desert) make it possible for people to approach their fellows and that people cannot disperse over an infinite area as the earth is a globe’ (Kant 1991b: 106; see also Benhabib 2004: 33). Thus, people from different nations unavoidably end up side-by-side, and there is no escape from addressing the question: how should liberal nation-states treat the non-members that reach their shores and/or live in their midst?

The presence of such non-citizens in liberal nation-states is, moreover, a very salient political issue. This is because non-citizens affect so many different spheres of the societies they live in – including the very makeup of the body politic – as a result of the fact that people are cultural, economic and political actors all rolled into one. Furthermore, rates of migration have accelerated in recent decades; as a result of that the world has entered a phase of increasing globalisation. Globalisation is a process characterised by an increase in the velocity and intensity of political, economical, social and cultural interactions (Giddens 2000: 92; Held 1999: 1–31). Migration is an intrinsic part of this process. The fact that individuals are political, economic, social and cultural actors all rolled into one makes increased migration the globalisation phenomenon *par excellence*.

It can, of course, always be debated to what extent globalisation is a new phenomenon, and to what extent it is increasing. Globalisation sceptics, however, seem to be an ever-decreasing minority, and they tend to focus on questioning the increase in transnational economic activities (Hirst 2000); what cannot be denied is that the number of people that live in foreign states is increasing. In 1910, 33 million people lived outside their own states, while the corresponding figure was between 160 and 175 million in 2000. The number of people residing in foreign countries has thus increased almost six-fold during a time when the world population has little more than tripled. This trend has, furthermore, accelerated during the latter part of the past century (Benhabib 2004: 5; Massey 2004: 1).

perspective, and second, communitarian discourse in general, as well as in this specific area, starts from the assumption that most states are nation-states. As such they are the political expressions of national communities, and therefore constitute the appropriate level for regulating immigration (Walzer 1983; Miller 1995; Tamir 1993; Meilaender 2001; Friedman 1994: 333–334).

There is also currently a strong migration flow from the developing world to the developed world; hence this accelerating trend is most noticeable in liberal nation-states where the population of non-citizens is rising sharply, and becoming increasingly diverse (Held 1999: 314–318; Massey 2004: 1–3). This upward trend of migration from the poorer parts of the world to the richer ones also means that the remittance income that immigrants send home is becoming an important part of the developing world’s economy: it now outstrips the total amount of official foreign aid to the developing world, and makes such migrants the developing countries’ main export to the developed world in terms of foreign exchange earnings (Massey 2004). The upshot is that liberal nation-states are hosting increasingly large and diverse populations of non-citizens, and the issue of their legal standing is becoming ever more significant in both the developed and developing world.

The existence of such large non-citizen populations poses a specific challenge to liberal nation-states along the lines outlined above. Liberal nation-states are committed to respecting individuals’ right to self-determination, and this right is in principle equal and universal. The question then becomes: to what extent, if at all, can liberal nation-states invoke the idea of national sovereignty to discount non-citizens’ universal and equal right to individual self-determination, without giving rise to normative inconsistencies?

The question of which rights should or should not be applicable to non-citizens is a difficult one to answer for liberal nation-states. Consequently, the debate over non-citizens’ rights has been raging since the very beginning of western political philosophy (see next chapter). This thesis will deal with the particular issue of how this problem has been dealt with, in practice, in two large and influential liberal nation-states. More specifically this thesis will answer a two-fold question: *What are the normative rationales behind the laws that regulate non-citizens’ legal standing in the U.S. and Germany; and is the treatment of non-citizens in the U.S. and Germany internally normatively consistent?*

The Aim and Purpose of the Thesis

The thesis thus aims to contribute to the political theoretical debate over the treatment of non-citizens by analysing the normative rationales behind non-citizens’ legal standing in the U.S. and Germany. *This means, in practical terms, that the first task is to deduce³ and characterise*

³ The term deduce here refers to the tracing of or the deriving the meaning of something. Here, the term does not refer to logically inferring something.

the normative rationales behind the laws that regulate non-citizens' legal standing in the U.S. and Germany. The second task is to conduct an analysis of their internal coherence. This two-fold task will be fulfilled in four closely related steps. *The first step* is concerned with identifying the theoretical bases of the normative rationales behind the treatment of non-citizens. Liberal nation-states are constituted by both the cosmopolitan and the communitarian rationales, as described above, and the first step is devoted to uncover these two normative rationales, from a political theoretical perspective. Such a theoretical excavation clarifies what these two existing normative alternatives actually entail and what the normative logic or reasoning behind each is. The first step hence clarifies, on a theoretical level, the normative foundations that lie behind the treatment of non-citizens in liberal nation-states. Such a theoretical identification of the two rationales also makes it possible to identify their application to existing laws regulating non-citizens in the two states. That is, the theoretical identification of the rationales creates a tool that will be used for the task of deducing the rationales behind the actual laws of the U.S. and Germany (see step three).

The second step is to theoretically identify consistent overall perspectives for the treatment of non-citizens based on the cosmopolitan and the communitarian rationales respectively. It is clear that a consistent approach can be identified by applying each of the two respective normative rationales to all potential rights that non-citizens could be granted or denied; it is also clear that the scope for maintaining such quickly diminishes if rights based on these alternative rationales are combined. That is, if non-citizens are granted the right to refugee protection as a universal cosmopolitan right, then it becomes inconsistent to deny them the right to security or subsistence as part of the community's right to self-determination; conversely, if non-citizens are denied the right to admission due to the community's right to maintain itself as a particular nation, then membership cannot be open to all non-citizens. There are, however, some limited possibilities to consistently combine the normative rationales, and a relevant consistent normative perspective that combines the two rationales will be analysed in the second step. The second step hence lays the foundation for the internal consistency analysis by identifying consistent approaches based on combining these two normative rationales. By doing so, the second step also further clarifies what the normative alternatives are.

The third step takes us into the empirical world, and to the analysis of the case studies. In this step, the normative rationales behind the actual laws regulating the legal standing of non-

citizens will be deduced. This will be done by first outlining the legal treatment of non-citizens in the U.S. and Germany; following this, their normative rationales will be deduced by drawing on the theoretical identification in step one (for more details, see the Method section below).

The completion of steps one, two and three thus provides a clear picture of the different coherent theoretical options for the treatment of non-citizens, as well as a clear picture of the normative rationales behind the actual treatment of non-citizens. This sets the stage for the crucial *fourth step*, which is concerned with the internal consistency analysis of the treatment of non-citizens as characterised by the case studies. In this fourth step, internal inconsistencies assessed with reference to the actual overall normative commitments of the two states will be identified. Therefore, the case studies are the sole focus of the critical analysis, and it is internal consistency that will be measured. The further theoretical question of what constitutes the best normative approach will not be addressed.

The theoretical exercise in the second step, however, plays two important roles in the fourth step. Firstly, it functions as a general blueprint for identifying the two states' overall normative positions, against which their internal inconsistencies are identified. Secondly, the consistent perspectives identified in the second step also function as detailed benchmarks for identifying which positions are internally consistent. The fourth step hence builds on all the previous steps to provide a critical analysis of the current treatment of non-citizens in these two states, based on their normative commitments. The fourth step thereby generates proposals for changes to the laws regulating non-citizens' legal standing based on the pre-existing normative commitments of the two states; it will be undertaken at the end of the case studies.

The purposes of fulfilling these two tasks (over the above-mentioned four steps) are threefold. The *first purpose* is a clarifactory one. That is, the first purpose is to clarify in theory, and in practice, what the existing normative alternatives entail and what the normative bases for the actual treatment of non-citizens are. This is important, as no truly fruitful normative debate about non-citizens' legal standing can take place in the absence of a clear understanding of where we stand and what the politically relevant normative alternatives are. The first purpose is thus to provide a foundation from which an applied normative debate of non-citizens' legal standing in these states can take place. There is a need for this kind of clarity. Matthew

Gibney has, for example – in relation to the refugee debate – pointed to the problem that empirically inclined commentators tend to launch normative critiques without theoretically analysing or clarifying what normative obligations states can be said to have; conversely, political theorists analyse the nature of these obligations, but fail to connect them to the existing political framework and legal practice, and hence render their critiques somewhat otherworldly (Gibney 2004: 15–16).

The *second purpose* is to conduct a critical analysis of the normative consistency of the actual treatment of non-citizens in the U.S. and Germany. The fact that this analysis takes place on an applied level means that it generates specific and applicable suggestions for changes to the laws regulating non-citizens' legal standing where they are found to be normatively inconsistent. The normative force of the recommendations will, hopefully, be particularly potent as they are based on existing normative commitments, and tailored to the existing legal framework.

The *third purpose*, more general in nature, is to shed some light on what kind of political communities the U.S. and Germany are. Their treatment of non-citizens does not generate a complete account of the nature of these political communities, but it reveals much about their normative essence and self-perception. To what extent are they political communities based on the notion that all individuals are equal and have the same rights? And to what extent are they political communities based on the notion that rights are particular, being attributes of membership? That is, their treatment of non-members constitutes a reflection in which the essence of these political communities can be viewed (Kantstroom 1993: 158–159, 178; Benhabib 2004: 2, 176; Schuck 1984: 85). In this respect, the issue of non-citizens' legal standing is particularly interesting as, in the words of a legal historian: “Legislation is a major function of the state and a powerful means of social change; it is also a precious indication of the general level of civilization and of prevailing ideas about society.” (van Caenegem 1991: 37) In sum, this thesis, taken in its entirety, will provide the applied normative clarity required for a fruitful normative debate of this issue, critically assess and make practically applicable recommendations for changes to the current situation, as well as shed some light on the general question of what the natures of the U.S. and German political communities are.

Contributions

This thesis draws on a very large number of political theoretical and jurisprudential writings. The theoretical framework draws on the vast political theoretical discourse around non-members/citizens' moral standing as well as on the smaller discourse around the normative aspects of immigration to liberal nation-states. This thesis also draws heavily on the jurisprudential discourse around non-citizens' legal standing in Germany and the U.S. In terms of the thesis' contributions to these discourses it can be said that the thesis makes a general contribution to the long-standing normative discourses around the moral status of non-citizens and the normative discourse around immigration to liberal nation-states. This general contribution chiefly consists of adding empirical material to these normative discourses. The thesis, however, also makes a small theoretical contribution by analysing the possibility to coherently combine the cosmopolitan and communitarian rationale in this area.⁴

The thesis' specific and direct contributions are however made to the smaller *normative discourse* surrounding non-citizens' *actual legal standing* in the U.S. and Germany. This discourse constitutes a relatively unexplored area. Probably as a consequence of that it straddles the rather solid border between political theory and jurisprudence. Political theorists usually operate on a level of abstraction that lies above particular rights and actual laws. To the extent that specific rights become part of the analysis they tend to be hypothetical or used as illustrations, lest the specifics get in the way of the theoretical argument. Jurists on the other hand take the actual law as their point of departure and fairly frequently take an interest in non-citizens' overall legal standing, nor are normative aspects absent from jurisprudential analyses of non-citizens' legal standing. From a political theoretical perspective, however, what the jurisprudential analysis often lacks is a comprehensive normative foundation. That is, the kind of normative foundation that makes it possible to see the entire normative edifice/construction behind particular rights; i.e. the kind of normative foundation that makes it possible to truly see how, and not only where and in what way one position differs from another and to analyse if the normative foundation of different laws are incoherent rather than simply different. That said, a normative discourse around non-citizens' actual legal standing in the U.S. and Germany exists and it is steadily growing. Notable contributions include (Gibney 2004; Rubio-Marin 2000; Bosniak 1994; Scaperlanda 2001; Schuck 1984; Gibney

⁴ That is, the thesis also makes a small contribution towards increasing the presently inadequate supply of practical political theories that combines these two rationales, as called for by Brubaker for example (Brubaker 1989a: 4–5).

1986; Joppke 1998a; Meilaender 2001; Aleinikoff 2002b; Neuman 1996; Neuman 1991; Soysal 1994; Jacobson 1996).

The thesis makes two unique contributions to this specific discourse. First, the thesis provides a comprehensive and thorough political theoretical analysis of non-citizens' overall legal standing in the U.S. and Germany. Other analyses have either been political theoretical in nature but have focused on limited areas of non-citizens' legal standing, or have looked at non-citizens' overall legal standing but have only partly looked at normative aspects (for an example of the first see Gibney 2004 and for an example of the second see Scaperlanda 2001). Second, the thesis provides a systematic analysis of the internal normative coherence of non-citizens' overall legal standing. The two contributions are connected in that the combination of political theoretical depth and the extended legal remit paves the way for the internal coherence analysis of non-citizens' overall legal standing.

In terms of prior contributions Matthew Gibney's and Ruth Rubio-Marín's seminal books merit special attention. These books have been great sources of inspiration and most closely resemble this thesis (Gibney 2004; Rubio-Marín 2000). Gibney's and Rubio-Marín's works interweave political theory and actual laws in a similar fashion to this thesis. These two books do, however, differ in significant ways from the thesis at hand. Although this thesis' normative point of the departure and foundation is similar to Gibney's, Gibney pays more attention to the political level whereas this thesis deals exclusively with existing laws. Gibney's book moreover focuses on the narrower question of refugees and includes many more case studies than this thesis. Rubio-Marín, on the other hand, focuses more broadly on non-citizens' legal standing and uses the U.S. and Germany as case studies. But Rubio-Marín chooses a less political theoretical starting point, and is more interested in the conditions for achieving membership than the question of which rights belong to members and which belong to non-citizens *qua* individuals. Finally, the nature of the arguments for change presented in these two books differs from the arguments in this thesis. Gibney's and Rubio-Marín's arguments are based on their empirically and theoretically well-founded views, whereas the arguments in this thesis are derived from an internal coherence analysis.

The Nature of the Thesis

It should be clear at this point that this thesis is a slightly unusual political theoretical project. A short explanation of the nature of the kind of political theory this thesis exemplifies will

therefore further clarify the thesis' aims and purpose. This project differs from mainstream political theory mainly in that it is empirically driven. This means that the thesis is not only applied, but it takes the actual treatment of non-citizens in the world we live in as its empirical starting point. The underlying rationale for this approach is that political theory is as much about clarifying normative alternatives, working out consistent approaches to existing normative problems and putting forward critical suggestions for change based on where we actually stand as it is about improving conceptual philosophical tools, constructing ideal theories and putting forward critical suggestions based on where we ideally should stand.

This thesis therefore belongs, broadly speaking, to what Miller calls the Aristotelian School in the sense that Aristotle (in contrast to Plato) thought that political theory should take practical politics as its point of departure (Miller 1999: 52; Dunn 1990: 195). Aristotle's defence of this kind of political theory remains unrivalled:

But there are of course some today who concentrate on the search for the highest constitution, which needs ample resources; others talk rather about some common constitution, yet dismiss entirely the constitutions that actually exist and simply give their approval to the Lacedaemonian or some other. But what is needed is the introduction of a system which the people involved will be easily persuaded to accept, and will easily be able to bring in, starting from the system they already have. [...] Thus it is another of the duties of a statesman, in addition to those stated, to be able to render assistance to actually existing constitutions, as noted before. (Aristotle 1992: Book IV 1288b39)

The advantage of the empirically driven approach cuts deeper than the fact of it simply being closer to politics. There is always a gap between abstract philosophical concepts and actionable norms that can be enacted as laws. Philosophical concepts thus remain, empirically speaking, slightly nebulous or even indeterminate until they have been transformed into actionable laws. This means that the empirically driven approach has an advantage over mainstream political theorising in that it is able to make a normative contribution at the level where political changes ultimately take place. The suggested changes in this thesis are, in this sense, ready for implementation – or at least have a direct political and legal relevance that a more abstract analysis cannot offer.

This is not to deny that the empirically driven approach does have its own drawbacks. It does, for example, remain silent in terms of what constitutes the best possible solution and does not

produce any conceptual improvements. The empirically driven approach is not a better way of doing political theory; it is a complementary way. In other words, the nature of political theory as a discipline ultimately concerned with practical events engenders the need to work on two levels, the purely theoretical level and the applied empirical level. The particular value of this kind of applied and empirically driven political theory, which neither answers the question of what the ideal solution might be, nor leaves the philosophical tools it uses in a better condition than they were found, is aptly described by Beitz (See also Dunn 1985: 187–189; Dunn 1990: 193–196; Miller 1988: 651 for similar positions):

Although my discussion is necessarily preliminary, I hope that it will have several kinds of value in its own right. The most important of these is that it can bring some conceptual clarity to an area in which confusion is endemic. If readers are not persuaded by my criticisms of prevailing views or by the alternative positions I outline, my discussion should at least illustrate the respects in which such views require more careful formulation and defence than they have heretofore received. Even when I make no attempt to resolve outstanding controversies, my analyses of the normative concepts involved in them should make clear what the controversies are about and what would be needed to resolve them. (Beitz 1999a: 6–7)

This approach is perhaps less theoretically challenging than identifying an ideal solution, but it is no less important or valuable than the pure political theoretical approaches. It is also important to point out that this empirically driven approach should not be mistaken for a comparative politics approach. This thesis does not contain any positive elements. No attempt is made to explain why or how the laws analysed were enacted or implemented. The political forces behind the enactment and implementation of the analysed laws remain hidden. This means that the normative rationales behind these laws are deduced, and their normative consistency analysed, independently of the combination of political, social, legal and economic forces that might have led to their enactment. That is, the normative rationales that ultimately underlie the laws are analysed, ignoring all other aspects of the legal and political process.

This means, further, that the questions of to what extent and in what way normative issues have an impact on the political processes lie beyond the scope of this project. This is not to say that an examination of normative consistency cannot have an impact on legal adjudication. The nature of legal adjudication means that there is an inherent drive towards consistency, and there are examples of how the drive for consistency has affected legal

adjudication in this area (Schuck 1984: 47–49). It is also clear that that normative consistency has political significance, as it affects the strength of any laws enacted. As a prominent legal scholar puts it:

Far more important, they [normative contradictions in immigration law] are sapping immigration law of its moral force in the eyes of aliens, employers, officials and the general public. Law without legitimacy is little more than naked force, the power, as it has been said, that comes out of a barrel of a gun. And because immigration law reflects some of our most deeply held values concerning community, self-definition, national autonomy, and social justice, any diminution of its legitimacy entails a profound, perhaps irretrievable, loss. (Schuck 1984: 80)

The fact that this thesis analyses the normative rationales behind laws, as distinguished from the broader political process that determines the content of such laws, does not mean, therefore, that normative issues are irrelevant to the broader political process: it simply means that it is assumed, as in political theory in general, that the normative end result of any political process can be analysed separately from the specifics of that process, and that normative issues have an independent value that goes beyond their demonstrated impact on that process itself.

Clarifications and Key Definitions

The term non-citizen is obviously central to the thesis. The term denotes a legal distinction between members and non-members of a state. Non-citizen is thus defined as: *a person who is neither a citizen nor holds a legal status that is equivalent to that of citizenship.*⁵ The subsequent question is: which sub-groups of non-citizens in this sense are to be included in the analysis? The thesis aims at providing an overall analysis of the legal standing of non-citizens. This means, *prima facie*, that all non-citizens should be included in the analysis. One group of non-citizens – short-term visitors – is, however, excluded from the analysis. The reason for this is that short-term visitors differ from non-citizens who wish to reside in a state in ways that have a great significance for the thesis' analysis. First, many of the specific rights included in the analysis (see below) do not pertain to short-term visitors. Second, and closely related, short-term visitors cause little concern and their political significance is low, as they lay claim to few rights and have a much smaller impact on the body politic than non-citizens who reside (or wish to reside) in states other than their own.

⁵ It should be noted that this definition is somewhat broader than the term denizens. This term figures frequently in the literature but it refers, historically and currently, to a privileged group of non-citizens: those that hold a permanent resident status and the term denizen is too narrow for the purpose of this project (Hammar 1990a: 14–15).

The omission of short-term visitors from the analysis is in line with a basic legal distinction in the two case studies. In the U.S., *immigrants* are admitted for the purpose of taking up residence whereas *non-immigrants* are just that, and hence are admitted for short-term visits. The difference between non-immigrants and immigrants, in terms of their desire to reside in or merely visit the U.S., gives rise to a differentiation in terms of the criteria for entry and in terms of the legal entitlements they hold once inside. Moreover, non-immigrants who want to adjust their status (i.e. to become immigrants) while in the U.S. have to be admissible under the rules regulating entry for immigrants (Carliner 1990: 60; Legomsky 1997: 2–5, 99, 502; Immigration and Nationality Act (henceforth INA) 101). Similarly, in Germany a distinction is made between short-term stays and stays of longer duration. Stays of longer duration require that the non-citizen fulfil the conditions for obtaining a resident or a settlement permit, whereas short-term stays do not (Immigration Act 6).⁶

Undocumented or illegal immigrants (henceforth called undocumented residents)⁷, will be included in the analysis as their intention in general is to reside in the country, rather than just to pay a short-term visit. Short-term visitors, who overstay, *ipso facto*, intend to extend their stay, and the difficulty of passing borders illegally means that few non-citizens would do so merely to pay a short-term visit or to commute between countries, although some illegal immigration clearly is seasonal. Detailed facts about the duration of undocumented residents' stays are for obvious reasons hard to obtain. Existing approximations, however, support the assumption that the bulk of undocumented residents are not short-term visitors. As much as 33% of the undocumented residents in the U.S. have been in the country for over ten years and 94% of such adult men and 54% of adult women are in the labour force (Passel 2006). There are no approximations of the average duration of undocumented residents' stays in Germany; but the fact that the nationality of undocumented residents in Germany mirrors the nationality of asylum seekers indicates that the undocumented residents have entered Germany with the intention of residing in Germany, and that the vast majority of them are not commuting between their home country and Germany, as none of the countries bordering

⁶ It is of note that Germany decides the requirement for long-term stays, whereas short-term stays require a Schengen Visa, for which the criteria are decided by the Council of the European Union on a basis of unanimity (Treaty Establishing the European Union; Sinn 2005: 39; Immigration Act 6).

⁷ The term undocumented residents is used rather than the term illegal immigrants as the latter seems to pre-empt the analysis of what this group's standing should be and it is also slightly confusing as the term immigrant usually is used to denote non-citizens who are legally in a state.

Germany has generated a large number of asylum seekers after 1989 (Interior 2006a: 18; Cyrus 2004; Interior 2005f: 27–28).

One further clarification is needed, as the non-citizen citizen dichotomy indicated by the above definition unfortunately is not perfect. It should be noted that a small group of nationals who technically are not citizens exist in the U.S. This group of non-citizens nationals, almost exclusively natives of American Samoa and Swains Island, will be treated as citizens according to the above definition, and will thus be excluded from the analysis. The reason for this is that nationals who are not citizens have the same rights as citizens, save for the fact that nationals who are not citizens have lesser rights in terms of being entitled to sponsor naturalisation than citizens (Legomsky 1997: 2, 1009–1010).

The German system used to give rise to much larger difficulties in this respect as the term German national used to be considerably wider than the term German citizen. This was due to the fact that a sizable number of so-called ethnic Germans⁸ were considered to be German nationals. German nationals held all the rights of German citizens while technically not being citizens; a legal difference existed between the groups, as only citizens were protected from deprivation of nationality (Sorensen 1996: 72; Münz 1998: 160; Koopmans 2000: 199; Neuman 1998: 270–271).

The concept of ethnic Germans still exists, and is recognised in the German Constitution (*das Grundgesetz*, hereafter the Basic Law) (Basic Law 116 (1)). However, recent changes (1999) to the law pertaining to ethnic Germans have removed the difference between German nationals and German citizens by automatically granting citizenship to already recognised ethnic Germans as well as to all who, in the future, might be recognised as such (Green 2000: 118; Hogwood 2000: 127–128; Interior 2005f: 85; Nationality Act 7, 40 (a)).⁹ This means that the difference between citizens and ethnic Germans, for the purpose of this thesis, is at this point eradicated.¹⁰

⁸ Ethnic Germans is the commonly used term, although other terms such as status Germans, repatriates and re-settlers also are in use (Martin 1994; Münz 1998; Marshall 1996; Hogwood 2000: 127, 133).

⁹ This right to citizenship also extends to all non-German family members of ethnic Germans. The definition of family members is furthermore wider than the definition that applies in the case of a non-citizen's right to family re-union (Interior 2005d: 80, 82, 85; see also the German case study).

¹⁰ It should be noted that recent changes to the law regulating ethnic Germans did not only relate to the right of ethnic Germans to automatically become citizens. Restrictions on who qualifies as an ethnic German, numerical restrictions, reduced social rights and other substantial measures to reduce ethnic immigration were also put into place (Marin 1994: 216–217; Groenendijk 1997: 466; Hoffman 1999: 370; Geddes 2003: 84–85). Moreover,

Another change in the 1990s – the creation of EU citizenship – did however increase the complexity of who is to count as a German citizen. EU citizenship is created by EC law,¹¹ a form of supranational law that is applicable in Germany and is superior to German statutes. This does not, however, mean that EU citizenship constitutes a federal citizenship that eclipses German citizenship such that all EU citizens must be seen as German citizens. Holding EU citizenship only confers a partial status, as EC law only regulates limited areas of national law and EU citizens are not on par with German citizens in Germany.¹²

This partial nature of EU citizenship is also reflected in the fact that EU citizenship does not confer an independent status over and above a national citizenship: the Treaty clearly stipulates that jurisdiction over nationality solely rests with the individual member states (Joppke 2001b: 353–356; Joppke 1999: 27–37; Kurthen 1995: 931; Nascimbene 1996: 3; Sorensen 1996: 154–155; Treaty Establishing the European Union 17). This means that EU citizenship is based on a mutual and reciprocal agreement by EU member states to afford each other's citizens limited legal privileges. EU citizenship is hence not the equivalent of German citizenship, and this means that EU citizens will be placed in the category of non-citizens under the above definition. This is in line with the German Immigration Act, which defines EU citizens as non-citizens, albeit EU citizens' legal standing is regulated in a specific sub-act (Immigration Act 2).

It has now been established which categories of non-citizens will be included in the analysis. Thus, it is time to move on to the definition of legal standing. Liberal nation-states are rights-

only persons born before 1993, unless reasons of family reunification are cited, can now claim the status of ethnic German (Groenendijk 1997: 467; Münz 1998: 170–171; Bommes 2000: 102–103; Green 2000: 110; Joppke 2001: 36–37). These changes have also altered the process for qualifying as an ethnic German so that the process now more closely resembles an ordinary immigration process (Marshall 1996: 256–257; Hailbronner 1998: 212). This point should not, however, be overstressed, since ethnic Germans never were seen as citizens living abroad according to the *jus sanguinis* principle, in which case their right to enter Germany would not have been a matter of judicial regulation. In other words, qualification as an ethnic German has always been subject to specific legal controls (Neuman 1998: 270). These recent changes, furthermore, mainly concern the process of qualification; the definition of who is to be counted as an ethnic German is still based on descent and affinity to German culture (Groenendijk: 1997: 469). This is immediately clear from the latest official declaration of the criteria for qualifying as an ethnic German:

German nationality presupposes descent as the natural child of a German citizen or a German national, evidence of an avowed belief in German national values, as well as confirmation of this belief by informally imparted knowledge of the German language. (Federal Government Commissioner for Migration 2004: 29)

¹¹ The term EC law is used to underscore that only enforceable supranational law is of interest here; so-called soft law is hence not included in the analysis.

¹² It is of note that EC law in this area partly pertains to EU citizens, and partly to so-called third country nationals, but that many of the rights analysed are not affected by EC law (See the German case study for more details).

based communities; hence the term legal standing refers, in general, to a person's legal rights. A legal right is, according to the everyday use of the term, a legal provision that either grants access to something, like social welfare or the right to vote, or entitles a person to protection from certain interventions in her life, like the right to be secure in person and property. Non-citizens' legal standing can hence be defined as *those legal entitlements non-citizens have or are included in, or conversely lack or are excluded from* as compared to citizens. This definition draws heavily on Guiraudon's, and the basic idea is aptly summarised by her: "In the simplest of terms, it can be understood as what is not forbidden to non-nationals, what foreigners are included in." (Guiraudon 1998: 305)¹³ This is a basic definition, and the analytical remit will be drawn considerably tighter as only certain rights will be included in the analysis (see below).

This takes us on to the definition of national jurisdictions. There are, broadly speaking, two main options. The two states' jurisdictions can be seen in terms of their geographic or administrative boundaries. That is, a state's jurisdiction can be seen as co-extensive with its territory, or it can be seen as co-extensive with its exercise of sovereignty. The two alternatives obviously overlap to a large extent, as the modern state is based on the notion that it is sovereign over its territory. There is, however, nevertheless an important difference, with important normative implications, between the two alternatives. This difference is engendered by the fact that the two states in question (like many others) exercise sovereignty outside their national territories, by deploying their state officials in refugee camps, sea vessels, foreign airports, diplomatic missions and military installations. (It should be noted that a state's embassies are regarded as part of its national territory.) In order to include these forms of exercise of sovereignty within a state's jurisdiction is defined as: *all instances where a state exercises effective sovereignty over non-citizens*. The reason for opting for a definition that includes all forms of exercise of effective sovereignty, rather than a purely territorial

¹³ Non-citizens' obligations will not be included in the analysis, as non-citizens in general have the same obligations as citizens. Minor exceptions to this rule exist. The example that springs to mind is military service, but non-citizens' obligations vary even in terms of this duty, and it should be noted that non-citizens' obligations cannot be assumed to be lesser in this respect. Non-citizens are not obliged to serve as conscripts in Germany, but certain non-citizens are subject to military drafts in the U.S., France and Italy, for example. Non-citizens, moreover, have a less favourable standing than citizens in this regard, in certain instances. All non-citizens (including undocumented residents) in the U.S., save for non-immigrants, are liable to drafts but cannot become officers, for example. Non-citizens that are released from serving in the military in the U.S. are, moreover, permanently ineligible for citizenship, and non-citizens were excluded from the amnesty granted to individuals who left the U.S. to avoid military service during the Vietnam War. (This exclusion includes U.S. citizens who surrendered their citizenship to avoid the draft) (Benhabib 2004: 158—159; Carliner 1990: 210—213).

definition, is that the thesis is concerned with these two states' choices, as political communities, and a territorial definition omits important choices that they make freely.

This issue of exercising sovereignty abroad underlines the need to clarify that the thesis is concerned with laws that are directly applicable in national courts. This does not mean that international law is irrelevant to the analysis. International law, in fact, plays an important role, as key elements of international law have been incorporated into U.S. and German law, as the case studies will show. This means, however, that the limits implied by the institutional framework of nation-states is taken as a given. The states will therefore not be criticised for failing to act abroad, at the international level, or for failing to build a capability to do so. This is in line with the thesis' focus on the here and now rather than on ideals for the distant future. However, a state can be criticised, from this perspective, for failing to uphold certain rights in those instances where it exercises *effective sovereignty* over a non-citizen, even if this is done outside its territory;¹⁴ it should be pointed out that the word effective is key, as the definition is based on the idea that a state's jurisdiction and responsibility are limited by constraints on its ability to exercise sovereignty within an existing framework. This means that the mere presence of public officials outside the territory does not in itself expand the state's jurisdiction; nor are territories where armed conflicts are ongoing considered to fulfil the definition of effective sovereignty.

The term rationale is used in accordance with its standard meaning. A rationale is hence "the fundamental reason or logical basis" for something (Oxford Dictionary 1997). Normative rationale is then *ipso facto* defined as – *the fundamental normative reason that justifies or validates* a given law. A normative rationale hence does not refer to a specific normative argument, but refers to the deeper or more fundamental normative reasons or logic behind the arguments, that is the normative basis for a law. Put in slightly more philosophical terms, normative rationales can be said to be somewhat less distinct than first principles, but the concept of first principle provides a good indication of the meaning of the term normative rationale. Such normative rationales can be said to consist of a few (depending on the

¹⁴ It could be added in this context that the U.S. Supreme Court, at least, in relation to the right to *Habeas Corpus*, has recently rejected the territorial jurisdiction principle (Rasul et al.v. Bush et al. (2004): 2695—2696, see the U.S. case study for more details). The notion of purely territorially based jurisdiction also sits uncomfortable with the Basic Law, as its first article stipulates that *all* state authority must respect as well as protect human dignity. The German Constitutional Court (*Bundesverfassungsgericht*) has indeed also explicitly rejected the idea that its jurisdiction is limited to German national territory (Rubio-Marin 2000: 207—208; BVerfGE 76, 1 (1987), see the German case study for more details).

preferred breakdown) internally consistent basic principles that together constitute the essence of a normative perspective.

The fact that such normative rationales constitute basic normative perspectives also explains how states can be said to base their laws on a cosmopolitan rationale even though it is sometimes assumed that the very idea of state laws based on a cosmopolitan rationale is self-contradictory. This assumption is, however, based on a conflation of limited enforceability with limited validity (Galloway 1993: 278–281; Habermas 1996a: 456–457; Bauböck 1994: 233–234). Habermas drives home this point very forcefully:

As enacted actionable norms, constitutional rights are valid within a particular legal community. But this status does not contradict the universalistic meaning of the classical liberties that include all persons as such and not only all members of a legal community. Even as basic legal rights, they extend to all persons insofar as the latter simply reside within the jurisdiction of the legal order. (Habermas 1996a: 456)

In other words, the issue of normative scope is analytically distinct from the question of legal scope, and a commitment to cosmopolitanism does not generate any corresponding commitment to a world state.¹⁵ As Beitz aptly puts it: “Moral cosmopolitanism is distinguished not by any particular view of world organization but rather by a view about the moral basis on which this question should be decided.” (Beitz 1999b: 286) A failure to make this distinction between normative and institutional commitments has caused some confusion in the academic discourse, and the importance of not conflating these two positions is increasingly apparent (Caney 2005: 5, 15–16; Tan 2004: 10, 94–95; Beitz 1999b: 286).¹⁶

The precise details of what is meant by the cosmopolitan and the communitarian rationales will become clear over the next chapter. It is, however, noteworthy and should be stated from the start that the label cosmopolitanism is not used exclusively by philosophers that focus on individual rights but also by some utilitarians and some post-modern philosophers; it is, however, the cosmopolitanism based on individual rights that can be found in the political and legal discourses in liberal nation-states, and it is therefore this form of cosmopolitanism that

¹⁵ Analogously, communitarians are not theoretically committed to the argument that all nations have a right to statehood, although they often commit themselves to this position on instrumental grounds.

¹⁶ That said, it should be noted that differences in terms of preferred institutional setup can have important normative implications (Caney 2005: 5, 15–16). Institutional solutions, or the means to a normative end, can give rise to new normative problems, and can therefore become part of the normative debate. This complexity is, however, avoided in this thesis, as the institutional setup is taken as a given and does not constitute part of the normative analysis.

will be of interest in this thesis (Tan 2004: 46; Fine 2002: 139–140). Nor is the communitarian label exclusively used by philosophers that emphasise communities' right to self-determination according to their own social meanings; the label is also used by certain Marxists (Gutman 1992: 120–121). It is, however, the former kind of communitarianism that will be of concern here, as it is this form of communitarianism that can be found in the political and legal discourses in liberal nation-states.

The Thesis' Analytical Remit

The thesis' analytical remit is limited by the fact that it only is concerned with two states. The remit is further (and significantly) limited by the fact that the thesis is only concerned with the current legal standing of non-citizens. This means that the historical aspects and developments in the two cases studied are of interest only in so far as they have a bearing on the analysis of non-citizens' current legal standing. This means that no overall historical analysis will be provided, although the analysis of the current legal standing of non-citizens occasionally warrants brief historical excursions.¹⁷ No cut-off date by which current is defined is set. The time of writing thus defines the term current. This decision is based on the notion that non-citizens' overall legal standing changes incrementally, as it is made up of a large number of statutes and constitutional provisions. There is thus no reason to set a specific date to establish that a particular dramatic change has been included or excluded. That said, every effort has been made to include the latest changes in this area and changes until 2007 are included.

The foregoing restricts the remit considerably, but it still leaves the task of pinning down exactly which rights will be included in the analysis. The fact that the two normative rationales co-exist in liberal nation-states and often dominate different areas of rights, makes it paramount to cover a wide area of rights in order to assess the overall legal standing of non-citizens. A more narrow focus, excluding certain areas of rights, would have undermined the basic ambition of providing an overall analysis of non-citizens' legal standing in these two states. The reason for including a wide range of rights in the analysis is thus analogous to the reason for including all non-citizens who reside (or wish to reside) in the two states. The

¹⁷ The American legal system is part of the common law tradition, where case law plays an important role as a source of law, and the case law in this area has a long history. Germany's legal system belongs to the civil law tradition, where case law plays a much lesser role. In Germany, the focus lies more on the wording of the law and the intention of the legislator, and the text of the German Basic Law is central to the analysis of non-citizens' legal standing in Germany. The Basic Law still qualifies as a young constitution, but it was the result of a long historical process, and it is necessary to partly unravel German constitutional history in order to unearth the meaning of the principles behind the Basic Law.

guiding principle for choosing the specific rights has hence been that the whole gamut of rights available in liberal nation-states should be covered.

The selected rights have been divided into five realms, comprising the *admissions* rights, *civil* rights, *political* rights, *social* rights and *naturalisation* rights realms. This five-fold categorisation draws on Hammar, who places the issue of non-citizens' rights between the admissions realm and the naturalisation realm,¹⁸ and on Marshall's famous categorisation of rights into civil, political and social rights (Hammar 1990a: 16–21; Marshall 1992: 11–14; See Layton-Henry 1990 for a similar combination of these two categorisations). That said, it makes no difference which realm a right is placed in, as the division of rights into these five realms only serves the purpose of making the analysis and presentation more transparent.

Each of the five realms contains one or more specific rights. The total number of rights included in the analysis is 17, and the rights are as follows. From the admissions rights realm: 1) the right to be admitted for the purpose of residing. From the civil rights realm: 2) the right to freedom of speech and conscience; 3) the right to hold and to acquire property; 4) the right to freely choose one's profession; 5) protection from (arbitrary) intervention in person and property; 6) the right to equality before the law (protection from discrimination); 7) the right to a fair trial and the right to seek legal redress (open and fair access to courts and procedural due process rights); and 8) the right to secure residency (the right not to be expelled and uprooted from one's life). From the political rights realm: 9) the right to vote; and 10) the right to stand for elections. From the social rights realm: 11) the right to subsistence; 12) the right to basic health care; 13) the right to basic education; 14) the right to a share of welfare provisions on an equal basis; 15) the right to higher education; and 16) the right to comprehensive health care. From the naturalisation rights realm: 17) the right to be naturalised (the right to citizenship).

The above list is intended to cover the *most basic legal rights* within the existing legal systems of both these states. This list is fairly comprehensive, but it is not exhaustive. A list

¹⁸ Minor differences between naturalised and native citizens exist in some liberal nation-states. The example that springs to mind is the constitutional requirement of that the U.S. president must be a native born citizen. This might be of symbolic importance and perceived as important in terms of safeguarding the nation from external threats, but it is relevant to very few individuals and applies to no other political office, although a person must have been a citizen for a specific number of years in order to be elected to Congress (seven years for the House of Representatives and nine years for the Senate) (U.S. Constitution art. 2 sec. 1 cl. 5; art. 1 sec. 2 cl. 2; art. 1 sec. 3 cl. 3).

containing all rights that might be deemed basic would become too long. This means that some rights that could be considered basic are excluded. Potentially basic rights have been excluded on two different grounds. Firstly, rights that are seen as basic from a particular philosophical perspective, but which have not been recognised as such by the existing legal systems are excluded, as the thesis focuses on the existing legislation; cultural or environmental rights are potential examples of such rights. Secondly, rights that are deemed less important for non-citizens than the listed rights, but which nevertheless can be seen as basic are excluded on grounds of limited space.

The Thesis' Legal Remit

This thesis depends on a close connection between political theory and law. This means that a legal remit corresponding to the analytical remit outlined above must be identified. It is clear that the general legal context is constituted by American and German law.

In the case of the U.S. it can be said, first of all, that only federal and constitutional law is of interest, and that state law will not constitute part of the analysis.¹⁹ The reason for this limitation is that the jurisdiction over and regulation of non-citizens (nowadays) is firmly placed at the federal level.²⁰ This means that state laws are only of indirect interest, in so far as they are linked to federal or constitutional laws. This narrows down the remit in terms of levels of law but the remit can be drawn even tighter, as only certain areas of law within these two echelons of law are of interest. More specifically, three legal areas constitute the precise legal remit of this thesis. *Immigration law* covers laws regulating entry and expulsion of non-citizens (Legomsky 1984: 256; Motomura 1992: 1626; Nedzel 1997: 129; Legomsky 2001: 365; Taylor 2001: 133; Motomura 1994: 202; INA 101 (17)). That is, immigration law covers the first realm, and the right to secure residency from the civil rights realm. However, the overall treatment of non-citizens spans beyond immigration law, and *alienage law* covers non-citizens' general legal standing and other substantial rights not covered by immigration law, such as most civil, social and political rights (Aleinikoff 1998: 511–513; Nedzel 1997: 129; Motomura 1994: 202). Alienage law thus covers the civil, political and social rights realms, (save for the right to secure residency, which is covered by immigration law). The right to naturalisation, i.e. the right to acquire citizenship after birth, is covered by

¹⁹ This restriction of the remit does not exclude constitutional law that applies to the states. One case where state laws make up the federal policy will also be included; this is the case of the federal electorate, which is made up of the combined state electorates (see the case study for more details).

²⁰ The federal level is also where the U.S. is represented as a sovereign nation, a fact that also goes a long way towards explaining why the issue of non-citizens' legal standing is dealt with at the federal level.

naturalisation or nationality law. Naturalisation law hence covers the fifth and last rights realm, the naturalisation realm (Boswell 1992; Weil 2001; Legomsky 1997: 1039, 1053).²¹ In terms of legal sources, it can be said that the Constitution, constitutional case law and the INA constitute the main legal sources in this context.

As in the U.S. case, the legal remit in the German case is also limited to the echelons of law that apply on the federal level and this for analogical reasons (Neuman 1990: 82; Bowie 1954: 660–661; Kommers 1997: 75–76; Basic Law 72, 73 (2–3), 74 (4)).²² Here also, a further tightening of the remit is possible, as only alienage jurisprudence is of interest. In Germany however, alienage jurisprudence is not divided into different areas of law but is made up of one area – *Ausländerrecht* or foreigners’ law, which deals with all major areas of non-citizens’ rights (Rittstieg 1993: 2). This means that the foreigners’ law covers all five realms and thus constitutes the specific legal remit of analysis in the German case study.²³ It can be said in terms of legal sources that the Basic Law, Basic Law case law, the Immigration Act (Germany’s first Immigration Act which came into force on 1 January 2005), the Nationality Act and the Asylum Procedure Act constitute the main legal sources in this context. Beyond that, the Treaty Establishing the European Community, certain EU directives and some international law conventions directly affect non-citizens’ legal standing in Germany (See for example Council Directive 2003/109/EC; Council Directive 2003/86/EC; Council Directive 2003/9/EC).

²¹ Note that that naturalisation law is a narrower concept than citizenship law, which also includes acquisition of citizenship at birth, loss of citizenship and rights and duties of citizens (Neuman 1994: 247).

²² The Basic Law explicitly bestows the power over immigration and naturalisation to the federal legislative branches. The legislative power over laws relating to residence and settlement of non-citizens is concurrent. This means that the states (*Länder*) have a right to legislate, but only if the Federation has not chosen to exercise its right to legislate, in which case federal law overrules state law; further, the Federation has a right to legislate if the matter cannot effectively be dealt with on the state level, or if a state law might harm the interest of other states, or the people as a whole, or if it is necessary to maintain the economic unity of Germany. The right to determine if there is a need for federal legislation, furthermore, rests with the federal legislature, although the German Constitutional Court police *abuses* of this right. This means that the Federation possesses the bulk of legislative power in this area, and more importantly it is responsible for legislation that concerns the basic rights that are of interest in this thesis, whereas the states’ main responsibility lie at the level of implementation (Bowie 1954: 660–661; Neuman 1980: 82; Kommers 1997: 75–76; Basic Law 72, 73 (2–3), 74(4)). The fact that the German states carry much of the responsibility for implementing the laws that regulate the treatment of non-citizens means that many of the federal laws in this area are so-called framework laws (*Rahmengesetze*). This means that the federal laws set binding guidelines or frameworks that limit the states’ leeway in applying these laws, but the final implementation is carried out by the states (Cremer 1998: 53, 63; Guiraudon 1998: 296; Basic Law 83–86; Cyrus 2003: 7). It should, moreover, be noted that federal law, EC law and the German Basic Law are superior to state law, including those enshrined in state constitutions (Benda 1981: 3). The impact of state law and the differences between states thus appear on the level of implementation, and this level – for all its general relevance – is not covered in this thesis.

²³ The entire analysis will take place within the remits outlined but this does not mean that these entire remits will be analysed. The unit of analysis is the enumerated list of basic rights, and this unit fits within the established remits but it does not span them.

The relationship between supranational law and German law merits a brief discussion. Article 24 of the Basic Law states that “[t]he Federation may, by statute, transfer sovereign powers to international institutions” and Article 25 makes the general rules of public international law directly applicable in Germany (Basic Law 24, 25). This creates a link between the German legal system and supranational law. This link has subsequently been strengthened by the fact that Germany (albeit as the then Federal Republic of Germany) has joined both the EU and the Council of Europe. Much of the influence of supranational law is transmitted via German law and the drafting of German laws is partly shaped by Germany’s supranational legal obligations, especially the obligations deriving from its membership of the EU and the Council of Europe. The influence of supranational law, however, also extends to German case law. The European Court of Justice and the European Court of Human Rights have had a substantial influence on German case law. The importance of the European Court of Human Rights in this area was, for example, made very clear and entrenched in 1987 when the *Bundesverfassungsgericht* (the German constitutional court) ruled that: “... when interpreting the Fundamental Law [the Basic Law], the Court must have regard to the European Convention for the Protection of Human Rights and the caselaw which ensues therefrom [sic].” (BVerfGE 74, 358 (1987): 370). The impact of supranational law on German law will not, however, be further analysed in this thesis because the question of how law develops or is shaped lies outside the scope of this thesis, as explained previously (Neuman 1990: 82; Kommers 1997: 75–76; Frowein 1992).

The Choice of Case Studies

The choice of national case studies simply reflects the desire to make a direct normative contribution that pertains to the world we live in, rather than the world we ought to live in, as described earlier. Both the number and the specific choices of case studies are closely related to the nature and method of the project. The limited number of case studies is justified by the fact that they are very comprehensive, covering several categories of non-citizens and a whole gamut of basic rights. A complementary reason for limiting the numbers of case studies is that the comparative element of the thesis is limited to illuminating and clarifying the normative basis for the treatment of non-citizens in the two states. That is, the comparisons made are not intended to establish any general conclusions that would be valid for all liberal nation-states.²⁴

²⁴ To devise an analytical framework that allows one to draw general conclusion in this area is, if at all possible, a tall order, as the complexity and differences between these two studies strongly suggests.

That said, the choice of case studies is partly influenced by the fact that these two states make for interesting comparisons, highlighted by a brief comparison in chapter six.

Size in terms of the number of non-citizens who reside or seek entrance in a country has been the primary selection criterion. This follows from that the ambition has been to make the analysis directly relevant to the largest possible number of individuals and that it is not possible to draw general conclusions that would be valid for all liberal nation-states from this kind of case study. The choice of the U.S. and Germany²⁵ is straightforward from this perspective. The U.S. and Germany are the largest net receivers of immigrants and host larger non-citizen populations than any other liberal nation-states, although a few smaller liberal nation-states do host larger non-citizen populations in relative terms (Passel 2005: 19; Passel 2006; Interior 2005f: 21–26; Zlotnik 2004).²⁶

The non-citizen populations in these two states are indeed larger than many states' total population. The U.S. hosts a population of 14.4 million (2005) legally residing non-citizens, and the estimated population of undocumented residents stands at 11.1 million (2005), putting the total at a staggering 25.5 million (Passel 2006: 3–4).²⁷ Germany hosts a population of legally residing non-citizens of 7.3 million (2004). The estimates for undocumented residents are less reliable in Germany, and vary from 0.1 to 1.5 million (2002) (Väyrynen 2003: 11; Interior 2005e; Interior 2005f: 8–23; Cyrus 2004: 32; Sinn 2005: 6). This puts the total German figure at around 8 million. The laws analysed in this thesis thus pertain directly to at least 33.5 million individuals in total.

An additional factor in choosing the U.S. and Germany for the case studies is the increased salience of migration in these two states due to the rapid growth in the size of their non-citizen populations. For Germany this growth is nothing short of a social revolution. The non-citizen

²⁵ On a separate note, it should also be mentioned, that the German case study, with a few exceptions, is based on English sources. All quotations from court cases are English translations, made by legal experts. The decision to rely chiefly on English-language materials and to keep the text monolingual is based on two related facts. One, the thesis is written for an English speaking audience. Two, there is a plenitude of material available in English, as many German leading scholars write in English and the German government provides a lot of information in English. These two facts made it possible to make the thesis more accessible for its audience without having to adjust its content in linguistic terms.

²⁶ Germany and the U.S. are two of the most influential states in the world, which also means that their treatment of non-citizens has an important effect on other states. This impact can be direct, as when the treatment of non-citizens in these countries affects the number of non-citizens that seek admission to other states. These states could also have an indirect impact on other states due to the likelihood that their size and standing could make them standard setters.

²⁷ Note that these figures are based on official censuses, and that estimates in this area vary somewhat.

population grew from 1.2% in 1960 to 8.9% in 2003. The U.S. has always had a large non-citizen population but it has grown rapidly after the end of the Second World War. The annual immigration inflow, in the U.S., has also peaked in absolute terms, reaching 1.5 million immigrants in 2000 and since then staying above the one million mark (Held 1999: 315; Interior 2005g; Passel 2005: i, 54).²⁸

The thesis' nature and method makes the task of connecting law and political theory paramount, and the fact that these two states are constitutional has also influenced the choice of case studies. A constitutional state's legal system revolves around a legal nucleus that clearly spells out the normative principles that legitimise the exercise and limits of power (Rubio-Marín 2000: 6–7; Karpen 1983: 60–61). This means that constitutional systems draw normative principles directly into their legal discourses: the interpretation of law, in light of a constitution that explicitly states the basic principles for the exercise of power, generates values as a by product, to borrow Karpen's phrase (Smith 1985: 6–7); the fact that legal adjudication plays a particularly pivotal role in these two constitutional states is also a great advantage, as will explained below (Faist 1995a: 223).

Method

Political theory is defined by its questions rather than its methods. This is a natural consequence of the fact that any answer to the central question in political theory – how we ought to live together? – has implications for what is considered a valid method for answering it. This means that the method varies with the nature of the political theoretical project, and that method as such in political theory is not well defined (Kymlicka 2002: 5). That said, at least two common standards that are of relevance to the present work can be said to be widely accepted in political theory. One is internal consistency, and the other the correctness of empirical premises (Glaser 1995: 22).²⁹ The thesis' analysis must hence, at the very least: (a) rest on correct empirical assumptions, meaning that the normative rationales must be identified correctly and on sufficient grounds; and (b) the thesis must be internally consistent in terms of its initial analysis of the alternative theoretical approaches to the treatment of non-

²⁸ It should also be mentioned that Germany's membership in the EU constitutes an additional reason for including Germany in the analysis. The existence of EU citizenship and EC law in this area constitute an interesting development, both in terms of creating a group of privileged non-citizens, as well as in terms of introducing a supranational level that affects non-citizens' legal standing.

²⁹ A third criterion, correspondence to moral intuitions, is usually included among the commonly accepted standards (Glaser 1995: 22). This criterion is, however, not relevant to this thesis as it deals with existing rules that enjoy wide support and are based on normative rationales that are widely accepted.

citizens, and in terms of its internal consistency analysis of the U.S.'s and Germany's actual treatment of non-citizens.

The more specific and fundamental methodological challenge this thesis faces concerns the task of deducing the normative rationales behind the laws that regulate non-citizens' legal standing. It is assumed that all laws analysed in this thesis ultimately rest on some normative foundation. This is clearly not the case with all laws in general. The normative rationale behind the law stipulating right-hand-side traffic in the U.S. can hardly be said to be the opposite of the normative rationale behind the law stipulating left-hand-side traffic in the U.K. Laws of this technical or pure regulatory nature cannot be said to rest on a normative rationale.

This thesis is, however, only concerned with laws that regulate basic rights, and such rights only make sense in a normative context. A law stipulating left-hand-side traffic as opposed to right-hand-side traffic makes sense in the absence of any normative rationale, as it only is a question of co-ordination and not a question of bestowing or withholding a right. A law stipulating that only people with blue eyes have a right to vote, on the other hand, makes little if any sense in the absence of a normatively relevant meaning for this characteristic. The need to belabour this point is at least partly engendered by the sharpness of the English language. The term *Recht* in German and *Rätt/ret/rett* in the Scandinavian languages, for example, encompass the notions of law, right and justice. The fusion of these terms makes it harder to conceptualise the notion of law without implicating the notion of justice and to conceptualise the notion of justice without referring to law.

The basic rights in this thesis will be considered as *Rechte* in the sense that they are rights sanctioned by law, and resting on a normative rationale. It is absolutely crucial to point out that this assumption in no way means that laws are assumed to be normatively driven or informed, or that legislators perceive normative consistency as an aim in itself when they promulgate laws. It only means that a law regulating a basic right is assumed to *ultimately* rest on an explicit or implicit normative rationale – at least in principle – whatever the cause that led to its adoption happens to be. The assumption made is therefore not that normative rationales can explain why non-citizens' have been included or excluded from certain basic rights, but that the laws that regulate non-citizens' legal standing implicitly or explicitly rest on some normative rationale.

This still leaves us with the specific methodological challenge of how the normative rationales behind laws are to be deduced or identified. The methodological key to this problem is also based on the disconnection between the political process that precedes the enactment of a law and the normative rationale that underlies laws regulating basic rights. This disconnection reduces the complexity that might otherwise be involved, as questions about why and how a law was enacted (and the like) can be bypassed. This disconnection also makes it possible to focus solely on the discourse with the clearest emphasis on the normative aspects of the law. This means that the thesis draws mainly on the jurisprudential discourse, as jurisprudence or the philosophy of law provides an excellent bridge to political theory (This literature is extensive and for but a few examples see Whelan 1983: 447, 449–450; Schauer 1986: 1505, 1507; Wu 2001: 62; Aleinikoff 1998; Bosniak 1994; Schuck 1984; Neuman 1994; Schuck 1998b: 19–81; Heller 2001; Neuman 1991; Wright 1994; Nafziger 1983; Joppke 1999; Rubio-Marín 2000; Scaperlanda 2001; Kantstroom 1993; Krajewski 1996).

It will become evident in the case studies that the connection between alienage jurisprudence and political theory is strong and that the main jurisprudential discourses and their central doctrines in fact can be directly linked to the thesis' political theoretical framework. The details will be outlined and become clear in the first sections of the case studies; it suffices to say at this point that the key legal doctrines and principles ultimately boil down to the cosmopolitan and communitarian perspectives discussed above.

The vast majority of the basic rights analysed in this thesis have come before the constitutional courts, and have hence become part of these jurisprudential discourses. This means, in practical terms, that the specific analysis of a particular right, in almost all instances, starts by placing a right within the relevant jurisprudential discourses; that is to say, most rights can be directly placed within a universal or a particular rights paradigm. This makes it possible to immediately connect the analysis of particular rights with the relevant jurisprudential discourse – and in turn to the cosmopolitan or the communitarian rationales, as the jurisprudential discourse in each area corresponds to the two rationales. That said, such a first, immediate connection cannot in itself yield a conclusive result and the specific rights must be analysed in more detail.

The jurisprudential discourse continues to play a vital role at this stage of the analysis, as it not only categorises and describes different rights, but also draws out the underlying arguments for why *specific* rights are informed by elements of doctrines that rest on the cosmopolitan and communitarian rationales respectively. This means that the jurisprudential discourse identifies distinct signs that reveal which of the two normative rationales underlie any particular right. It can be said, in more practical terms, that the more detailed analysis of specific rights is based mainly on an examination of court cases, which are analysed in terms of the jurisprudential discourse involved around each one. The detailed analysis of rights in relation to this discourse usually yields a conclusive result in terms of what a law's underlying normative rationale is. That said, the analysis is sometimes shored up by further references to the relevant academic literature and/or analysis of the legislative process. The very wording of the law can also, in conjunction with the relevant academic literature, sometimes provide further evidence.

In sum, the practical analysis is based mainly on constitutional court rulings, but also on the relevant academic literature, the actual legal text and material from the legislative process. This detailed analysis is guided by, and relates to, more general jurisprudential discourses, which in turn are connected to the cosmopolitan and the communitarian rationales. This means that the analysis in this thesis will illuminate, conceptually speaking, how an abstract normative rationale has been (perhaps unwittingly) translated into an actionable norm/law, by identifying the rationale first in its abstract philosophical form, then in its abstract legal form and finally in its applied legal form. The analyses will not, it is worth stressing again, demonstrate how and why this norm has been turned into an actionable law.

It should be pointed out – given that the analysis draws extensively on constitutional jurisprudence – that the analysis does not depend on or subscribe to a specific method of constitutional interpretation, such as the grammatical, the historical, the structural/systemic or teleological methods. These methods are concerned with interpreting and applying the law based on the history of the law, its wording, its structure or its perceived overall purpose (Kommers 1997: 42–45). The fact that the analysis carried out here does not endorse or depend on any specific method of legal interpretation is simply a reflection of the fact that the task of applying the law (or historically understanding it) is not part of the analysis. The task of applying the law is also, in general, prior to the task of inferring the normative rationale that underlies a law. The constitutional courts do, in fact, deploy a number of different

interpretation methods in applying the law (Kommers 1997: 42). But this is of no consequence to the thesis' analysis, as it does not aim to explain the decisions from a legal perspective, or to criticise the decisions, but simply aims to analyse the normative rationales that underlie the laws.

There is always the risk of basing the analysis on insufficient evidence, and it is important to note in this respect that a right cannot, for example, be said to rest on the communitarian rationale simply because non-citizens are excluded. The exclusion must be *based on* their lack of membership in the particular political community in question. That is, non-members must be excluded on the ground that they are morally less relevant as non-members, not because a functional division has been made between political units, for example. Nor can a right be seen as resting on the cosmopolitan rationale just because non-citizens are included; non-citizens must be included *on the basis that* they have a universal right to self-determination.

It is, moreover, important to note that rights based on individual autonomy need not be seen as having universal scope. The rights of Germans under the Basic Law are often based on an individual right to autonomy, see for example (BVerfGE 7, 377 (1958)). In sum, it is important to note, in general, that the real question is not simply that of what rights non-citizens have, but that of the grounds on which they hold these rights; this means that there is always a need to go beyond the fact that rights include or exclude non-citizens, or that rights are based on individual autonomy, for example; a normative rationale can only be identified once it is clear what the *grounds* for inclusion or exclusion are.

This need to base the analysis on a sufficiently deep level is not simply a philosophical problem. The technical challenge of penetrating the legal structure can also create problems in this regard. There is always the risk that a normative rationale might be misconstrued due to the internal legal structure of the argument being overlooked or misinterpreted. The pre-emptive doctrine is a case in point. This doctrine is based on the notion that the federal government in the U.S. holds the right to regulate non-citizens' legal standing. This doctrine is normatively void, at least in relation to the issue at hand, as it simply delegates a right to regulate a particular issue to a specific level of government (Koh 1985: 98–99). This means that any decision to strike down a state statute that is based on invidious discrimination does not, in itself, equal a universal protection from such discrimination. The Supreme Court could very well strike down the statute according to the pre-emptive doctrine, but this does not

preclude the federal government from retaining and exercising the right to deploy the very same distinction that was found invidious when deployed by a state. Thus, it is necessary to peel off all the layers of administrative rules and fully account for the legal structure before the underlying normative rationale can be conclusively identified.

In conclusion, in this first chapter it has been established what questions this thesis will answer, what the purpose of answering these questions is and what academic contributions this will produce. In addition, the key concepts and the remit of the analysis have been defined. The nature of the analysis and how the analysis will be undertaken in practical terms have been outlined. *The second chapter* will identify and discuss the cosmopolitan and communitarian rationales. *The third chapter* is the last theoretical chapter and it builds on the identification of the rationales and constructs theoretically coherent positions to non-citizens' legal standing based on the two rationales. *The fourth chapter* and *the fifth chapter* constitute the case studies. The case studies are comprehensive and therefore each divided into three sections. The case studies' first sections describe non-citizens' legal standing. The second section deduces the normative rationales behind the laws presented in the first section, partly drawing on the second chapter. The third section is devoted to the internal coherence analysis. This analysis is based on the states' positions as they have emerged in the two first sections of the case studies in relation to the coherent positions identified in chapter three. *The sixth* and ultimate chapter is devoted to a final analysis of the thesis' findings and it highlights some interesting points of comparisons between the case studies.

Chapter Two

Cosmopolitanism vs. Communitarianism

Two normative rationales

If the power of thought is universal among mankind, so likewise is the possession of reason, making us rational creatures. It follows, therefore, that this reason speaks no less universally to us all with its 'thou shalt' or 'thou shalt not'. So then there is a world-law; which in turn means that we are all fellow-citizens and share a common citizenship, and that the world is a single city. Is there any other common citizenship that can be claimed by all humanity? And it is from this world-polity that mind, reason, and law themselves derive. (Aurelius 1964: Book IV 4)

The final association, formed by several villages, is the state. For all practical purposes the process is now complete; self-sufficiency has been reached, and while the state came about as a means of securing life itself, it continues in being to secure the *good* life.... For the real difference between man and other animals is that humans alone have perception of good and evil, just and unjust, etc. It is the sharing of a common view in *these* matters that makes a household and a state. (Aristotle 1992: Book I 1252b27–1253a7, emphasis in original)

This chapter will explore the cosmopolitan and the communitarian rationales in detail. The analysis of the two rationales will include an examination of what a political community based on each rationale would look like. The aim of extending the analysis beyond mere description of the rationales is to render them more tangible in a political context. This will also help to prepare the ground for the next chapter, where the construction of theoretically consistent approaches to the treatment of non-citizens is carried out. It is worth repeating that the aim is not to evaluate the two rationales or to critically analyse or compare them. Due warning must therefore be given to the reader not to expect too much theoretical depth here: the essential purpose of the chapter is to describe and clarify the nature of the two rationales, in order to establish their philosophical bases and meanings.

The Cosmopolitan Rationale

The analysis of the cosmopolitan rationale will pay special attention to Kant's writings, as Kant is the most influential cosmopolitan philosopher. The centrality of Kant's work is, moreover, enhanced by the fact that Kant's philosophy bridges the cosmopolitanism of the ancient world with its modern successor. That said, an analysis of cosmopolitan thought must

commence with the cosmopolitanism of the ancient world. The etymological roots of the term cosmopolitan are found in the ancient Greek word *kosmos*, meaning world, and the word *polis*, meaning city. These roots reveal the basic idea behind cosmopolitanism as a universal and boundless philosophy, where location or membership is seen as normatively contingent. The cosmopolitan tradition goes back at least to 300 BC to the Cynic philosopher Diogenes of Sinope. Diogenes' most famous follower Zeno of Citium established a philosophical school under the simple roof of his porch in Athens and it was the location of the school that gave name to the cosmopolitan school of thought called Stoicism (*Stoa* meaning porch in ancient Greek) (Nussbaum 1997; Schlereth 1977: 58; Heater 2002: 26–44; Fine 2002: 138–139).

Stoicism developed as the *poleis* of ancient Greece, where the notion of a particular citizenship and local patriotism constituted core norms, gave way to the Macedonian and later the Roman empires where notions of human similarities and transnational co-operation became much more important. Interest in Stoicism continued throughout the ancient era, but Stoicism did not develop into a comprehensive philosophy until Roman times, under the influence of philosophers like Seneca, Cicero and Marcus Aurelius (Nussbaum 1997; Schlereth 1977: 58; Heater 2002: 26–44; Fine 2002: 138–139; Arieli 2002: 13). Roman Stoicism has exercised great influence over later cosmopolitan thought not least via Roman law. Roman law was created in order to unite and keep together virtually the whole known world and thus a legion of nations. To this end Roman jurists deployed the abstract Stoic philosophical notion of equal personhood as the foundation for the empire's universal legal system and as part of this system Roman law introduced the notion of the sovereignty of the unqualified individual.³⁰ This influential notion meant that a person, as a legal subject, was conceived without regard to her membership or position within any group (Fine 2002: 139; Noll 2000: 75–76; Arieli 2002: 13–15).³¹

Early cosmopolitanism was based around a few basic tenets, succinctly conveyed by Cicero (see also the initial quote for a similar exposition by Marcus Aurelius):

³⁰ It should be noted that this law, *jus Gentium*, only applied when non-Romans were parties, as disputes between Romans were regulated by *jus Civile*.

³¹ The cosmopolitan nature of Roman law was a great inspiration for legal scholars in the twelfth century, who sought to move away from the feudal order. The fact that Roman law had so much to say about the state and its eminence also inspired European statesmen who tried to replace the feudal order with modern states. These statesmen were, however, also inspired by Aristotle's notion of the secular and autonomous *polis* (van Caenegem: 1991:133–136). The marriage of universal individualism and the absolute sovereign secular state is still evident in the existing state order.

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions ... We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times... (Cicero 1994: Book III XXII)

Cicero also identified the main moral implication of the cosmopolitan perspective, and can lay claim to coining the key phrase, *dignitas hominis* (the dignity of man), that is central to cosmopolitanism. This expression entails the notion that all individuals have a universal right to have their personhood respected and protected, as they as rational beings are capable of exercising self-determination (Cancik 2002: 19–22, 27).³² The Stoics hence originated the notion that justice is universal, that all human beings (as rational creatures) possess human dignity which bestows rights on all persons independently of what culture or nation that they belong to and that persons therefore on a basic level are equals (Colish 1990: 97, 100, 146; Coleman 2000: 251, 258–259; Heater 2002: 32; Fine 2002: 138–139; Arieli 2002: 13; Cicero 1991: Book III 28; Seneca 1995: Book 3:28).³³

The notion of a divine universal law that bestowed rights on all persons was passed from the first cosmopolitan philosophers to the Roman stoics and on to the Christian natural law philosophers. The problem with this notion was its ambiguity not to say its indeterminacy which was caused by the fact that no agreed criterion or basis on which a law could be said to be universal existed. This problem was not confined to the theoretical world of philosophers; jurists also failed to turn natural law into a distinct or coherent notion. As one legal historian describes the situation during the Middle Ages (Williams 2003: 49; Heater 2002: 34–36; Nussbaum 1997: 36–39; Cancik 2002: 33–37; Arieli 2002: 13; Dicke 2002: 113):

³² The dignity of man was only one form of dignity in the Roman world, and although it was the most basic, it was hardly seen as more important than the dignity of the state or the dignity that followed a particular rank (Cancik 2002: 23–24).

³³ It is crucial to appreciate that the Roman Stoics, more than earlier and later cosmopolitans, viewed themselves as citizens of two commonwealths (Heater 2002: 37):

For there is a fellowship that is extremely widespread, shared by all with all (even if this has often been said, it ought to be said still more often); a closer one exists among those of the same nation, and one more intimate still among those of the same city. For this reason our ancestors wanted a law of nations and the civil law to be different: everything in the civil law need not be in the law of nations, but everything in the law of nations ought also be part of civil law. (Cicero 1991: Book III 69)

One [commonwealth] is great and truly common to all, where gods as well as men are included, where we look not to this corner or that, but measure its bonds with the sun. The other is that in which we are enrolled by accident of birth – I mean Athens or Carthage or some other city that belongs not to all men but only a limited number. (Seneca 1995: On the Private Life 4)

In fact, however, everyday-life was but a pale reflection of that great platonic idea.... The *jus divinum* or *naturale* was a very vague law, which had never been put in writing and whose content was therefore strictly unknown or at least uncertain. Its interpretation depended on everyone's personal understanding and could vary enormously according to the individuals concerned, whether governors or governed – and what is the practical value of a supreme but unknown law? (van Caenegem 1991: 189)

It was this problem that Kant set out to solve. By replacing the general theistic foundations of much of early cosmopolitan thought with the concept of individual autonomy Kant managed to provide cosmopolitanism with a clear foundation from which specific determinate universal rights could be derived. It must be remembered that the Stoics exercised a profound influence on later cosmopolitans including Kant and he retained the key notion of universal reason (Williams 2003: 49; Heater 2002: 34–36; Nussbaum 1997: 36–39). For Kant, as for the Stoics, reason was an *a priori* concept that is independent of empirical context or experience. This means that reason is a thing in itself. That is, reason is objective in the sense that it is not dependent on a particular context. Further, it is universal in the sense that it applies independently of any particular context. The novelty of Kant's philosophy lies in the fact that he turns reason into, not only the means for accessing the universal law, but also the source or basis of universal law. The universal good or justice is, on his account, not a divine law that speaks to us as rational creatures; rather, the universal good is what reason tells us can be maintained as a universal law. So the content of universal law can be found or re-discovered and explicated by asking what can be held as categorically just, i.e. just independent of any context or particular circumstances. This is the meaning of the Categorical Imperative, which in its first formulation, states that "... I should never act except in such a way that I can also will that my maxim should become a universal law." (Kant 1993: 402) That is, there is a universal law and it stipulates that one should always act in such a way that one could wish that all others would reciprocate in kind (Wood 1999: Section I; Kant 1993).

At this point, it seems almost as though Kant's cosmopolitanism is a basic philosophy of non-contradiction. Do only what you would want to have done to you. This is, however, an erroneous conclusion (sometimes drawn) from the Categorical Imperative, and Kant ultimately put more flesh on the notion of what is universally just (Smith 1991: 73–78). The 'I can will universally' bit is crucial in this respect, as it connects the individual as a morally responsible agent to the notion of the universally good (Kant 1993: 402). Kant held that only human beings are moral agents, as moral agency presupposes a free will, which in turn only

rational creatures have. Rational beings have the ability to grasp what the universal moral law is by using their rational faculty, but they actively have to use their rational faculty and practical reason (ability to choose what is rational) in order to embrace it. The connection between choice/will and morality means that an act only has moral worth if it is freely willed or chosen.

This is why the fact that an act can be universalised is not enough, it must be actually willed in order to have moral worth. That is, a moral law must be chosen; its status as moral depends, or lies, in the fact that it is chosen. Human beings are not hardwired to act in accordance with (or contradict) the universal moral law, and individuals do not end up following the universal law as a consequence of being endowed with it by God, by nature or in virtue of a specific upbringing. This means that individuals are self-legislators: they give a universal *a priori* law to themselves, i.e. a law that they do not receive from others and are not nurtured to embrace. There is thus an intrinsic connection between free will and the universally good in Kant's philosophy, and it goes beyond the fact that the normative validity of a just act depends on the fact that it is independently and freely chosen; the universally good ultimately consists in respecting individuals' ability to exercise their free will or autonomy (Kant 1993; Wood 1999: Section I).

It is also this capacity for autonomy that bestows an absolute and universal value on individuals. This follows from the fact that individuals as self-legislators are universally valuable, as their capacity for autonomy is not good in relation to any specific aim. The human ability to exercise autonomy is a universal value in that it is not contingent on anything else, such as membership or particular empirical contexts, and this means that individuals as autonomous beings have a universal and absolute value or human dignity. That is, they are valuable not as means to some other end, but as ends in themselves (Kant 1993; Wood 1999: Section I). This means that the Categorical Imperative cannot simply be seen as a rule of non-contradiction, and that it also can be formulated as: "Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means." (Kant 1993: 429)

To sum this up, people, as autonomous individuals, have the ability to act freely – i.e. independent of any social context – which in turn means that they have a universal value; and if people have a universal value, due to their ability for autonomous action, then the only

thing that can be willed universally is that all human beings' capacity for autonomy is respected. It is also clear from this that the Categorical Imperative protects human beings' autonomy in general, and not only the right to choose the universally good. This simply follows from the fact that it is not the *consequence* of making the right choice that has value but the underlying ability to choose it autonomously; or to put it differently, the use of the rational faculty must be respected in general, as one cannot respect the free moral choice of following the Categorical Imperative while not respecting the actual function or exercise of choosing. To put it yet another way, if the value of our faculty for reason lies in that people can freely exercise their ability to choose, then their right to choose must be respected, not just their particular choices. The core of Kant's moral and political philosophy is thus that all persons have an absolute value, or even better human dignity, due to their ability to exercise moral autonomy (Kant 1993; Dicke 2002: 112; Eckert 2002: 46).

Moreover, the facts that all human beings are seen as autonomous and that all have the right to exercise their ability for autonomy leads to the crucial conclusion that human beings are of equal moral worth (Wood 1999: Section I; Kant 1993; Kant 1991a: 64–74; Williams 2003: 70, 99). This dual normative premise, of equal universal worth, leads to Kant's notion of the Kingdom of Ends. The Kingdom of Ends is the idea of an order where all individuals have an equal right to exercise their autonomy and pursue their own ends, as long as they respect all other human beings as autonomous persons just like themselves. The Kingdom of Ends thus entails or translates into a universal principle of rights stipulating that individuals have a right to exercise their individual freedom as long as this is compatible with everyone's equal right to do the same (Kant 1993):

Every action which by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with a universal law is right (Kant 1991c: 133)

The notion of the Kingdom of Ends hence lays down the foundation for individuals' rights and generates a general rule for measuring the extent of these rights. The cosmopolitan order hence combines positive and negative freedoms, and focuses on the need for equality, and on

individuals' ability to co-operate on the basis of such equality, in order to achieve freedom for all (Kant 1991a: 73–79; Williams 2003: 92–102):³⁴

For we are interested only in the *form* of the relationship between two wills, in so far as they are regarded as *free*, and in whether the action of one of the two parties can be reconciled with the freedom of the other in accordance with a universal law. Right is therefore the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom. (Kant 1991c: 133) [or in more familiar terms] ... for each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of everyone else within a workable general law – i.e. he must accord to others the same right as he enjoys himself. (Kant 1991a: 74)

The essence of cosmopolitanism has now been outlined. This leaves the more detailed task of drawing out the basic components of the cosmopolitan rationale. This will be done in relation to modern cosmopolitanism, since much scholarly effort has gone in to dissecting the basic tenets of cosmopolitanism. The modern cosmopolitans have, moreover, made some further conceptual contributions to the cosmopolitan school of thought, and the analysis will draw on them to further clarify the cosmopolitan rationale. Modern cosmopolitanism does, however, retain the basic features of Kantian and Stoic cosmopolitanism.

Modern cosmopolitanism finds its representatives in influential writers like Barry, Beitz, Hart, Held, Nagel, O'Neill and Pogge, among others. There are of course differences between these writers, but modern cosmopolitanism is united by some core assumptions that together represent, or make up, the cosmopolitan rationale (Held 2002b: 11–17; Pogge 1994: 89–90). The central component of cosmopolitanism is *individualism*; it is individuals as autonomous persons that hold rights – not groups, or individuals as members of groups. That is, it is individuals' ability to act autonomously and to guide their own lives that makes them truly human and bestows dignity/value on them (Hart 1955: 175–176; Beitz 1999a: 53, 215; Beitz

³⁴ This standard, based on an equal right to autonomy, applies "... only to those relationships between one person and another which are both external and practical, that is, in so far as their actions can in fact influence each other either directly or indirectly." (Kant 1991c: 132–133) This means that cosmopolitanism only gains practical relevance in so far as individuals are interconnected. Kant not only assumes that individuals in general are interconnected, but further argues that the world constitutes an interconnected sphere:

Since the earth is a globe, they cannot disperse over an infinite area. ... The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt *everywhere*." (Kant 1991b: 106–108, emphasis in original)

The Kingdom of Ends is hence an attempted solution to the practical moral problem that global interconnectedness gives rise to. (For further comments on the close link between global interconnectedness and cosmopolitanism see Kant 1991b; O'Neill 1994: 81; Habermas 1997: 121; Scheffler: 1997: 192; Waldron: 236–237).

1998: 826; Barry 1998: 145; Barry 1999: 13, 38; Pogge 1994: 89, 115; Benhabib 2004: 97; Tan 2004: 1; Held 2004: 172; Wood 1999: 156). The notion of individual autonomy is closely related to *rationality*, which is another core component of cosmopolitanism: it is the faculty of reason that enables human beings to exercise autonomy and give them the ability to grasp moral norms (Calhoun 2002: 99–101).³⁵

The combination of individualism and rationality/autonomy as the basis for rights leads to cosmopolitanism's third key component – *universalism*. Cosmopolitanism is universal in terms of validity in that it applies to all cultures, being based on the fact that all individuals as rational beings can equally see what is universally just. Cosmopolitanism is also universal in scope in that it encompasses all individuals, as autonomy is seen as a universal characteristic that all individuals share in (Pogge 1989: 250; Barry 1998: 156–157; Pogge 1994: 89; Caney 2005: 26, 78).³⁶ The final key component of cosmopolitanism is *equality*, i.e. that all individuals have equal rights. The notion of equality follows from that all individuals share the ability to exercise autonomy and therefore have an equal right to concern as autonomous individuals.

In sum, the cosmopolitan outlook is thus constituted by the notion that individuals as autonomous persons have a universal and equal right to freedom, and an equal right to concerns (Hart 1955: 175, 190–191; Kant 1993; Barry 1998: 146; Pogge 1994: 89–90; Caney 2005: 64–65; Tan 2004: 1; Held 2004: 172). This outlook can best be understood as a universal individual right to be treated with impartiality. The impartiality criterion stipulates that all moral choices must be thought of and evaluated as if all affected by the choice could come to occupy any of the potential positions that an affected person could end up in as a consequence of the choice. The impartiality criterion is thus a heuristic device that can be deployed to test whether a given decision is compatible with the universal right to equal concern (and hence can be accepted as a universal maxim) (Beitz 1994: 123–125; Habermas 1993: 137; Nagel 1991: 64–71; Barry 1998: 145; Held 2004: 109–110; Wood 1999).

³⁵ It is noteworthy that many modern cosmopolitans have jettisoned Kant's metaphysical edifice where rationality as a thing in itself is the basis for the universal good (See for example Held 1995: 167, 188, 223, 282; Held 2002b: 13–17; Habermas 1996a). Modern cosmopolitans instead tend to rely on the notion that individuals would endorse cosmopolitanism if they scrambled out all egotistical assumptions (see the impartiality criterion below).

³⁶ It is of note that all cosmopolitans hold that cosmopolitanism is universal in scope, i.e. applies to all, but that some cosmopolitans hold that it is not universal in validity, i.e. that cosmopolitanism cannot be demonstrated as universally valid (Caney 2005: 26–33).

The impartiality criterion does not alter or add to the cosmopolitan rationale, but it constitutes a conceptual development, as it makes it easier to deduce what is compatible with the cosmopolitan rationale. Modern cosmopolitans have contributed with another conceptual development of this kind by making a distinction between formal and substantial rights, making it clear that formal rights to self-determination can be empty. This is an important distinction, as it can be used to show that the right to self-determination does not exist in the absence of a certain level of social and material goods, and that hence only equal substantial rights are compatible with the impartiality criterion (Barry 1998: 146; Beitz 1998: 830; Pogge 1994: 89–90; O'Neill 1994: 84–86; Beitz 1995: 127–136; Held 1995: 192–195; Held 2002a: 42–44).

To briefly recapitulate, it can be said that the Stoics created the core of the cosmopolitan canon. It was the Stoics who first held that at least some rights are universal, and belong equally to all individuals as partakers in reason. Kant's cosmopolitan philosophy embraces this notion and further develops the cosmopolitan philosophy by anchoring the notion of equal individual rights in individuals' capacity for self-determination. This is a crucial development, as it creates a criterion from which a coherent normative basis for individual universal rights can be deduced. The modern cosmopolitans retain the basic principles of Kant and the Stoics, and further develop cosmopolitanism in two important ways. The impartiality criterion does not change the cosmopolitan rationale, although it often is seen as replacing Kantian metaphysics. It is, however, a very important conceptual development, which makes it much easier to cash out the implications of the cosmopolitan rationale. Nor does the modern cosmopolitans' focus on substantial rights, rather than formal rights, change the cosmopolitan rationale, but it is another important development because it highlights that the impartiality criterion is not compatible with anything less than substantial rights. In conclusion, the cosmopolitan rationale can be said to be based on the idea that: *individuals have an equal and universal right to exercise self-determination, and therefore a right to be treated with equal concern simply in virtue of their status as persons.*

The Nature of a Cosmopolitan Political Community

So what would a political community based on the cosmopolitan rationale look like? A cosmopolitan political community must be a *Rechtsstaat* (a state ruled by law) in the full sense of the word. This means that the state declares its law transparently and publicly, so as to enable people to plan and guide their lives; that all are equal before the law, so as to protect

individuals from invidious discrimination; and that the power of the state is limited, so as to create room for and respect the universal right to individual autonomy. (For a fuller discussion of the concept of *Rechtsstaat* see the German case study.) This means that a cosmopolitan political community cannot be a pure democracy, as no power can override individuals' universal right to autonomy. That said, a cosmopolitan political community must be democratic. A person does not have the right to have a say over all things that affect her. An attractive potential partner's decision to turn down a marriage proposal will affect the snubbed person, but the latter has no right to partake in the other person's decision. She does, however, have the right to participate in all collective decisions that affect her ability to exercise her autonomy.

Thus, a cosmopolitan political community must allow all individuals who are affected by its decisions to have an equal say over these collective decisions, i.e. the right to participate in the political process derives from the fact that collective decisions affect individuals' right to self-determination (Caney 2005: 158). Democracy hence rests, in the cosmopolitan perspective, on the notion of universal individual autonomy and equality, not on the notion that a nation has the right to express its collective will (Held 1995: 71, 145–158). This also means that democracy, to the extent that we live in 'overlapping communities of fate', to use Held's famous phrase, should be transnational (Held 2000: 424; compare Kant above). This follows from the fact that a democratic process must be delineated by those whom the decisions affect – not by any particular community.

Communal borders and/or memberships are morally arbitrary from the cosmopolitan perspective, as it is individuals' ability to exercise autonomy that forms the basis for rights (Barry 1999: 53; Pogge 1994: 107). The fact that all individuals are entitled to equal concern on this basis, moreover, has very important and wide-ranging implications for the concept of national sovereignty. A cosmopolitan political community cannot invoke the notion of national sovereignty to disadvantage certain (equally entitled) individuals due to their nationality, as this would violate the impartiality criterion and thereby the idea that all individuals have a right to equal concern *qua* persons. This means that national sovereignty must be in line with the equal concern allocated to citizens and non-citizens alike (Cole 2000: 184–185; Habermas 1994: 22–25; Beitz 1991; McCarthy 1999; Fine 2002: 144–145). A national populace can neither ignore the individual rights of minorities within the nation, nor the individual rights of non-citizens. Or to put it in more philosophical terms: to discriminate

against individuals on the grounds of membership violates the impartiality criterion, and thereby non-citizens' equal universal right to individual autonomy. This means that individuals' rights trump nations' rights in a cosmopolitan political community (Cole 2000: 184–185; Habermas 1994: 22–25; Beitz 1991; McCarthy 1999).

The notion of a cosmopolitan political community, where universal individual rights trump the right to communal sovereignty, only becomes fully comprehensible in light of the cosmopolitan position on culture. Culture is seen as important in that it constitutes a necessary background, or context, from which individuals exercise their autonomy; human beings are cultural beings and cannot make sense of the world outside some social or cultural context. This does not mean, however, that individuals are dependent on *a particular culture*. Individuals' intrinsic identities vary within nations, and some key elements of certain members' identities can stretch over national borders and connect them to people with whom they share very little else.

Culture, from the cosmopolitan perspective, is like the air we breathe: we cannot live without it, but it is all round us. This means that there is no such thing as a particular German culture that people in Germany depend on for their ability to exercise autonomy (Hall 2002: 26–27; Held 2002c: 52–53). No more than there is such a thing as German oxygen that Germans need to survive. Germans need both oxygen and culture, but both, the culture and oxygen that Germans breathe are simply floating all around them, and cannot be classified as German in any meaningful sense. This perception of culture is perhaps best captured by Waldron:

We are made by our languages, our literature, our cultures, our science, our religions, our civilization – and these are human entities that go far beyond national boundaries and exist, if they exist anywhere, simply *in the world*. (Waldron 1995: 103 emphasis in original)

This means that culture is recognised as essential to human beings, but culture is not a cohesive or all-encompassing entity. It follows from this that it is not necessary, and indeed impossible, to protect particular cultures, or particular communities based on a shared culture.

The ability and key to moral and social co-operation is instead to be found in all individuals' ability for autonomy and the mutual recognition of the same; it is a defining feature of

cosmopolitanism that the ability to co-operate morally, socially and politically does not depend on particular cultures or communities (Heater 1990). As Williams puts it:

Kant regards liberty as constraint under external law that permits us to pursue happiness in our own way without fear for our lives and arbitrary arrest. The civil conditions under which this occurs are tied neither to any particular national state nor to any particular cultural conditions. (Williams 2003: 99)

This means that both the notion of culture and the notion of justice transcend specific communities, i.e. *Moralität* transcends *Sittlichkeit* (Habermas 1996a: 513, see below for a further discussion of these concepts). This specific perception of culture is pivotal, since it explains both how universal moral deliberation is possible and why communal sovereignty cannot be defended on the grounds that individuals depend on the existence of particular cultures.

In sum, the basic structure of the cosmopolitan community is embodied in the democratic *Rechtsstaat*. A democratic *Rechtsstaat* embodies the cosmopolitan rationale in three related ways. One, it provides all individuals with the right to equality before the law; two, it entitles all individuals to an individual sphere that the state or other individuals cannot encroach upon; and three, it gives all individuals an equal say in the collective decisions that affect their ability to govern their lives. These features must, moreover, be applied universally from a cosmopolitan perspective and thus cover citizens as well as non-citizens (Linklater 1998: 189–193; Held 1995: 145–156). Only a democratic *Rechtsstaat* that respects the equal rights of all individuals would pass the impartiality criterion or be a community based on principles that all individuals could agree to (Held 1995: 147–148, 160).

The Communitarian Rationale

The history of communitarianism is less well delineated than the history of cosmopolitanism. That said, the roots of communitarianism can also be traced back to the ancient Greeks, notably to Aristotle. Communitarianism is in general based on the notion that moral virtue or justice develops from, and is based on, human association – and is thus not an *a priori* concept but is particular to specific communities/nations. This means that morality and justice are intrinsically intertwined with membership in particular communities, and that justice is not universal but particular to distinct communities (Coleman 2000: 186–192; Aristotle 1992:

Book I 253a29). From this perspective, people can only exist as truly human and moral beings in particular communities:

Among all men, then, there is a natural impulse towards this kind of association; and the first man to construct a state deserves credit for conferring very great benefits. (Aristotle 1992: Book I 1253a29)

Any one who by his nature and not simply by ill-luck has no state is either too bad or too good, either subhuman or superhuman – he is like the war-mad man condemned in Homer's words as 'having no family, no law, no home'; for he who is such by nature is mad on war: he is a non-cooperator like an isolated piece in a game of draughts ... (Aristotle 1992: Book I 1253a1)

The communitarian perspective found its most powerful modern philosophical expression in Hegel. Hegel reacted against Kant's notion that morality could be detached from the empirical realm, i.e. detached from particular nation-states, and that membership therefore was arbitrary from a moral point of view:

Essentially, however, it [patriotism] is the sentiment which, in the relationships of our daily life and under ordinary conditions, habitually recognises that the community is one's substantive groundwork and end. (Hegel 1967: § 268)

The rational end of man is life in the state, and if there is no state there, reason at once demands that it be founded. ... It is false to maintain that the foundation of the state is something at the option of all members. It is nearer to the truth to say that it is absolutely necessary for every individual to be a citizen. (Hegel 1967: § 75 Additions)

The basic idea that Hegel is putting forward here is that membership in a particular community is essential for a person's very humanness. Hegel's argument clearly draws on Aristotle, and his idea that the *polis* lies at the heart of a truly human life. Aristotle and Hegel can also be said to be the two philosophical titans on whose shoulders communitarianism rests (Gutman 1992: 120–121; Avineri 1992: 1–2; Kymlicka 2002: 208–210; Smith 1991: 4–5, 8, 31, 43, 106).

This longstanding tradition experienced a *renaissance* in the early 1980s when Sandel, MacIntyre, Taylor and Walzer created a modern communitarian canon (MacIntyre 1981; Taylor 1985; Walzer 1983; Sandel 1982). The modern communitarian canon bears a close

resemblance to its historical precursor, and modern communitarians draw heavily on Aristotle and Hegel.³⁷ Communitarianism represents, at the general level, a distinct and cohesive philosophical perspective, though many specific differences between its particular philosophical proponents can be identified (Kymlicka 2002: 273–276; Mulhall 1992; Gutman 1992).³⁸ The analysis below will mainly draw on modern communitarians, as they tend to focus more clearly on communitarianism as a particular philosophical perspective, and the communitarian rationale hence appears in a more condensed and accessible form in their writings.

Communitarianism clearly challenges and contradicts the cosmopolitan view of justice as something universal, as communitarianism perceives of justice as something that is particular and dependent on cultural/communal contexts. This basic difference in this perception of the nature of justice is easy to grasp for German (and Scandinavian) speaking persons, as these languages contain one word for a universal notion of justice *Moralität* (*moral*)³⁹ and another for justice as communal standards *Sittlichkeit* (*Sedlighet/sedelighet/saedelighed*).⁴⁰ An act can therefore be described as plainly universally wrong or immoral (*unmoralisch*) or as not being according to customary values (*nicht den Sitten entsprechend*).

The notion of *Moralität* represents Kant's struggle to detach justice from particular circumstances and particular histories in order to discover an abstract, but universal, notion of justice; whereas "... *Sittlichkeit* or ethical life ... is rooted in the customs, traditions and practices of a community." (Smith 1991: 8) The communitarian perspective is thus based on the notion that normative issues are questions about what constitutes just behaviour at a specific time for specific people in particular communities (Avineri 1992: 1–2; Kymlicka 2002: 208–210) As Aristotle, later echoed by Macintyre, puts it:

Similarly the task of all citizens, however different they may be, is the stability of the association, that is, the constitution. Therefore the virtue of the citizen must be in relation to the constitution;

³⁷ The creation of a modern communitarian canon also followed a very general historical pattern, where the prominence of a universal moral theory is followed by critique from philosophers who emphasise the importance of the particular. Plato was followed by Aristotle, Kant by Hegel, and Rawls by the modern communitarians, although Rawls partly abandoned much of the apparent universalism of his early writings (Rawls 1999).

³⁸ The differences between particular thinkers are of no concern here, as the task at hand is to outline the basic communitarian rationale.

³⁹ It should be pointed out that the word moral also is derived from the Latin word for custom and that there therefore, etymologically speaking, exists no difference between the terms.

⁴⁰ The term *Sittlichkeit* still carries the meaning of morally wrong and is hence not the equivalent to customary or *comme il faut*, which denotes that something is in accordance with etiquette or tradition rather than moral.

and as there are more kinds of constitution than one, there cannot be just one single *and perfect* virtue of the sound citizen. (Aristotle 1992: Book III 1276b16, emphasis in the original)

Moral philosophy is often written as though the history of the subject were only of secondary and incidental importance. This attitude seems to be the outcome of a belief that moral concepts can be examined and understood apart from history. Some philosophers have even written as if moral concepts were... timeless.... This is obviously false. Moral concepts are embodied in and are partially constitutive of social life. (MacIntyre 1998: 1–2)

The basic communitarian notion that justice depends on the existence of particular communities is based or rests on the epistemological argument of *social embeddedness*. The social embeddedness argument holds that individuals make sense of the world and gain knowledge of normative issues via a social process, rather than by any autonomous use of reason (Sandel 1982: 150, 179). The best way to understand this social process is, perhaps, to think of it as a hermeneutic circle. In other words, it is a process where the whole can only be understood in relation to its parts, and the parts can only be understood in relation to the whole, so that the whole and the parts are intrinsically connected. That is, individuals can only make sense of themselves as parts of a social or cultural whole, and a culture as a whole can only be understood as a web constituted by its members and their associational interactions.

More specifically, this process works through the social direction and interpretation of particular social meanings in a given community. This means that a person's actions are directed or informed by her social understanding of what constitutes acceptable or just behaviour; and her self-perception or self-image is in turn shaped by the community's feedback on her actions. The upshot of this process is that members internalise and become constituted by the social meanings embedded in their community, and the community exists in these shared understandings that constitute its members (MacIntyre 1981: 204–225; Taylor 1985: 15–57; Walzer 1983: 8, 261; Margalit 1990: 444–449). The social embeddedness argument thus gives rise to the communitarian perception of a community as a social or cultural entity made up of common understandings of what constitute justice. Aristotle conveyed this idea succinctly: “The virtue of justice is a feature of a state; for justice is the arrangement of the political association, and a sense of justice decides what is just.” (Aristotle 1992: Book I 1253a29)

The particular social meanings in a particular community do not only create a particular perception of justice – they are also constitutive of and shape individuals as members of a particular society. The constitutive power of sharing values, moreover, goes beyond the fact that members can make sense of other members' moral claims, and that members act on shared social meanings binds them together in a community:

Inter-subjective meaning gives people a common language to talk about social reality and a common understanding of certain norms, but only with common meanings does this common reference world contain significant common actions, celebrations, and feelings. These are objects in the world that everybody shares. This is what makes a community. Once again, we cannot really understand this phenomenon through the usual definition of consensus as convergence of opinion and value. For what is meant here is something more than convergence. Convergence is what happens when our values are shared. But what is required for common meanings is that this shared value be part of a common world, that this sharing is shared. But we could also say that common meanings are quite other than consensus, for they can subsist with a high degree of cleavage; this is what happens when a common meaning comes to be lived and understood differently by different groups in a society. It remains a common meaning, because there is the reference point which is the common purpose, aspirations, celebrations. (Taylor 1985: 39)

A community is thus based on the fact that inter-subjective meanings are turned into common meanings in such a way members start to share goals and aspirations. This has a direct impact on the notion of universal individual claims for rights. For if justice is a set of social meanings that members of a community come to understand and be constituted by in a social process, then there can be no neutral universal point from which the notion of justice can be objectively evaluated. There is not such a thing as a thing in itself. Nor can an individual lay claim to any right that is not recognised and shared in a given community. This means that communitarians reject the methodological individualism of cosmopolitanism in favour of methodological holism; justice can only be understood and analysed as a holistic phenomenon, where the overall particular social context determines what is just.

The upshot of the epistemological argument for social embeddedness is hence that *the community is prior to justice*. Or put differently, the question of what justice is can only be addressed retrospectively, after the question of what the community is has been answered, as MacIntyre puts it (Sandel 1982: 150, 179, 186–187; MacIntyre 1981: 204–225; Taylor 1985: 10–57; Sandel 1992: 22–24; Walzer 1981: 3–30, 312–321; Smith 1991: 41–42, 133):

I belong to this clan, that tribe, this nation. Hence what is good for me has to be good for one who inhabits these roles. As such, I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. ... The notion of escaping from it [my particular background/circumstances] into a realm of entirely universal maxims which belong to man as such, where in eighteenth-century Kantian form or in the presentation of some modern analytical moral philosophies, is an illusion and an illusion with painful consequences. (MacIntyre 1981: 220–221)

The community is thus seen as a cohesive and unified entity that is made up of shared understandings, and members belong to their communities like they belong to their families. This does not mean, however, that the community is one large family. Communities consist of several layers and families, the civil society and the political sphere are all part of the same overall community. A community is hence not a large family based on biologically driven loyalty, but is made up of smaller units that together constitute an entity that shares an understanding of their common social and political good. This also means that the community constitutes a unified whole that cannot exist without the family, the social and the political spheres which together make up the community/nation (Smith 1991: 9, 130; Buchwalter 2001; Hegel 1967: § 151 Additions, 181; Durst 2001: 231; Aristotle 1992: Book I 1252a34–1252b27).

A person's family, social and political lives are hence connected to a particular community, and the community's different spheres cannot be disconnected from each other but constitute a unified whole. This centrality and omnipotence of the community re-connects to the social embeddedness argument. The fact that individuals are constituted by their shared understandings means that they cannot make sense of who they are and what is just outside their community. This is where the intertwined perceptions of family, social and political life have been formed, and it has become part of who they are. Individuals are thus dependent on particular communities in order to make sense of themselves as moral beings; only sub humans and super humans can exist outside a particular community (Aristotle 1992: Book I 1253a1–1253a29).

Communities also play a key role in motivating people to act morally. A person cannot be moved to act morally by abstract universal principles from a communitarian perspective; as such principles do not connect to or resonate with a socially constituted person. A person must come to perceive the fulfilment of duties as part of who she is (Ignatieff 1984: 51–53;

Walzer 1997: 104–106). That is, the existence of communities provides a real tangible incentive to act on duties, as the intrinsic connection between members in a specific community creates a we that breaks down the barrier of egoism and makes moral behaviour possible (Miller 1995: 57, 66; Sandel 1992; for a discussion of the essential creation of a we, see Mouffe 2005: 14–15, 19). The sense of a we hence fulfils a pivotal role by connecting particular individuals' ends with a collective end. This connection means that sharing within a community does not become a question of serving others, but ultimately also constitutes a part of serving one's personal ends. In the absence of a sense of a community, on the other hand, individuals are reduced to mere ends, as they will have to contribute to ends which they are not part of (Sandel 1982: 78–81, 143–144; Miller 1995: 66; Miller 1988: 651; Sandel 1992: 22–24).

This means that part of the socialisation process that makes individuals moral beings involves creating an attachment to, and a sense of obligation towards, the well-being of fellow members, and to the community as a whole (MacIntyre 1981: 219–220; Sandel 1992: 23). Aristotle aptly and succinctly described this connection between associations, the development of fellow-feeling, and ultimately the applicability of justice: “And the extent of their association is the extent of their friendship, as it is the extent to which justice exists between them.” (Aristotle 1998: Book VIII 1159b25)

The notion that morality presupposes a sense of fellow-feeling, and that the sense of fellow-feeling within communities must therefore be preserved, in turn, leads to the key communitarian notion of *partiality*. That is, the special attachment to fellow members includes forming *special* ties and a sense of duty towards other members, and such ties can only be upheld if membership in the community confers a right to such partial treatment (Tamir 1993: 96–102, 115–116; Meilaender 2001: 99–100; Miller 1995: 65). The basis for partiality is thus that a community based on mutuality can exist only if individual members can expect that their specific commitment to other members will be reciprocated. Or put slightly differently, any sense of community would be put into question and eventually disappear if members did not reciprocate in their moral actions in acting partially towards each other (Miller 1995: 65–66; Miller 1988: 650). Such reciprocal partiality between members also feeds back to and reinforces the sense of living in a shared community, and bolsters social cohesion by making the notion of a we tangible. The upshot of this is that not only does a community have a right to treat members and non-members differently (according

to what its particular social meanings prescribe), it has a duty to do so; a community must treat members with partiality in order to maintain itself as a community and the existence of communities is a pre-condition for the existence of justice.

In sum, the communitarian rationale is based on the idea that communities are essential for justice. Individuals can only make sense of themselves, the question of what justice is and what obligations they have inside a particular community; justice comes into being through members' associative interactions within a bounded community of shared understandings. The connection between individuals and communities as mutuality constitutive is also what makes it possible for individuals to come to see their individual interests as part of the interests of a larger collective. The existence of such a moral community pre-supposes shared constitutive social meanings, and community membership implies and generates preferential treatment. That is, only if members share a sense of justice, and in general can trust that other members will pay special attention to their needs, can a moral community based on solidarity be sustained.

The question of what rights someone is owed, in general, must always be asked retrospectively, in light of what community she belongs to; and the question of what a community (or any of its members) owes another person must depend on whether that other person is a member of the community or not. The fact that justice cannot exist without bounded communities, where membership makes an intrinsic normative difference, means that communities have a right to uphold and sustain themselves as exclusive entities. The communitarian outlook and rationale can hence be said to be based on the ideas that: *membership in the nation is what confers rights on individuals and nations have a right to maintain themselves as particular communities and exclude non-members from the rights that members enjoy, due to the fact that the existence of particular bounded communities is a pre-condition for the existence of reciprocal schemes of collaboration-based justice.*

The Nature of a Communitarian Political Community

The communitarian rationale translates into a particular view of the political community as the political embodiment of a shared culture, made up of shared social meanings. Nation-states are, from this perspective, charged with expressing, reproducing and protecting the nation's particular values, way of life and members. This means that nation-states cannot be neutral in

terms of the ends they pursue, or remain neutral between members and non-members (Tan 2004: 110; Smith 1991: 155):

Among histories and cultures, the nation-state is not neutral; its political apparatus is an engine for national reproduction. National groups seek statehood precisely in order to control the means of reproduction. (Walzer 1997: 25)

This means that the very notion of a nation-state is based on the idea that the state exists in order to protect a particular community, and not simply to uphold law and order:

It is clear therefore that the state is not an association of people dwelling in the same place, established to prevent its members from committing injustices against each other, and to promote transactions. Certainly all these features must be present if there is to be a state; but even the presence of every one of those does not make a state *ipso facto*. The state is an association intended to enable its members, in their households and kinships to live *well*: its purpose is a perfect and self-sufficient life. (Aristotle 1992: Book III 1280b29, emphasis in the original)

The state is not simply an instrument of force and coercion but a locus of shared understandings. A state is more than an instrument ensuring civil peace; it is a wider network of shared ethical idea and beliefs. A state is ultimately a meeting of minds, since it depends on a common cultural history and a sense of civic identity. (Smith 1991: 233)

This also means that a legitimate constitution is anchored in the culture or *Sittlichkeit* of a nation, and not based on any abstract universal notion of justice (Buchwalter 2001: 213). In Hegel's words:

... the constitution of any given nation depends in general on the character and development of its self-consciousness. In its self-consciousness its subjective freedom is rooted and so, therefore, is the actuality of its constitution. The proposal to give a constitution – even one or more or less rational in content – to a nation *a priori* would be a happy thought overlooking precisely that factor in a constitution which makes it more than an *ens rationis*. Hence every nation has a constitution appropriate to it and suitable for it. (Hegel 1967: § 274)

Nation-states are hence intrinsically particularistic, and if they were not to put the interests of their members first, they would contradict their *raison d'être* and would act illegitimately (Gibney 2004: 200–201). In order to fulfil its function as the protector of a particular nation, the nation-state must clearly have the right to pursue its internal ends without any external interference. The basic political implication of the communitarian rationale is thus that

communities must enjoy absolute national sovereignty if they are to be able to constitute schemes of justice, given that such schemes must be particular and inter-communal (Tamir 1993: 69–77; Miller 1995: 81–99; Walzer 1980: 211, 228; Walzer 1983: 31–63; Gibney 2004: 24–25; Benhabib 2004: 40–41).⁴¹

Walzer succinctly makes the communitarian case for national sovereignty vis-à-vis other states: “Toleration is an essential feature of sovereignty ... Sovereignty guarantees that no one on *that* side of the border can interfere with what is done on *this* side.” (Walzer 1997: 19, emphasis in original) And Hegel aptly describes the intrinsic value of sovereignty in internal terms, while berating the idea that sovereignty could be traded for reasons of expediency:

Those who talk about the ‘wishes’ of a collection of people constituting a more or less autonomous state with its own centre, of its ‘wishes’ to renounce this centre and its autonomy in order to unite with others to form a new whole, have very little knowledge of the nature of collection or of the feeling of selfhood which a nation possess in its independence. (Hegel 1967: § 322)

The connection between the communitarian rationale and national sovereignty can, in more philosophical terms, be broken down into three closely related points. One, moral claims are valid only given a particular context, and thus justice can only be served if particular communities have the right to follow their own social meanings; communal sovereignty is thus a pre-condition for justice. Two, a nation has the right to protect or safeguard its specific way of life, as this particular way of life is vital to its members’ sense of self or identity as well as their ability to co-exist in harmony as moral beings. Three, the vital need to prioritise members requires communal sovereignty, and without the right to treat members partially, communities could not establish themselves as moral reciprocal schemes characterised by mutual trust and solidarity among members; hence communal sovereignty is essential as it enables the partial treatment of members.⁴²

⁴¹ Many communitarians further hold that political communities have a *prima facie* right to statehood (Tamir 1993: 74–76; Miller 1995: 81–118). The important political connection between nationhood and statehood is, however, founded on instrumental grounds, whereas the basic right to communal sovereignty is an extension of the intrinsic moral value of communities. That is, statehood is not seen as an intrinsic good but as a precondition for effectively safeguarding communities’ existence and independence. The fact that nationhood has a public and political element to it does not change this fact, since public participation in national culture and politics does not pre-suppose a sovereign nation-state, whereas the security of this right does (Margalit 1990: 450–453). That said, a specific territory can constitute a part of a community’s self-understanding (Walzer 1983: 44; Tamir 1993: 74–76).

⁴² It is important to stress that communities do not have a right to self-determination or sovereignty simply by virtue of, or only if, they represent a community based on ethnicity; it is the mutual recognition of belonging to a

The essence of a communitarian political community is thus that it is sovereign, but also that it stands in a special relationship to its members, and that these members stand in a special relationship to one another. This partial nature of the communitarian political community is pivotal to understanding the nature of rights in a communitarian political community. As Arendt succinctly puts it, membership in a nation is what gives the individual the 'right to have rights' (Arendt 1968: 296–302; see also Miller 1995 for a similar position). Or as Walzer puts it:

Men and women do indeed have rights beyond life and liberty, but these do not follow from our common humanity: they follow from shared conceptions of social goods; they are local and particular in character. (Walzer 1983: xv)

A communitarian nation-state is hence characterised and legitimised by the fact that it enables its members to live according to their particular and shared social meanings, and ensures their reproduction (Walzer 1981: 314; Walzer 1997: 25). This means that a communitarian political community derives its legitimacy from popular sovereignty (Mouffe 2005: 83–84). The communitarian perspective hence inverts the relationship between national and individual self-determination, compared to cosmopolitanism. The fact that nations have an absolute right to self-determination means that they have a right to decide the nature of their political system. This means that not all communitarian political communities must be democracies, and if they are they are very different kinds of democracies than cosmopolitan political communities. Democracy is not, from the communitarian perspective, based on the right to partake in the decisions that affect autonomous individuals' lives, but is instead based on a community's right to national self-determination. It is the nation's right to determine its own fate collectively that constitutes the normative basis for any communitarian democracy. This, in turn, means that the right to participate in the democratic process is based on membership in the community, and not some abstract notion of personhood. That is, the idea of democracy pre-supposes a nation and there can be no democracy in the absence of a *demos*. Democracy is from this perspective not an individual right to participate in the decisions that affect the individual but it is about creating a connection between members and their community and participating in the community's collective governance; democracy is educational and participatory, i.e. about reinforcing and maintaining the connection between individual

community that shares certain social meanings and a sense of mutuality over time that distinguishes a political community or nations from other associations (Miller 1995: 112–113).

members and the nation; it is not about individual rights. This relates to that political institutions are considered to be formative not neutral from a communitarian perspective. That is, while cosmopolitanism is based on the notion that political institutions ought to be neutral and treat individuals impartially, communitarianism is based on the notion that political institutions foster a sense of community and loyalty among the nation's members (Hegel 1967: 314–315; Muller 2002: 163).

Such a perception of democracy also reconnects to the notion that sharing and showing solidarity are only possible in a community; only if people feel that the democratic process, at least to some extent, is about competing ideas for a common communal good will minorities respect the democratic process. Liberal Danes accept that they constitute a minority in Denmark – they perceive that their interests are taken into account in Danish democracy, even though they might prefer another set of policies; Danes as a nation would, however, not accept being a minority in Germany even if the formal democratic rules afforded them no less influence as individuals, because they perceive that their interest as Danes cannot be protected by Germans. In other words, this sense of belonging to a nation is necessary for individuals to accept the unavoidable compromises involved in any democratic process (Mill 1975: 382; Weiler 1995).

Communitarianism, like cosmopolitanism, only becomes fully comprehensible in light of the specific communitarian notion of culture.⁴³ The communitarian perspective perceives of culture as a discrete and encompassing phenomenon (Gibney 1999: 172; Margalit 1990: 443–447). That is, cultures make up whole and discernable blocks (Tamir 1993: 8; Walzer 1983: 28–31; Walzer 1997: 91). People thus live their lives within particular national communities, and a meaningful distinction between Spanish and Dutch culture can be made. This, in turn, means that members of one nation would struggle to make a life for themselves outside their nation. The communitarian take on culture is: (a) obviously a precondition for the notion that individuals are intertwined with *particular and distinct* communities; and (b) a precondition for the validity of national sovereignty, as nation-states derive their legitimacy from representing distinct and particular national communities.

⁴³ It is noteworthy that these two competing notions of culture go to the heart of the difference between communitarianism and cosmopolitanism.

In sum, a political community based on the communitarian rationale is the expression and a defender of a particular nation. This means that the communitarian political community cannot be neutral in regards to the ends it supports. Nor can it be neutral between members and non-members: it must uphold and embody the nation's particular social meanings and put the interests of its members first. It is imperative that nations be allowed to maintain themselves as bounded communities based on their own cultures, where membership in the nation makes an intrinsic normative difference – the nation, as a moral sphere, enables people to live just and fully human lives; and it is this function that any communitarian political community's right to absolute national sovereignty ultimately rests on.

This means, in conclusion, that the conflict between the communitarian and the cosmopolitan rationales is fundamental and cuts very deep. The question is not which moral norms ought to be applied. Rather, the question is what rights are based on and subsequently who is to be considered a rights holder. The fact that certain communitarian political communities recognise individual autonomy and equality as their basic moral principle does not resolve the tension between the cosmopolitan and the communitarian rationales. The real question is: who holds these rights and why? Translated to liberal nation-states, the question becomes: do rights hold *among equals* so that all who share in the equal status of citizenship have the same rights; or do persons hold rights *as equals*, in which case all individuals, non-citizens and citizens alike, have the same moral standing. From a communitarian perspective rights hold among equals, and a person holds rights as a member, not as a human being: "We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights." (Arendt 1968: 301) By contrast, from the cosmopolitan perspective all individuals hold equal rights, as equals, on the basis of being autonomous individuals.

Chapter Three

Consistent Approaches to Non-citizens' Rights

Three consistent approaches to non-citizens' rights

I believe in the right of every living human being, without distinction of colour, race, sex or professed belief or opinion, to liberty, life and subsistence, to complete protection from ill-treatment, equality of opportunity in the pursuit of happiness and an equal voice in the collective government of mankind. (Wells 1940: 101)

It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man. ... Equality, in contrast to all that is involved in mere existence, is not given us, but is the result of human organisation insofar as it is guided by the principles of justice. We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights. (Arendt 1968: 300–301)

This chapter is the final theoretical chapter. It is dedicated to cashing out three coherent approaches to the question of non-citizens' legal standing, based on the cosmopolitan and the communitarian rationales. To retain expositional clarity, both rationales will be applied separately to all rights. These two approaches are here called the strong cosmopolitan and communitarian approaches. It can also be said, in general, that the scope for combining the rationales is limited; the possibility of withholding rights on the communitarian rationale, without giving rise to inconsistencies, is severely circumscribed as soon as rights are provided on the cosmopolitan rationale, and vice versa.

It is, however, possible to combine the two rationales into a consistent approach, even if the two rationales are incompatible in that individual self-determination and collective self-determination cannot *reign supreme* simultaneously. The third approach, which is here entitled the weak cosmopolitan approach⁴⁴ is based on the fact that it is not inconsistent to

⁴⁴ It could always be debated why the third coherent approach outlined in the thesis should be called weak cosmopolitanism, rather than weak communitarianism or something else. There are two reasons why the term weak cosmopolitanism is used in this thesis. First, according to the weak cosmopolitan approach, the cosmopolitan rationale enjoys lexical priority over the communitarian rationale. This means that the cosmopolitan rationale constitutes an umbrella under which limited communitarian rights can be accommodated. In this sense the cosmopolitan rationale controls the communitarian rationale and therefore it is more natural to

deploy the two rationales on different levels;⁴⁵ indeed, many cosmopolitans hold that only rights that concern individuals' most fundamental needs are to be based on the cosmopolitan rationale, for example. Cosmopolitanism can hence be seen both as a substitute for as well as a complement to communitarianism (Heater 1990: 8; Caney 2005: 28, 65). That is, it is not inconsistent to hold that rights that are basic or fundamental to an individual's ability to live an autonomous life are to be based on equal concern for *all* individuals, whereas rights that are not basic or fundamental to an individual's ability to live an autonomous life is to be based on communal membership (Miller 1998: 166–167).

This means that the strong cosmopolitan and communitarian approaches simply are based on that the cosmopolitan and the communitarian rationales respectively are applied on all levels and with regard to all rights; by contrast, the weak cosmopolitan approach is based on the idea that rights that are basic in terms of exercising autonomy are universal and should be based on the cosmopolitan rationale, but rights that are not basic to the exercise of individual autonomy should be based on the communitarian rationale. A distinction between basic and non-basic rights is clearly central to the nature of, and a prerequisite for the possibility of, the weak cosmopolitan approach. Miller coined the phrase weak cosmopolitanism, and he has succinctly described how the weak cosmopolitan perspective, while clearly a cosmopolitan perspective in the wider sense, differs from strong cosmopolitanism, using the key distinction between basic and non-basic rights.⁴⁶

According to the strong version, the cosmopolitan perspective just *is* the moral point of view. All moral principles must be justified by showing that they give equal weight to the claims of everyone, which means that they must either be directly universal in their scope, or if they apply only to a select group of people they must be secondary principles whose ultimate foundation is universal. The weak version, by contrast, holds only that morality is cosmopolitan in part: there are

call the perspective weak cosmopolitanism rather than weak communitarianism or something else. Second, the choice of name simply reflects that this perspective already is labelled weak cosmopolitanism by Miller, who has done most to develop this approach, albeit he seems not to be committed to it (Miller 1998).

⁴⁵ The attentive reader will note that no weak communitarian perspective is presented. This is not a consequence of the fact that no such approach exists or that it cannot be constructed. Indeed when the thesis' theoretical framework was originally developed, a weak communitarian perspective was included. This perspective was based on Walzer's and Miller's notion that specific communitarian rights can be combined with universal rights based on biological needs (Walzer 1983; Miller 1995). The reason for not including this weak communitarian perspective in the final thesis is simply that the jurisprudential debates in the empirical case studies are not influenced by this perspective. This means that the weak communitarian account is superfluous as far as this thesis is concerned, given that the thesis is based on an internal coherence analysis and does not aim at identifying all available positions or the best normative position.

⁴⁶ The fact that Miller coined the term and described the nature of weak cosmopolitanism does not mean that he is committed to this position. Whether or not Miller is committed to the weak cosmopolitan perspective is at any rate irrelevant to this thesis.

some valid principles of equal consideration with universal scope, even though there may also be independent, nonderivative, principles with more restricted scope. According to weak cosmopolitanism then, we may owe certain kinds of treatment to all other human beings regardless of any relationship in which we stand to them, while there are other kinds of treatment that we owe only to those to whom we are related in certain ways, with neither sort of obligation being derivative of the other. (Miller 1998: 166–167)

What should concern even weak cosmopolitans, however, are societies which cannot guarantee their members' fundamental rights - societies which fail to protect basic freedoms of expression and association, or which cannot provide adequate food, education, or medical care. (Miller 1998: 179)

The difference between weak and strong cosmopolitanism is thus that the weaker form holds that the universal individual right to autonomy trumps particular social meanings and national sovereignty only in very specific circumstances, namely when rights that are essential to the exercise of individual autonomy are on the line. The universal right to autonomy is hence seen as a right to adequate autonomy. Galloway has aptly described this key distinction between when a right should be based on the cosmopolitan rationale or alternatively on the communitarian rationale:

It is a standard of *adequacy* which distinguishes those in need from those who are not. A person who has the opportunity to make an adequate number of significant choices about the direction of her life is to be distinguished from the person who has only a few choices available or who has many trivial options. While a person may have fewer choices available than another, I argue that we may nevertheless decline to hold that she is in need, if we hold that a threshold of adequacy has been met. (Galloway 1993: 298, emphasis in original)

Held's three-fold categorisation of harm is also helpful in terms of making the distinction between basic and non-basic rights and their connection to individual autonomy more tangible. According to this categorisation, individuals can be considered to suffer *serious* harm if their lives are in danger owing to their basic needs not being met, as when people are deprived of their right to subsistence and/or security; individuals can be seen as suffering *substantial* harm if their life choices are seriously restricted so as to severely undermine their ability to exercise autonomy, as when people are deprived of their right to freely express themselves or are deprived of the basic education needed to function in their society. Finally, individuals can be said to suffer *moderate* harm if particular choices or options are not open to them. This includes access to particular lifestyles or to more than basic material resources (Held 2004: 99–100).

The weak cosmopolitan perspective would then grant universal protection from serious and substantial harm, as these levels of harm undermine the basic ability of an individual to live an autonomous life. The weak cosmopolitan approach would not, however, grant individuals the universal right to protection from moderate harm, as this level of harm still leaves people with the basic ability to live self-determining lives. Another way of thinking about weak cosmopolitanism, which is second nature to jurists, is to see individuals as simultaneously holding certain particular rights as members or citizens (*status civitatis*) and certain limited universal rights simply as persons (*status personae*) (Bader 1997b: 182).⁴⁷ In more practical terms, it can be said that the right to security, the right to subsistence and fundamental rights to personhood, i.e. universal rights that are essential to the basic exercise of autonomy, are universal rights according to the weak cosmopolitan perspective (Gibney 1999: 178; Shacknove 1988: 144; Bader 1997a: 40–41; Rawls 1999: 65).⁴⁸

The weak cosmopolitan perspective thus creates room for national sovereignty by deploying a weaker notion of individual autonomy than the strong perspective requires. This means, seen from the perspectives of communities/nations, that they, as co-operative or ethical communities, have a right to national sovereignty – but only within the boundaries set by basic universal rights (Tan 2004: 11; Miller 2000; Miller 1998, for similar normative perspectives on immigration, see Gibney 1986: 30–31, 103–104; Gibney 2004: 231–240.) What makes the weak cosmopolitan perspective distinctly cosmopolitan all the same is its insistence that national sovereignty must be restricted in order to protect all individuals' basic right to autonomy.⁴⁹

⁴⁷ It should be pointed out that there are some clear parallels between weak cosmopolitanism and Kant's *political* philosophy. Kant envisaged a cosmopolitan system where all persons as autonomous individuals would have certain rights including the right to hospitality. This included the right to sojourn in other states and not to be turned away if that would lead to the destruction (*Untergang*) of the person. This cosmopolitan right did, however, not include the right to become a member or to be treated as a full member (Linklater 2002: 276; Benhabib 2004: 49–69; Kant 1991b: 105–108). Rawls' later work can also be seen as a form of weak cosmopolitanism although Rawls' account seems to suffer from inconsistencies stemming from his reluctance to accept the primacy of liberal values whilst insisting that certain liberal rights must be provided universally (Rawls 1999: 40, 58, 112–113).

⁴⁸ It is noteworthy that Rawls sees these universal rights as an independent subset of liberal rights (Rawls 1999: 65–68). However, the right to private property and the rudimentary notion of freedom of conscience are rights that defend the individual from over intrusive social meanings, i.e. these rights pre-suppose a liberal notion of autonomy and are neither compatible with nor necessary for all systems of social co-operation; to argue, as Rawls does, that only forms of social co-operation that defend basic autonomy are universally acceptable simply begs the question. At any rate the weak cosmopolitan perspective must encompass more than rights that are a pre-conditions for any social association, i.e. security and subsistence, because an individual could have these rights and be left with no ability to exercise autonomy.

⁴⁹ The weak cosmopolitan perspective is not another kind of liberalism but shares the cosmopolitan hallmark of putting equal emphasis on equality and individual autonomy, albeit in a trimmed down version. This means that

This means that the perception of equal universal rights based on individual autonomy remains the core moral notion of the weak cosmopolitan perspective; the right to individual autonomy is indeed *reduced* in order to create room for particular social meanings and national sovereignty, but only in a limited way: the *essence* of individuals' right to autonomy cannot be encroached upon. That said, the cosmopolitan rationale is not deployed at all levels as in the strong cosmopolitan perspective, and the universal rights are hence fewer albeit they enjoy lexical priority. The details and nature of the weak cosmopolitan perspective will become more tangible as the weak cosmopolitan approach to the treatment of non-citizens is described in more detail below. It should also be remembered that the only concern here is what a weak cosmopolitan approach to non-citizens' rights looks like; what is to be considered a basic or non-basic right in general is of no interest here.

It is time to describe the three consistent approaches to the treatment of non-citizens in detail. This will be done by cashing out the strong and weak cosmopolitan approaches over the five realms of rights that were described in chapter one. This will be followed by the communitarian approach.

Cosmopolitanism and the Right of Admission

This section will commence with a detailed discussion of the admissions realm as the issue of admission brings many of the general key arguments, which also are applicable in the other realms, to the fore. It is clear that states must be impartial when dealing with non-citizens' requests for admission, i.e. the interests of citizens and non-citizens must be given equal consideration (Gibney 2004: 59). This follows from the dictum that "Freedom of movement is an important liberty in itself and a prerequisite for other freedoms." (Carens 1994: 144 for a similar position see; Dowty 1987: 11–19) The first part of this assertion, that freedom of movement is a right in itself, reconnects to the etymological roots of the ancient Greek and Latin words for freedom, *eleutheria* and *libertas*, where the word freedom refers to the opposite condition of being tied down or shackled (Cranston 1973: 31–33; Dowty 1987: 11–12). This notion of freedom was also used by Hobbes: "Liberty, that we may define it, is

the two cosmopolitan perspectives grant universal rights on the same grounds and according to the same criteria. The difference being that weak cosmopolitanism recognises fewer rights as universal since the notion of autonomy – which engenders the universal rights – is weaker. The point being that all other rights, from the weak cosmopolitan approach, are particular – i.e. founded on the communitarian rationale – and not based on any other version of liberalism. This can be compared with, for example, Galloway's account where certain rights are based on a contractarian notion (Galloway 1993).

nothing else but an absence of the lets and hindrances of motion... the more ways a man can move himself, the more liberty he hath.” (Hobbes 1949: 109–110)

It is, however, misleading from a cosmopolitan perspective to simply equate freedom with the ability to physically move around. Or rather, the right to free movement is devalued if it is turned into a simple question of individuals’ right to “... go here [sic] they want.” (Carens 1994: 144) The right to free movement is, from a cosmopolitan perspective, a basic right by virtue of being an intrinsic and essential part of the ability to autonomously shape one’s life – and this in two ways. One, free movement is an intrinsic part of exercising other freedoms that are essential for an autonomous life. The right to pursue and make autonomous choices regarding education, occupation, spouse, lifestyle and so on presuppose or potentially involve the right to free movement (Whelan 1988: 8). Two, freedom of movement also fulfils an important function in that it secures other individual rights. That is, in the absence of the right to free movement – the clearest example being incarceration – an individual has no control over her life and under these circumstances all freedoms turn into privileges (Shue 1980: 19–43, 78–82).⁵⁰

Thus the right to free movement takes its place among the universal individual liberties, mainly, as a right that in turn makes the right to live an autonomous life possible and hence secures other rights (Nett 1971: 218–219; Shue 1980: 19–43, 78–82). The above argument applies to free movement in general, but also to free movement between political jurisdictions. Security, job opportunities, education, marriage plans are all things that can prompt people to move, within as well as beyond national borders. That said, it is clear that the extent to which freedom of movement is limited will affect its impact on individuals’ ability to exercise autonomy. National borders are, however, morally arbitrary from the strong cosmopolitan perspective.

The fact that movement between borders is referred to as migration, a word that carries a somewhat negative connotation, and movement within borders mobility, a word that carries positive connotations, is a red herring, from this perspective. This means that restricting free movement over national borders violates the impartiality criterion: it is not based on equal

⁵⁰ Freedom of movement is not considered a basic right in that it is both an intrinsic part of the exercise of *all* other rights and a pre-condition for the safety of *all* rights. However, free movement is a basic right in that it is an essential part of enjoying many other rights and a pre-condition for the safety of many other rights. The important point in this context is that no autonomous life would be possible without this right.

concern of all. This follows from the observation that barring non-citizens from entry interferes with their ability to freely exercise autonomy and thus puts them in a disadvantaged position, on the morally arbitrary ground of lacking communal membership. From the cosmopolitan perspective, free movement within as well as between political jurisdictions is, therefore, a basic universal right that all individuals hold as autonomous persons. The centrality of this right also means that it enjoys lexical priority, and it can therefore only be restricted with reference to other basic rights (Whelan 1988: 8–9).

The implication of this is that individuals have a strong *prima facie* right to free movement, but states can restrict this right on grounds of conflicts with other basic liberties. It follows from the impartiality criterion that all such state decisions must be acceptable to all as autonomous individuals, i.e. no one can be expected to sacrifice her autonomy for the sake of others. At the same time, the right to free movement can be restricted if it undermines the autonomy of other individuals (Beitz 1983: 597–599; Galloway 1993). This means that states have the right to restrict immigration, but all restrictions must be based on equal concern for all individuals as autonomous beings, and not on morally arbitrary grounds such as skin colour or communal membership (Bauböck 1994).

This leaves open the possibility of restricting admissions in order to protect individuals who live in the state's jurisdiction, and to avoid any ruptures in the nation's basic social fabric in such a way that its basic economic structures, or other preconditions for individual autonomy, are undermined (Habermas 1996a: 512; Ackerman 1980: 95). This includes restrictions based on the need to *prevent* criminal activity, but does not allow restrictions on free movement as additional punishment for previous crimes. (For a discussion of the difference between preventing non-citizens' from committing new crimes and bestowing additional punishment for already committed crimes, see the discussion of the Civil Rights Realm below.)

In terms of classes of individuals that seek admission, they can be divided into four basic categories: one, refugees fleeing acute and grave dangers; two, economic immigrants seeking better economic, educational or cultural opportunities;⁵¹ three, family members seeking to be reunited with their families; and four, co-nationals who are not citizens (legal members) of the

⁵¹ This group thus includes immigrants who seek out better opportunities, of which increasing their economic opportunities is the most common aim but not the only one.

nation-state.⁵² Refugees have a right to admission as their ability to live an autonomous life, or indeed any life, *ipso facto* will be threatened if they are denied admission. This right does not hold only for political refugees, as it is not the source of the threat (provided that the refugee is not personally culpable) but the potential harm to the individual as an autonomous person that constitute the basis for the right to admission; it makes no difference if the refugee is fleeing political persecution, a natural disaster, serious diseases or famine (Pogge 1997: 15). The fact that refugees have a universal individual right to admission also means that discrimination on the grounds of membership, ethnicity or perceived connection to the nation constitutes a blatant contradiction of the impartiality criterion (Scanlan 1988: 84).

Non-citizens who want to be admitted in order to be reunited with their families also have a right to admission (Carens 1994: 157–158). The cosmopolitan argument for a right to family unity is based on the notion that the right to a private sphere is essential to persons' functioning as autonomous individuals, and recognition of that the family constitutes the core of this sphere (Beitz 1983: 598). The right to a private sphere is not a limitation of the impartiality criterion in the sense that persons can disregard other individuals' equal right to concern in matters regarding family; the right to a personal sphere instead recognises that the impartiality criterion is based on respect for equal autonomy, and that this includes the right to family life as an essential part of any autonomous life. This therefore means that all residents, not only all citizens, have a right to family reunification (Beitz 1983: 597–599).⁵³

Economic immigrants have a right to be admitted, as the ability to pursue different opportunities is an important part of living a self-determining life; since this is a right which individuals' hold equally, no distinctions can be made on grounds of skill, education or financial situation (Habermas 1993: 149). Adoption of a policy allowing only skilled or rich

⁵² In terms of priority of admission it can be said that refugees fleeing acute grave dangers have the highest level of priority, followed by people seeking to be united with their families. Economic immigrants, seeking better opportunities and co-nationals are not prioritised groups. This follows from the fact that the only rules compatible with the impartiality criterion is that priority is given to individuals who risk suffering the most serious harm as a consequence of being denied entry (Dagger 1985: 440, 447; Nagel 1991: 66–71; Held 2002b: 63). It is, moreover, noteworthy that no normative solution exists in cases where it is unavoidable that some individuals' basic right to autonomy will be encroached upon. Such cases simply constitute an unavoidable tragedy, from the cosmopolitan perspective.

⁵³ The fact that the right to entry is based on individual autonomy means that it in principle extends to close friends as well as family members. An individual's essential private sphere does not necessarily only consist of family members. The focus here will, however, be on family members, for three related reasons. One, this group is almost universally accepted as the most important in this respect. This follows from that family ties tend to be closer and of longer duration than most friendships. Two, it is much easier to discern family members than close friends. Three, one and two explain why the family figures so prominently in the legal discourses, which ultimately are the concern in this thesis (Krieken2001: 119).

people to immigrate whilst barring poor and unskilled people from entry might benefit a state, but so would a policy of expelling poor and unskilled residents; the point being that both would violate the impartiality criterion.

Co-nationals are, of course, covered by the general right to admittance. The fact that membership in a given community, cultural or ethnic group is not recognised as a basis for moral priority, however, means that this group has no special standing. Nor can non-citizens from liberal states be given priority over non-citizens from illiberal states, on the basis that the admission of non-citizens from illiberal states might undermine the political institutions that uphold individual rights. Such a policy is incompatible with the impartiality criterion, as cosmopolitanism is founded on the idea that all *individuals* have the ability to participate in a cosmopolitan political order. A system that is supposed to be able to secure universal acceptance and transcend particular ethical-cultures cannot discriminate on the grounds that certain individuals do not have experience of a particular culture (Bauböck 1994: 92–101; Habermas 1996a: 513).

The question of which of these classes of individuals the *weak cosmopolitan approach* is committed to admit can partly be inferred from the above. Refugees and family members have a right to admission, as they will suffer serious and substantial harm, respectively if not admitted, i.e. their basic ability to exercise autonomy would be undermined if they were not admitted (Perry 1995: 102–103; Gibney 1986: 125–126). Refugees' existence, not to mention their ability to live a basic autonomous life, would be undermined were they to be denied entry. It also follows from the above that the weak cosmopolitan perspective – like the strong cosmopolitan perspective, and for analogous reasons – is committed to treating all refugees equally, independently of whether they are refugees fleeing from political persecution, famine or natural disasters. Non-citizens who seek admission for the purpose of family reunification also have a universal right to entry, as their basic right to autonomy would be encroached upon if they were denied the right to live with their families.⁵⁴ It would be possible to exercise some level of autonomy while separated from one's spouse or children. But this would entail substantial harm for an individual, as a person's family constitutes an essential part of her life

⁵⁴ It is noteworthy that family members of citizens in addition to this universal right have a right to admission as they are members of the community from the weak cosmopolitan perspective (see the communitarian perspective below).

plan. Families are in addition often also a crucial part of the support that individuals need to pursue their life plans (Gibney 1986: 129–130; Carens 1994: 157–158).⁵⁵

Economic migrants do not have a right to admission from a weak cosmopolitan perspective. This follows from the fact that it is not a basic right to seek or obtain *better* economic opportunities as such: individuals can live autonomous lives as long as they have *adequate* opportunities available to them. It should be pointed out in this context, however, that a person who has no or virtually no economic opportunities open to her, and lacks the possibility of earning a livelihood, *is* deprived of her basic right to exercise autonomy (but such a person would have a right to be admitted as a refugee under the weak cosmopolitan perspective). Co-nationals are not seen as having a right to admittance on the strength of their

⁵⁵ Galloway argues that non-citizens do not have a right to entry to join persons they have become emotionally dependent on, if the dependency, at least partly, is a consequence of a choice the person willingly made. Galloway likens the choice of developing emotional attachment to a choice of pursuing a particular carrier which necessitates access to a particular state, and argues that non-citizens cannot willingly put themselves in a position of dependency and then have a right to admittance. This argument is based on that autonomy is seen as being as much about living with once choices as it is about being bailed out (Galloway: 1993: 298). This argument is not compatible with strong cosmopolitanism as it will put a heavier burden on certain individuals on the morally arbitrary ground that they have chosen to marry outside their community. Nor does it hold as a weak cosmopolitan argument in that, it cannot be deemed a non-basic right due to its voluntary nature. A person, who chooses to put herself at risk for the thrill or the hell of it, does not necessarily have a basic right to assistance. There are, however, two fatal problems with Galloway's argument. It is, first of all, doubtful if developing emotional ties can be seen as a choice in the same way as taking the risk of climbing a mountain or even the choice to pursue a particular carrier. This as the development of emotional ties involves a complex web of social and physical factors that most people feel is beyond their control. It would be strange to upbraid a person for not finding love in a way one might blame a person for not working hard enough to achieve necessary qualifications needed in the labour market or for risking her life to climb a high mountain. This is not to say that economic decisions, for example, are totally within peoples' control and that question of love lies totally beyond it. People cannot be held fully responsible for the course their professional lives take and people can certainly, to some extent, affect their emotional life, but the two spheres are qualitatively different. This means that the right to family unity hardly can be demoted from the status as a basic right on the ground that it is a choice that a person could have refrained from making. Secondly, even if people could be held morally responsible for their emotional dependencies, there is a difference, between the family spheres and most other choices. To freely choose to pursue the partner of one's choice, without consideration of membership status is an absolutely fundamental right. To freely choose a carrier, for example, is also an important part of individual freedom, but it is possible to restrict this right without encroaching on the core of a persons' autonomous life, provided that some economic opportunities are available. There is a qualitative difference between state action that interferes with a person's professional life and a person's family life. To be dismissed from one's post can simply not be compared to be separated from one's family.

Gibney also denies that all individuals have a universal right to family reunification. He, however, conditions his argument on the premise that the separation must have been voluntary in the first place, holding that admitted refugees but not guest workers must have the right to bring their families (Gibney 1986: 142).

This argument seems to run up against the limits of when a choice is free or when a free choice carries moral weight. If the conditions for a choice is unreasonable then, at least, the part of the agreement which pertains to the unreasonable condition carries no moral weight and is not morally binding. Thus admittance cannot be made dependent on that the family cannot join the immigrant since this right is a basic right in the first place, or at least any such part of the agreement will be invalid. I.e. it seems questionable to argue that refugees have a right to bring their relatives, even if the relatives are not in danger, since the right to family reunification is a basic right and at the same time hold that waving this important right is a fair condition for admission in general.

right to individual autonomy, as the desire to live with kith and kin (as opposed to family) is not connected to their ability to exercise autonomy.⁵⁶

Cosmopolitanism and Civil Rights

Civil rights are a set of fundamental rights that enable individuals to exercise autonomy by protecting them from arbitrary intervention by the state (and other individuals). Civil rights limit what a state can do to an individual and also provide individuals with procedural rights that ensure that any potentially valid state action fulfils the impartiality criterion. That is, legitimate state action must conform to rules that ensure that individuals have a general right to defend their interests, including the right to have their cases tested under fair conditions while ensuring that the state minimises any necessary infringements. Civil rights embody the notion that individuals have a universal right to self-determination, which all states must respect and protect, and the idea that this applies as much to citizens as non-citizens.

Non-citizens are, moreover, entitled to civil rights in deportation cases. This follows from that deportation is analogous to other criminal cases, in that deportation cases are brought against persons who are suspected of breaching the law, and a negative outcome for the accused results in punishment. The penal nature of deportation is plain, as to be uprooted from one's life, home, job, education and family clearly constitutes punishment. To deport, exile or banish a person as way of punishment is after all a longstanding tradition. Deportation has, moreover, historically been considered as one of the most severe forms of punishment available to the state, and was largely used as a way of handling dangerous criminals in the absence of prisons (Stimson 1953: 205–207). Madison concluded as much, well over two hundred years ago: “if a banishment of this sort [of a residing non-citizen] be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.” (Madison 1799)

The penal nature of deportation also means that states cannot simply add deportation to a sentence, or deport a non-citizen after she has served her normal sentence. To do so would mean that non-citizens were being punished more severely than citizens for a given crime, and this is a clear violation of the impartiality criterion. Criminals can, however, be deported in order to serve their sentences in the state that holds their administrative responsibility; as an

⁵⁶ Co-nationals do, however, have this right on the communitarian rationale but it should be noted that a community, largely, has the right to define who is a co-national.

alternative to that the offender serves the sentence within the jurisdiction where the crime was committed. A person can also be deported if she poses a risk to the community, but only if the harm caused to the individual by such deportation is proportional to the potential risk she poses.

In general, the more serious the crime and the less harm deportation will cause a given individual, the more appropriate as a means of safeguarding the public deportation becomes. Deportation is thus a valid instrument for preventing criminal activities in the same way that a court can impose restraining orders on relevant individuals to prevent criminal activity. What is important, from the cosmopolitan perspective, is that no one is punished twice, or more severely, based on lack of membership, and that individuals are not deported on grounds that do not relate to impeding future criminal activity on their part. This also means that deportation must be based on evidence, not mere suspicion, and conform to the due process of law, just as other penal procedures.

The fact that civil rights are basic individual rights means that the *weak cosmopolitan perspective* includes these rights among the universal rights that all individuals enjoy (King 1983: 530). Civil rights are part of the minimum rights required to live a basic autonomous life. Individuals who are denied the right to free speech and conscience, barred from owning property, or not afforded protection from arbitrary intervention in person or property, are deprived of their basic ability to exercise individual self-determination. That said, non-citizens cannot be included in all civil rights on par with citizens. Non-citizens' right to equality before the law must be restricted solely to those rights that are regarded as universal from the weak cosmopolitan perspective; to afford non-citizens full equal law protection would simply undermine the possibility of upholding any particular rights based on membership.

There could, furthermore, be exceptions to non-citizens' inclusion in civil rights if one or several specific civil rights could be deemed not to be a basic prerequisite for the exercise of individual autonomy. The right to freely choose one's profession can, for example, be restricted without undermining individuals' basic ability to exercise autonomy, if and only if *some* kind of employment or social provision is made available to all individuals (King 1983: 530). This kind of restriction is clearly not trivial, but it does not mean that it would encroach on the very essence of individuals' right to self-determination as would restrictions on individuals' right to self-expression. It is after all accepted that not every person will be able

to work in her profession of choice, due to qualities inherent in the person or restrictions imposed by the market or the state.

This is clearly sometimes perceived as a loss and causes much disappointment, but it is not perceived as a loss comparable to being denied the right to self-expression, to live with one's family, to continue to live in one's abode, or to protection against the arbitrary confiscation of individuals' property. Strong cosmopolitanism takes it for granted, of course, that all persons should have a right to compete for jobs on an equal footing. It is an entrenched right that all citizens have in liberal states. There are, however, many rights that are entrenched for citizens in liberal states, and which are universal according to the strong cosmopolitan perspective, that are not essential to the right to exercise basic autonomy.

Cosmopolitanism and Political Rights

The only procedure for collective decision-making that is compatible with due respect for individuals as self-legislative persons is one where all have an equal say over collective decisions. The impartiality criterion, furthermore, demands that all individuals must have an equal say independently of their wealth and/or communal membership (Habermas 1993: 147). This means that the right to participate in the political process cannot be withheld from non-citizens. On the contrary, the effectiveness and legitimacy of democracy is dependent on that non-citizens who are affected by the decisions are given the right to participate in the political process. To deny non-citizens access to the democratic process would create an unacceptable disjunction between the forces that affect individuals' ability to control their lives and the political structures that are meant to empower them (Held 1995: 145–158, 267–286).

Political rights fall squarely within the prerogative of members from the *weak cosmopolitan perspective*, as the lack of political rights does not deprive individuals of their basic ability to exercise autonomy. This argument can appear controversial. This is not because the exercise of political rights is usually seen as an essential part of an autonomous life – it is perfectly possible to live an autonomous life without voting or standing for election. Political rights are, however, sometimes held to be essential for the securing of other rights. Shue has, for example, argued, in an influential book, that the right to participate in the political process is a basic right, as all other rights are only securely held, i.e. are enjoyed as rights and not mere privileges, if they are backed up by democratic institutions (Shue 1980: 74–78).

The first thing to notice about this argument is that Shue readily admits that his argument does not hold in theory. There is no theoretical connection between political rights and the right to security, for example. Shue, however, argues that only political participation will guarantee other basic rights in practice (Shue 1980: 86–87). This argument indeed enjoys some general empirical support (Caney 2005: 83). Shue’s general argument cannot, however, be simply translated or transferred to the question of non-citizens’ political rights. That is, denial of non-citizens’ political rights does not mean that a state has thereby become a dictatorship. Hence the issue is not one of whether basic rights are secure in dictatorships but whether non-citizens’ basic rights are secure in democracies where they do not have a right to vote.

It is very possible that Shue would hold that his general argument does not apply in this particular case. Indeed, if his argument is based on the idea that it is the existence of democratic institutions as such, and not a groups’ ability to block attacks on their rights that guarantee basic rights, then his argument would no longer be valid in this case. There are, moreover, good empirical reasons for not deploying Shue’s general argument in this case. That is, most democratic states in practice do deny non-citizens political rights, but uphold other basic rights for non-citizens. This has much to do with the fact that most democracies are *Rechtsstaaten* (states ruled by law). That is, they have political institutions that guarantee basic rights for all, often by putting them beyond even the power of the majority of the people.

This points to a general weakness in Shue’s argument: he neglects the wider context that secures rights and focuses on the right to partake in elections, ignoring the important role that a state’s political institutions, legal system and political culture play in underpinning individual universal rights. All absolute power corrupts absolutely, and democratic power is no exception. At any rate, there are no theoretical or empirical grounds for holding that denying non-citizens political rights means that their basic rights will be encroached upon as a consequence. Thus, there are no grounds for bestowing non-citizens with political rights from a weak cosmopolitan perspective.

Cosmopolitanism and Social Rights

Free movement in conjunction with access to social rights can arguably strain welfare regimes, but the cosmopolitan perspective offers no general possibility for closing state borders or national welfare systems to non-citizens. Restricting access to social rights for non-

citizens can seem laudable *from the inside*, but it is clearly a breach of the impartiality criterion (Carens 1992: 41–42; Gibney 1999: 171–172). To exclude non-citizens from social rights is tantamount to establishing a feudal order. That is, an order where citizens hold a birthright to privileged treatment (Carens 1992: 41–42).⁵⁷

This issue is more complex from a *weak cosmopolitan perspective*. All individuals have a paramount interest in receiving basic education, basic social provisions and emergency medical treatment. A person who is deprived of these rights is deprived of her basic ability to live an autonomous life. This means that basic social rights must be afforded to non-citizens from a weak cosmopolitan perspective. Equal access to a free university education, elaborate social provisions and full medical coverage may be desirable for all individuals, but these rights are not essential to ensure the ability to exercise basic autonomy. Non-basic social rights should hence be based on the communitarian rationale according to the weak cosmopolitan perspective. To regulate social rights in a discretionary manner is moreover an important right for a sovereign nation. This is not least true given that modern state legitimacy is derived as much from protecting citizens socially and economically as it is derived from providing physical protection; to this we can add the communitarian argument explicated in the previous chapter that partial treatment of citizens and a sense of reciprocity are essential to maintaining a particular community (Bader 1997a: 46–47; Shacknove 1988: 144; Perry 1995: 105; Gibney 1999).

Cosmopolitanism and the Right to Naturalisation

From the strong cosmopolitan perspective, there can be no general restrictions on the right to naturalise, since abiding in a state simply equals membership of that state (Carens 1989: 46).⁵⁸

The right to naturalisation is thus analogous to the way in which federal citizenship carries with it a right to acquire local citizenship within a federation. Thus naturalisation only has the administrative function of recognising that a person can exercise her right to local

⁵⁷ That said, states have, the above notwithstanding, the right to restrict immigration if it threatens to undermine the basic social and economic structures of a state. A state can also put in place certain limited residence requirements since social rights in general are provided where an individual abodes. (See the Naturalisation Realm for a further discussion.) Finally, it is compatible with the impartiality criterion to make social rights dependent on the willingness to contribute to the system, if and only if everyone is provided with a the opportunity to contribute to the system. This follows from that individuals have a right not to be arbitrarily excluded and to be given the same concern but not the right to free ride on others.

⁵⁸ This also means that double membership is not an obstacle to naturalisation from a cosmopolitan perspective. A person who has a strong connection to two places ought to enjoy membership in both places. This reflects the cosmopolitan idea that citizenship ought to be neither exclusive nor unitary. This is also why cosmopolitans argue that local membership must be complemented with regional and a universal citizenship (Held 1995).

membership; i.e. it is recognition of the fact that the individual resides in the state, and hence qualifies for all rights that require her being a local resident. The relevance of local membership or citizenship does not stem from the intrinsic importance of such membership, but from the necessity of a functional division between jurisdictions. States divide the right to levy some taxes and the responsibility for providing certain public goods and social rights, for example.

This *prima facie* right to exercise local membership is, however, conditioned upon the willingness of an individual to become a functional member of a given society, and this includes learning the language. Thus a basic language requirement for naturalisation is compatible with the impartiality criterion. This follows from that acquiring a basic command of one of the dominant languages in a state is necessary in order to be a functioning member of a given state, and the requirement to be a functioning member is not an arbitrary condition as it affects all individuals' ability to exercise autonomy. An immigrant cannot be expected to possess this knowledge when admitted, but it can be expected that she acquires it once a reasonable amount of time has passed; if this turns out not to be the case, it would be reasonable to withhold the right to naturalisation until this requirement is fulfilled.

It should be pointed out in this context that natural born citizens, in most states, are under an obligation to learn an official language as a key component of their compulsory education. This said, citizens are not excluded from membership if they fail to do so. A straight comparison between citizens and non-citizens cannot, however, be made in this context. To fail to learn to communicate in the language of instruction in one's native land is not seen as a choice, but a failure that is caused by social and/or cognitive problems, for which the individual is not held responsible. This might also be the case for certain groups of non-citizens who are elderly or have learning disabilities, but non-citizens who choose not to learn an official language can be denied citizenship. This follows from the fact that they have chosen not to become functioning members of the community, and willingness to be a functional member is not an arbitrary condition; to deny membership on this ground is hence compatible with the impartiality criterion.

It is often simply assumed, even by strong cosmopolitans, that a prior criminal record would disqualify an individual from naturalisation (See for example Habermas 1993: 146). Nevertheless, it would appear that the impartiality criterion only allows for this under specific

circumstances. Individuals who have committed crimes and have been punished for them generally regain their basic individual rights upon their release from the penal system. It follows from the impartiality criterion that this must hold for citizens and non-citizens alike. Thus, non-citizens cannot be deprived of their right to acquire membership in the community where they abide simply in virtue of having a criminal record – at least not if other (citizen) ex-criminals are not deprived of comparable rights permanently.⁵⁹

A state has the right to take measures to uphold liberal institutions, as these are essential to all individuals' ability to exercise autonomy. This means that it is valid, from a cosmopolitan perspective, to deny non-citizens who are hostile to basic cosmopolitan values the right to naturalise (Habermas 1993: 147). This right to denial is, however, limited in two ways. One, no individual can be denied the right to naturalise simply by virtue of their descending from an illiberal culture. Cosmopolitanism is based on the notion that people, as autonomous beings, have a right to be treated individually, and hence they cannot be denied rights solely due to membership in different collectives. The universal foundation of cosmopolitanism also means that the presupposition is that all can become functioning members of a cosmopolitan society. Two, mere indifference or scepticism towards basic liberal values cannot disqualify a person from the right to naturalisation, as citizens only are barred from engaging in behaviour that constitutes *direct* hostility towards liberal values.⁶⁰

The right to naturalisation is not a universal right according to the *weak cosmopolitan perspective*. This follows from the fact that the right to naturalise is not a pre-condition for

⁵⁹ Citizens are perpetually punished for their crimes in certain states, by a permanent loss of their right to vote for example, and the treatment of ex-felons can always be discussed but non-citizens cannot be singled out for additional punishment simply by virtue of lacking membership in a particular nation (See Chapter four Section III for a more detailed discussion).

⁶⁰ Cole argues that even this restriction is incompatible with the impartiality criterion since natural born citizens are allowed to be as illiberal as they wish (Cole 2000: 144–145). Cole's argument is at least partly based on erroneous empirical facts, as the two national case studies in this thesis demonstrate. The German Basic Law specifically curbs the freedoms of people who are hostile to the essential values in the Basic Law. Liberal freedoms cannot be used to overturn the system and article 9 and 21 outlaw parties and associations that want to impair the constitutional freedom and democracy. The freedom of academic teaching is also limited to people who do not try to subvert the constitutional order, article 5, and individuals who combat the free political order forfeit their right to freedom of speech, article 18. Germany is thus expressively a combative democracy where neither non-citizens nor citizens have a right to be as illiberal as they see fit. The U.S. Constitution contains no similar articles but the Supreme Court has upheld several laws that limit freedoms for individuals who seek to undermine a free society. This includes examples like the laws that banned syndicalism and communism, laws which both were held constitutional by the Supreme Court (Currie 1994: 214–215; see article 40 of the Irish Constitution for another example and see the German case study for a more detailed argument). That is, there is no reason in theory for liberal societies to slip into the relativist trap, nor do liberal societies in practice do so. The fact that there are relative few laws restricting actions against the liberal order in liberal nation-states is arguably due to a lack of need for these laws and not due to a lack of authority should such need arise.

being able to exercise autonomy on a basic level, and this in turn means that, from a weak cosmopolitan perspective, states have the right to allocate citizenship on a discretionary basis.

Undocumented Residents

As described earlier, states retain the right to deny entry and to deport non-citizens according to the cosmopolitan perspective, albeit the grounds for doing so are restricted. This does not, however, mean that undocumented residents lack rights in general. Individuals who have broken the law retain certain rights, the most important of these being the right to procedural due process. An essential feature of due process is that crimes must have a statute of limitations (see the U.S. case study for a more detailed discussion of the concept of due process of law). There are several reasons for applying statutes of limitations but the key normative argument is based on the notion that individuals would not have a reasonable chance to pursue and plan their lives if they could indefinitely be prosecuted for past wrongs (Rubio-Marín 2000: 88–89).

That said, particularly heinous crimes do not have a statute of limitations in certain liberal nation-states. There is, fortunately enough, no need to discuss the issue of whether all crimes ought to have a statute of limitations here, as violations of the immigration law in any case cannot be said to be on par with the crimes that are considered beyond pardon in certain liberal nation-states, such as murder and genocide. That is, any violation of other persons' rights and any damage caused to the community as an effect of violating immigration laws are nowhere near serious enough to warrant their inclusion among the exceptions to the general rule of that crimes have statutes of limitations. This means that there are time constraints on states' rights to deport undocumented residents, so that undocumented immigrants must, after the statute of limitations has expired, be treated as legal residents. Undocumented immigrants are, furthermore, entitled to basic social rights and other civil rights, as these rights hardly can be withheld from any person, and as they, at any rate, are not denied to other transgressors of the law. It is also noteworthy that undocumented residents who are minors cannot be held criminally responsible for breaking the immigration laws, just as minors cannot be held criminally responsible in other cases.

Undocumented residents also hold the rights listed above from the *weak cosmopolitan perspective*. These include the right to due process of law, the right to be treated equally compared with other offenders and the right to a statute of limitations on transgressions of

immigration law. This follows from the fact that a denial of these rights undermines a person's basic ability to exercise autonomy. Denial of a fair trial and to indefinitely live with the threat of deportation undermine a person's basic ability to exercise autonomy, as any person living under these conditions can have her life plan destroyed by deportation or incarceration at any time. Undocumented residents also have basic social rights and other civil rights, as these are basic rights that all individuals are entitled to as autonomous persons.

In sum, the strong cosmopolitan perspective assumes that non-citizens and citizens alike should have an equal right to concern, in all spheres. This means that citizens and non-citizens have the same rights. The question of non-citizens' rights becomes slightly more complex from the weak cosmopolitan perspective. In terms of admission, only refugees and family members have an individual right to be admitted from this perspective. The weak cosmopolitan perspective furthermore affords non-citizens basic social rights and civil rights – save for the full right to equality before the law and the right to freely choose their profession. Non-citizens are, however, denied political rights, more elaborate social rights and the right to naturalisation from the weak cosmopolitan perspective. This is because these rights are not essential to the ability of exercising basic autonomy.

It is worthy of note that a symmetric relationship between the right to individual autonomy and national sovereignty emerges from the weak cosmopolitan perspective. This is a consequence of the fact that rights which are fundamental to the basic exercise of autonomy – such as civil rights, the right to refugee protection, family reunification and basic social rights – do not stand at the centre of nation-states' right to self-determination. Correspondingly, rights that stand at the centre of nation-states' right to national self-determination, such as political rights, the right to control the labour market, the right to control the bulk of social spending and the right to membership (naturalisation) are not crucial for the basic ability to exercise individual autonomy.

Communitarianism and the Right to Admission

The analysis below will, as was the case with the above analysis of the two cosmopolitan perspectives, commence with a more detailed examination of the right to admission, for analogous reasons.⁶¹ It is plain that nation-states, on the communitarian perspective, have a

⁶¹ Special attention will be given to Walzer's account in *Spheres of Justice* as this is the most elaborate and sophisticated communitarian account of this particular issue. To what extent Walzer has shifted his position is of

general right to regulate immigration in accordance with their particular social meanings, as Hegel tersely put it: “Permission to enter a state or leave it must be given by the state; this then is not a matter which depends on an individual’s arbitrary will...” (Hegel 1967: § 75 Additions)⁶²

This is a right that nation-states hold on two grounds. First of all, non-citizens have no independent or universal moral platform from which they could demand admission. This is a simple consequence of the fact that the communitarian rationale is based on the notion that no universal vantage point of justice exists. Thus, all moral claims for admission must be based on the particular nation-state’s internal social understanding of justice. That is, all claims for admission must be made from the inside, as it were.

Secondly, the right to control admission is crucial for nation-states’ ability to maintain themselves as particular political communities. A nation-state perceived as a particular community, upholding the values and the special relationship between its members, cannot survive without the right to control admission: open borders clearly would mean a loss of control over the body politic. The right to entry does not therefore, from a communitarian perspective, hinge on the need or desire of the individual who wishes to enter, but rather depends on that person’s relation to the nation-state that she wishes to be admitted to.

This works much like the decision of a club to accept a person as a member: it is entirely a matter of the *club’s* desire to accept or not accept the applicant. A club has no obligation to non-members, and indeed loses its character as a distinct community if it allows persons to join on terms it does not recognise as its own (Walzer 1983: 31–63; Gibney 2004: 28, 31–32).

In Walzer’s words:

But the right to choose an admissions policy is more basic than any of these [state rights], for it is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so

no concern here as his account in the Spheres of Justice simply is used to draw out a coherent communitarian perspective on non-citizens’ right to admission.

⁶² It should be noted that this thesis does not deal with the right to exit a state as this right very seldom has been denied non-citizens. It is also noteworthy that citizens’ as well as non-citizens’ right to leave a state is a well established part of international law that the U.S. and Germany respect and apply. Article 13 of the Universal Declaration of Human Rights stipulates that: “Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country. It is of note that the Declaration contains no equivalent right to immigrate.

on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be any *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life. (Walzer 1983: 61–62, emphasis in original)

Nation-states do, however, have obligations, in terms of admission, towards members. A nation-state is the representative of a nation, and as such it has an obligation to protect the nation's particular social meanings as well as its members. This means that members always have a right to admission, for nation-states' sovereignty is based on their claim to safeguard a particular way of life for a particular people. That is, the perception of the state as an ethical community intrinsically intertwines the notion of communal membership with the right of admittance (Tamir 1993: 127–137).⁶³ Once again, in Walzer's words:

Greeks driven from Turkey, Turks from Greece, after the wars and revolutions of the early twentieth century, had to be taken in by the states that bore their collective names. What else are such states for? They don't only preside over a piece of territory and a random collection of inhabitants; they are also the political expression of a common life and (most often) of a national "family" that is never entirely enclosed within their legal boundaries. (Walzer 1983: 42)

It should be noted that the social understanding of who is a member is part of a particular nation's shared understandings; nations hence retain basic control of admissions, but the fact that it is not legal membership but communal/national membership that bestows rights from the communitarian perspective does create an obligation to admit members who are not citizens. Nations cannot thus, first of all, deny admission to recognised members. More importantly perhaps, nations cannot deny members' families admission. This follows because communities are stable historical associations where membership is passed from one generation to the next, not *ad hoc* associations; hence members' families are *ipso facto* members. Parents stand at the very centre of the constitutive social process discussed in the previous chapter; the family hence constitutes the foundation or the core of the nation, and is in this sense prior to the nation.

A nation is hence like a family in two senses. One, members have moral obligations to people they have not chosen or explicitly consented to be associated with. (This is also partly why nationality is constitutive.) Two, national membership is inherited and passed from parents to

⁶³ This said, claims to membership must be based on shared understandings of who is a member.

their offspring (Walzer 1983: 41, 62; Meilaender 2001: 157, 179–183; Gibney 2004: 26; Miller 1995: 23–24).⁶⁴ The fact that it is membership in the community, and not the universal right to an autonomous sphere, that engenders the right to admission for family members means that only members have a right to have their families admitted. That is, this right does not extend to non-members who are long-term residents.

The fact that the nation only has obligations towards members means that refugees who are non-members have no right to admission. A nation is simply free to admit refugees or not, as it sees fit. In Walzer's words:

Once again, communities must have boundaries; and however these are determined with regard to territory and resources, they depend with regard to population on a sense of relatedness and mutuality. Refugees must appeal to that sense. One wishes them success; but in particular cases, with reference to a particular state, they may well have no right to be successful. (Walzer 1983: 50)

Walzer argues that a nation's right to deny refugees admission does not include the right to deport asylum seekers who have been able to reach the shores of a safe nation-state (Walzer 1983: 51). Walzer offers one instrumental argument for this exception: the number of refugees that are able to file for asylum inside a given state is smaller than the total number of refugees, which makes the problem more manageable (Walzer 1983: 50–51).

This argument carries little weight on its own. After all, this holds true for any (arbitrary) divisions of a given population. The key question is that of whether the distinction between refugees on the inside and refugees on the outside is a morally relevant distinction. Walzer tries to argue for such a difference by appealing to the distinction between direct harm and passive harm, and argues that to expel asylum seekers who have entered a given state would involve actively harming helpless individuals whereas denying them entry would not (Walzer 1983: 50–51).

This argument hardly holds water. First of all, the premise that other refugees are not actively harmed clearly only holds if the refugees make no unsuccessful attempt to cross the border. To shoot unarmed refugees as they try to pass a state's border clearly involves as much direct

⁶⁴ The exact scope of who is a family member must be decided by the specific social understandings of what constitutes a family in a given nation-state.

harm to innocent people as deporting refugees who face certain death in the receiving country. Second, this distinction between passive and active harm (a version of the act-omission distinction) cannot carry the weight of this argument, for two reasons. One, the act-omission distinction suffers from the inherent weaknesses of basing a key normative claim on a normatively void distinction; to omit to act, when one has the ability to act, is as much a moral choice as to choose to act (Singer 1988: 119–120). Two, and most importantly here, there is no need, and indeed no ground, from a communitarian perspective, to differentiate between non-members who are physically inside the community and non-members who are outside the community.

A community's right to decide over non-citizens' survival must depend on social/cultural – not physical – location, from a communitarian perspective. That is, mere physical presence cannot engender universal rights that people on the other side of the fence lack (Miller 1995: 139). Indeed, Walzer himself seems to hesitate:

Why mark off the lucky or the aggressive, who have somehow managed to make their way across our borders, from all others? Once again, I don't have an adequate answer to these questions. (Walzer 1983: 51)

Walzer's argument hence appears to be inconsistent, and he offers no clear argument for why certain refugees enjoy universal protection (Gibney 2004: 34). The reason for belabouring this point is that it has an important general implication in that it demonstrates that Walzer's (and other communitarian thinkers') attempt to *ad hoc* insert universal cosmopolitan constraints on particular communities are incompatible with the communitarian perspective; and this also has implications for the political rights and naturalisation realms. Nation-states have a right to exercise national sovereignty according to their particular social meanings from a communitarian perspective; this means that no universal obligations based on non-members' perceived needs exist. That is, non-citizens have no right to admission, or anything else, regardless of the severity of their predicament.

This follows because from the communitarian perspective, moral obligations are not perceived of as universal and individual, but particular and inter-communal. The important point here is that from the communitarian perspective, communities can only be criticised from the inside. Any attempt to argue that non-citizens have a universal right to equality or to be afforded certain rights collapses under pressure from the communitarian rationale's

epistemological starting point.⁶⁵ The fact that members of many communities feel that non-members should not have the same rights as members, or that communities must be partial to their members, simply settles the issue from a communitarian perspective (Doppelt 1978: 15; Carens 2000: 24–28, 33, 37).

Communitarianism and Civil Rights

Civil rights embody particular social meanings based on individuals' equal right to self-determination. That is, civil rights are not universal rights, from a communitarian perspective, but are a particular set of rights that members hold on the strength of having, as Arendt puts it 'become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights' (Arendt 1968: 301). This means that civil rights, where applicable, are based on membership, and do not extend to non-citizens as a universal right would. Thus, if non-citizens are granted civil rights on a communitarian rationale, these rights must ultimately be based on the non-citizens' connection to the community and not on their universal right to exercise autonomy. That is, civil rights depend on membership *even* if they are linked to the ability to exercise autonomy, and are hence inter-communal rights.

Communitarianism and Political Rights

Political rights lie at the heart of national sovereignty, as they are essential to communal self-determination and protection of communities' particular social meanings. Thus members of political communities "...avoid if they possibly can, sharing it [political power] with anyone else." (Walzer 1983: 31) The fact that the political process is a communal affair means that it is up to a given community to decide on its political system. Communities need hence not be democracies, but if they are, they are democracies in the literal sense of the word. That is, democracy from a communitarian perspective is about the connection between members and

⁶⁵ It should be noted, in Walzer's defence that he, at one point, partly tries to ground the universal right to equal citizenship in the use of territory (Walzer 1983: 42–48, 61–63). Nations need territories but have not created them and thus have no right to mistreat non-members that rightfully abode in the land. This argument explains why a community holds no sway over non-members already present in their territories. Such people must be given the option to join, according to the social norms of the new nation-state or to form another nation-state. This since they are not bound by another nation's social meanings and no nation has an intrinsic right to a certain territory.

However, this qualification of national self-determination cannot apply to admitted non-members. This would be an unwarranted infringement on communal self-determination and mean that only certain democratic regimes have full sovereignty over their territories, i.e. can admit foreigners according to their own social meanings. It cannot be the case that the existence of foreigners generates a commitment to a specific liberal form of democracy. Indeed from a communitarian perspective foreigners do not have the right to democratic citizenship and their existence does not imply the moral need for democracy. Walzer's solution to the moral dilemma caused by transnational mobility is in this respect cosmopolitan, in that it seems to try to solve this problem by adopting a universally acceptable system.

the community and the purpose of the democratic process is thus to jointly express a collective will. It is not about individuals' rights to partake in the political process as self-determining individuals.

This also means, as a consequence, that non-members have no right to participate in the process. Indeed, the process loses its legitimacy if non-members participate, as the process then no longer represents the (pure) collective expression of a particular nation. This means, from an individual perspective, that it is a person's right as a member to jointly exercise collective self-determination which gives her the right to participate in the democratic process, not her ability for self-determination (Rubio-Marín 2000: 202). Democracy is about collective, and not individual, self-determination from the communitarian perspective and democracy therefore cannot be separated from the notion of nation (*demos*).

It is noteworthy that Walzer argues that national self-determination entails a right for all residents to participate in the political process:

For these rights [to national self-determination] are to be exercised only by the community as a whole (even if, in practice, some national majority dominates the decision making) and only with regard to foreigners, not by some members with regard to others. No community can be half-metic, half-citizen and claim that its admissions policies are acts of self-determination or that its politics is democratic. ... [this] is not communal freedom but oppression. (Walzer 1983: 62)

This claim that all residents or citizens must have an equal standing – a notion that smacks of universal liberalism – seems to be a grave and fundamental infringement on national self-determination (Carens 2000: 33; Gibney 1986: 10–11). Walzer is perhaps partly basing this argument on the ground that members of a community need to feel a sense of mutual obligation and special connection. While this argument makes sense *prima facie* it does not stand up to scrutiny. The fact that communities have a right to be ruled by their particular social understandings means that democracy cannot be imposed as a universal rule even for members and even less for non-members. Any such *universal* claim of equality is incompatible with the communitarian rationale. What would such a universal right to equality be based on from a communitarian perspective? Indeed the claim that nation-states have a right to absolute sovereignty but that they must grant all an equal say conflates two different and incompatible notions of communal self-determination (Meilaender 2001: 155–171).

The communitarian notion of self-determination refers to communities' right to be governed according to their own beliefs, *whatever* those beliefs happen to be. This is the notion Walzer embraces when he claims that:

All distributions are just or unjust relative to the social meanings of the goods at stake. (Walzer 1983: 9 emphasis added)

One characteristic above all is central to my argument. We are (all of us) culture-producing creatures; we make and inhabit meaningful worlds. Since there is no way to rank and order these worlds with regard to their understanding of social goods, we do justice to actual men and women by respecting their particular creations. ... Justice is rooted in the distinct understandings of places, honors, jobs, things of all sorts that constitute a shared way of life. To override those understandings is (*always*) to act unjustly. (Walzer 1983: 314 emphasis added)

The second notion of self-determination is sometimes called internal self-determination, and refers to a universal democratic perception of self-determination, where political power is exercised jointly through equal citizenship (Meilaender 2001: 164). This is the notion of self-determination Walzer deploys when he writes, 'no community can be half-metic, half-citizen and claim that its admissions policies are acts of self-determination or that its politics is democratic, this is not communal freedom but oppression'(Walzer 1983: 62). This notion of self-determination is clearly not based on the idea that a particular understanding of honours is the basis for the legitimate exercise of communal sovereignty. It is therefore incompatible with the communitarian rationale.

Communitarianism and Social Rights

Social rights must be understood in their specific cultural context and social distributions are just according to their specific inter-communal meanings (Walzer 1983: 6–9):

Bread is the staff of life, the body of Christ the symbol of the Sabbath, the means of hospitality, and so on. Conceivable, there is a limited sense in which the first of these is primary, so that if there are twenty people in the world and just enough to feed the twenty, the primacy of bread-as-staff-of-life would yield a sufficient distributive principle. But that is the only circumstance in which it would do so; and even there we can't be sure. If the religious uses of bread were to conflict with its nutritional uses – if the gods demanded that bread be baked and burned rather than eaten - it is by no means clear which use would be primary. How, then, is bread to be incorporated

into the universal list? The question is even harder to answer, the conventional answers less plausible, as we pass from necessities to opportunities, powers, reputations, and so on. These can be incorporated only if they are abstracted from every particular meaning – hence, for all practical purposes, rendered meaningless. (Walzer 1983: 8)

This means that non-members have no universal individual right to social provisions; as all such rights must be sanctioned by specific social meanings. The fact that universal (or rather, general) social provisions cover all citizens does not mean that non-citizens are equally entitled. Social rights are, in general, part of the inter-communal cooperative scheme of justice that gives a distinct and tangible meaning to membership. This perspective is best captured by Miller’s rhetorical question: “Why should an immigrant Turk in Holland be provided with benefits that are not provided for Turks in Turkey?” (Miller 1995: 139) Social rights are not a question of universal need but of local meanings and the sense of mutual obligation that holds between members of a particular community, and on the communitarian view it is not physical but cultural location that determines what a person is entitled to in this sphere.

Communitarianism and the Right to Naturalise

The right to control admission and to restrict civil, political and social rights to members is important from the communitarian perspective. These rights have a direct bearing on a nation-state’s ability to maintain itself as a particular community, and on its ability to exercise national self-determination. As important as it is to control these things, the right to control naturalisation is even more fundamental. From the communitarian perspective, the right to control naturalisation is *primus inter pares*, as naturalisation equals membership, and with membership comes the right to hold rights.⁶⁶

This means that non-members do not have a right to naturalisation, including those non-citizens who are born in the country and/or are long-term residents. Living in the country might, or might not, be considered to be a sufficient or a key aspect of obtaining membership in a given nation, depending on the particular social meaning of membership in that nation. As Aristotle aptly described the communitarian position in this regard:

⁶⁶ It is noteworthy that Walzer holds that foreign residents cannot be denied citizenship indefinitely. This universal right to naturalisation is incompatible with the communitarian rationale, just as Walzer’s claims that there is a universal right to asylum and political rights (Walzer 1983: 61; Benhabib: 2004: 119). The inconsistent combination of universal and particular rights plagues much of Walzer’s work and can be detected in his earlier work as well (Caney 2005: 196—199).

Who is a citizen? And, whom should we call one? Here too there is no unanimity, no agreement as to what constitutes a citizen; it often happens that one who is a citizen in a democracy is not a citizen in an oligarchy. ... Nor does mere residence in a place confer citizenship: resident foreigners and slaves are not citizens, but do share domicile in the country. ... A citizen, therefore, will necessarily vary according to the constitution in each case. (Aristotle 1992: Book III 1274b32–1275a34)

The right to naturalise hence depends on a nation's specific collective notion of when someone becomes a member. The fact that people born on American soil become citizens in the U.S. has no relevance in terms of who should become a citizen in other nations, and it does not mean that Japan, Israel or Germany have to abandon their perception of what renders a person a member in their nations.

Members' families must, however, have the right to naturalise. This can, at face value, appear counterintuitive. Why must children of members be considered communal members when this is not the case for non-citizens born in the community; why should *jus sanguinis* be a universal principle when *jus soli* is not? The imperative for all communities to include an element of *jus sanguinis* follows from the nature of communities as stable constitutive associations that exist over time. Nations would simply not be communities in the essential sense required by communitarianism if membership were not inherited, or if nations recreated themselves as a new community every few years.⁶⁷ Some form of the *jus sanguinis* principle must hence be part of a communitarian nation's naturalisation law, as long as 'nations are the political expression of a common life that never is entirely enclosed within their legal boundaries' (Walzer 1983: 42). This, of course, also means that communal members (in the relevant sense) who are not citizens have a right to naturalise.

Undocumented Residents

Undocumented residents like other non-members, lack rights from a communitarian perspective. There are no universal rules for the procedures for detecting and punishing undocumented residents, and nation-states enjoy absolute discretion in this area, as part of their right to national self-determination. That is, there can be no universal restrictions on the nature of the treatment of undocumented residents from the communitarian perspective.

⁶⁷ If only one sex or both can confer membership can of course vary from community to community, the important point here is that membership must pass from one generation to the next in order to create stable historical associations that are constitutive in the communitarian sense.

In sum, the communitarian rationale is based on the notion that communities constitute particular inter-communal moral spheres. This means that non-citizens can claim no universal rights. All rights that non-citizens hold are based on the fact that non-citizens are seen as full or partial members, and all attempts to smuggle in universal cosmopolitan rights via the backdoor, as it were, fail as described above. A nation-state does, however, have obligations towards non-citizens who are members of the nation. This follows because nation-states derive their right to collective self-determination from the fact that they represent particular nations. It is hence nations that have the right to sovereignty, not states. This means that non-citizens who are communal members have the same right as citizens. A nation-state thus has responsibilities as well as rights, but the responsibilities pertain to its members.

This concludes the theoretical part of the thesis. The next two chapters constitute the case studies. These chapters are devoted to deduce the normative rationales behind non-citizens' actual legal standing in the U.S. and Germany and to analyse the internal normative consistency of these two countries' treatment of non-citizens.

Chapter Four

The Case of the U.S.

A traveller in Europe becomes a stranger as soon as he quits his own kingdom; but it is otherwise here. We know, properly speaking, no strangers; this is every person's country; the variety of our soils, situations, climates, governments, and produce, hath something which must please everybody. (Crèvecoeur 1976: 29)

[...] Providence has been pleased to give this one connected country to one united people – a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence. (Madison 1999: No. 2 Jay)

Section I

The tension between the cosmopolitan and the communitarian rationales is woven into the social fabric of the U.S. The notion that rights exist *a priori*, and belong to all individuals as equally entitled, self-determining persons, has always coexisted with the notion that the U.S. is a particular nation, where the members are joined in a social compact and collectively exercise national sovereignty in their own interest:

The two ideas of popular sovereignty and human rights have shaped the normative self-understanding of constitutional states up to the present day. With the first idea we postulate that members of a democratic community are governed by themselves collectively; with the second, that they are governed by law and not by men. This is no less true for the United States than for any modern constitutional regime. (Habermas 1994: 1)

This normative tension, moreover, goes to the heart of American alienage jurisprudence, and the overriding question, in this regard, is what non-members' constitutional standing is:

Was the Constitution only a compact establishing a government to secure the individual rights of the people creating it? Or since they believed that all men, everywhere 'are endowed by their Creator with certain unalienable rights,' did the framers intend to create a government that would secure and respect the unalienable rights of all human beings, including those in their midst not party to the contract, and human beings in other societies upon whom their new government might impinge? (Henkin 1985: 31, Henkin is quoting from the Declaration of Independence)

The answer to this question will emerge below, but it is important to clarify that the normative tension between the cosmopolitan and the communitarian rationales is pervasive, and that the issue of non-citizens' legal standing constitutes a normative balancing act:

For the United States, the immigration issue is always particularly difficult because two competing values lie at the core of the American legal history and culture ... Not surprisingly; the U.S. Supreme Court's jurisprudence in the area of noncitizens' rights illustrates this dichotomy between the celebration of immigrants' personhood and the denial of equal status for noncitizens. (Romero 2001: 174–176)

The presence of this normative tension has not escaped scholars and much has been written on the topic (for a historical approach see Nafziger 1983: 835; Legomsky 1997: 100–109; Smith 2001: 2; Neuman 1991: 927–938; Neuman 1993a: 249; Schuck 1998b: 20–21; Schuck 1998a; Weissbrodt 1992: 2–3; for the existence of the tension in contemporary legal discourse see Meilaender 2001: 116–123; Schuck 1998b: 19–81; Romero 2001: 174–176; Vialet 2002: 13; Schuck 1984: 1–3; Heller 2001: 211–212; Henkin 1987: 855; Henkin 1985; for the connection between political theory and the legal discourse see Whelan 1983: 447, 449–450; Schauer 1986: 1505, 1507; Wu 2001: 62; Aleinikoff 1998; Bosniak 1994; Schuck 1984; Neuman 1994; Schuck 1998b: 24; Heller 2001; Neuman 1991; Wright 1994; Nafziger 1983; Legomsky 1997: 21; Gimpel 1999: 307–308; Chin 2001a: v; Joppke 2001b: 261). Nor has the presence of this normative tension in this area escaped the notice of the Supreme Court (henceforth in this chapter the Court): "The decisions of this Court with regard to the rights of aliens living in our society have reflected fine, and often difficult, questions of values." (Foley v. Connelie (1978): 294) It is thus clear that the normative tension between universal individual rights and national self-determination is very central to the issue of non-citizens' legal standing, and "in what follows, we shall see that these two different ideological threads – the one denying that a society owes aliens any obligation to which it does not consent, the other affirming the existence of certain obligations to aliens owed simply by reason of their

humanity – are woven throughout the fabric of immigration law.” (Schuck 1998b: 24; see also Gimpel 1999: 307–308; Joppke 2001b: 261)

The normative tension between the cosmopolitan and the communitarian rationales can, symptomatically enough, be traced to the very first federal immigration policy, the 1798 Alien and Sedition Acts, and the constitutional debate that followed it. In this debate the Jeffersonians, including Madison, stressed the universal language of the Constitution. More specifically, they argued that non-citizens were persons and thus could invoke the protection of the Constitution, and that the Acts were therefore unconstitutional. The federalists, on the other hand, argued that non-citizens were not parties to the Constitution, and that only Americans were protected by the Constitution, and the Act therefore was constitutional. Neither side in this debate won an outright victory, and it was instead moderate federalists – like Chief Justice John Marshall – who gained ground. The moderate federalists defended the Acts, while still claiming that non-citizens held certain rights under the Constitution (Neuman 1991: 927–938; Scaperlanda 1997: 1601–1604).⁶⁸

The normative essence of the debate around non-citizens’ legal standing remains the same to this day and the moderate federalists’ intermediary position resonates with the current alienage jurisprudence in the U.S. (Henkin 1987: 855; Nafziger 1983: 835; Legomsky 1997: 100–109; Smith 2001: 2). It is of note, however – the overall stability of the normative tension withstanding – that the two rationales have dominated the political and legal discourse at different times. The cosmopolitan rationale dominated the attitude towards non-citizens in the U.S. during the country’s first century:

The liberalism of America’s first century conceived of persons as autonomous, self-defining individuals possessing equal moral worth and dignity and equally entitled to society’s consideration and respect. This entitlement was in principle universally shared, a natural right deriving not from the particularities of one’s time, place or status, but from one’s irreducible humanity. ... [This] Liberal ideology was reflected in a policy of essentially open borders, one that strongly encouraged, indeed actively recruited, mass immigration to the United States. (Schuck 1998b: 20)

The cosmopolitan rationale is, furthermore, evident in some congressional acts and treaties from this time, and it has also left lasting imprints on alienage jurisprudence, as will become

⁶⁸ The Sedition and Alien Friends Acts included sunset clauses and expired in 1800 and 1801 (Neuman 1991: 927).

evident below (Burlingame Treaty art. V; Expatriation Act). That said, the cosmopolitan notion never stood unopposed, and not even the U.S.'s initial policy of open borders was as unambiguous as popular belief would have it. The fact is that many states restricted entry on health grounds and banned paupers and convicts from entry (Neuman 1993a: 249; Schuck 1998c: 213; Weissbrodt 1992: 2–3).

Moreover, the strength of the cosmopolitan notion soon faded. As the U.S. transformed itself into a nation-state that successfully competed with other nation-states in the international arena, a new conception of non-citizens' legal standing gained ground. This notion was based on the values of national sovereignty, and it emphasised the interest of the nation and its members (Schuck 1998b: 23; Legomsky 1997: 100–101; Schuck 1984: 20–23). The Court started to deploy this new ideology in unambiguous terms during the end of the 17th century, and it remains a fundamental part of U.S. law today; see the plenary power doctrine below (Nishimura Ekiu v. United States et al. (1892): 659; Fong Yue Ting v. United States et al. (1893): 711; for this historical development see Whelan 1983: 448). This means that the tension between the cosmopolitan and communitarian rationales has been present from the very beginning. Both rationales have gone through periods where they have been more or less dominant but the nature of alienage jurisprudence has always been that these two rationales co-exist and to some extent must accommodate each other (Meilaender 2001: 116–123; Schuck 1998b: 19–81; Romero 2001: 174–176; Vialet 2002: 13; Schuck 1984: 1–3; Heller 2001: 211–212; Henkin 1987: 855).

The Connection between the Normative Rationales and Law

In order to see in more detail how this tension is created, it is first necessary to look at the basic structure of the Constitution. The Constitution lays down a legal framework that is meant to ensure individual autonomy by restricting the government's power. The government's power is restricted, in general, by the fact that it only holds specified powers. That is, the Constitution limits the government's powers in a basic way, by not creating an absolute sovereign body.

This constitutional structure and its inherent limitation of the government's power led some of the founding fathers to argue that no extra protection of inalienable *a priori* rights was needed. The government simply had no right to infringe upon these rights in the first place, as the government held no powers that were not expressly granted to it in the Constitution.

However, as is well known, a Bill of Rights (the ten first amendments) defending these inalienable rights was soon added to the Constitution. The Bill of Rights was intended to make the implicit protection of individuals' right to liberty explicit, so as to ensure that the new federal government would not encroach on individuals' inalienable rights.

That the Bill of Rights is seen as protecting general *a priori* rights to individual self-determination; that it was not creating specific rights for specific individuals is made clear by the ninth amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (U.S. Constitution amend. 9) A further step to shore up the universal right for individuals to exercise autonomy on the basis of equality was taken after the Civil War, when the thirteenth and the fourteenth amendments were enacted to ensure that no states violated individuals' inalienable rights to freedom (Fleiner-Gerster 1990: 20, 30; Goodwin-Gill 1990: 151–152, 166; Aleinikoff 2003: 114–115; Aleinikoff 2002b: 179; Kay 1998: 16–22).⁶⁹

Parts of the Constitution are thus derived from, and connected to, the longstanding cosmopolitan tradition that stretches from Stoicism to natural law philosophy to modern cosmopolitanism (Henkin 1979: 409, 411; Rumble 1979; Cole 2003: 11–12). Cosmopolitanism is also present in the Declaration of Independence (Konvitz 2001: 38–40): "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." (The Declaration of Independence)⁷⁰ The protection of the universal individual right to self-determination was, and remains, a central feature of the U.S. constitutional order, and the Bill of Rights and the fourteenth amendment rest on the cosmopolitan rationale (Henkin 1979: 409, 411; Rumble 1979; Cole 2003: 11–12).

The fact that individual *a priori* rights enjoy a prominent place in the Constitution does not, however, resolve the tension between the cosmopolitan and the communitarian rationales. Firstly, the Constitution and its amendments refer both to citizens, persons and the people as holders of basic rights to freedom; the question of exactly who hold these inalienable rights

⁶⁹ The thirteenth amendment outlaws slavery and the fourteenth provides all persons with the right to equal protection under the law in all states.

⁷⁰ The Declaration of Independence does, however, contain the normative tension of interest here and the very last lines, for example, read "... we mutually pledge to each other our Lives, our Fortunes and our sacred Honor." (Declaration of Independence)

can therefore be seen as a somewhat moot point (U.S. Constitution see especially art. 1 sec. 2 cl. 2–3; art. 2 sec. 1 cl. 5; amend. 1, 4, 5, 6, 9, 14). Secondly, the federal government has been given extra-constitutional powers to regulate immigration, which puts into question the extent to which the Constitution protects non-citizens (Schauer 1986: 1508–1510; Aleinikoff 1990: 19–21; Neuman 1991: 912, 917, 927; Maltz 1996: 1143–1144; Neuman 1996: 52–60).

Hence, the question of non-citizens' legal standing cannot be answered simply by referring to the Constitution. Indeed, two opposing case law doctrines, reflecting the constitutional ambiguity and the normative tension between the cosmopolitan and the communitarian rationales, have evolved since the 17th century in the U.S. The two doctrines are known as the plenary power doctrine and the aliens' rights doctrine. These doctrines are still considered valid or good law. Indeed, non-citizens' constitutional and general legal standing can only be understood in light of these two doctrines. The normative rationales behind these two case law doctrines in fact correspond to the cosmopolitan and the communitarian rationales, as will be described in detail below (Scaperlanda 2001; Bosniak 1994: 1055, 1059–1064; Aleinikoff 1990; Chin 2001a: xiii; Joppke 2001b: 343–344; Hull 1983b: 220–234; Scaperlanda 1993; Chin 2001b; Kelly 2001: 9–24; Romero 2001; Taylor 2001; Joppke 2001a: 39–40; Henkin 1985: 13).

The Plenary Power Doctrine

The plenary power doctrine first saw the light of day in the *Passenger* cases,⁷¹ when the Court established that the states could not regulate immigration since this interfered with the federal government's right to regulate commerce; other enumerated federal powers were also referred to. It is important to note that the Court was concerned with federal vs. state jurisdiction at this point, rather than the issue of immigration as such (Legomsky 1984: 273–275; Legomsky 1987: 180–183; Weisselberg 1995: 940–943; *Smith v. Turner & Norris v. The City of Boston* (1849)). A few years later, the Court explicitly ruled that the federal government, in contrast to the states, had the right to regulate immigration. The Court's ruling here was analogous to its earlier one in the *Passenger* cases, in that the federal government was deemed to possess this right as part of its explicit or enumerated right to control commerce with foreign nations (*Edye v. Robertson* (1884): 591–592).

⁷¹ The *Passenger* cases dealt with the issue of immigration tax. The question was whether or not a state had the right to levy a tax on immigration, or if this would violate the commerce clause which grants the federal government the prerogative over commerce that is not internal to states.

A very significant shift took place in the first Chinese exclusion case. In this case, the Court did not invoke the commerce clause or any other enumerated constitutional power. Instead, it held that it was an inherent right of all independent sovereign nations to control immigration. The plenary power doctrine was thus disconnected from any enumerated constitutional power, and instead held as a general and inherent power embodied in national sovereignty (Legomsky 1987: 180–192; Weisselberg 1995: 944–947; *Chae Chan Ping v. U.S.* (1889); Legomsky 1997: 24–25; Henkin 1985: 25). This so-called sovereignty theory has since been the foundation of the plenary doctrine in a long line of Court cases (Legomsky 1987: 184).

It was clear after the first Chinese exclusion case that the federal government, by virtue of representing a sovereign nation, had a right to control immigration. It was, only in 1892, however – when the right to detain non-citizens, as part of enforcing immigration laws, was challenged – that the Court established that the federal government’s right to control immigration was extra-constitutional (*Nishimura Ekiu v. United States et al.* (1892); Henkin 1985: 12, 26–27).⁷² The basis for the government’s extra-constitutional power in this area is not grounded in the Constitution – indeed it is difficult to see how it could be, as the Constitution does not bestow this discretionary power over non-citizens, and only grants the federal government the right to enforce a uniform naturalisation policy. The plenary power doctrine is instead based on international inter-state law doctrines that provide all sovereign nations with the power to exclude and deport non-citizens (Grosh 1974: 1079; Verdeja 2002: 91; Scaperlanda 1993: 969–972; Aleinikoff 1990: 11–12; Chin 2001b: 178–179; Joppke 2001a: 39; Weisselberg 1995: 939–940, 1014; Legomsky 1997: 7–8; U.S. Constitution art. 1 sec. 8 cl. 4). This extra-constitutional foundation of the plenary power doctrine is highly significant, because where national sovereignty goes the rule of law cannot follow (Legomsky 1987: 194–195; Weissbrodt 1992: 50–55; Hesse 1959: 1586, 1609).

The plenary power doctrine is a slightly unusual doctrine in that it is a legal doctrine of legal deference. It gives the political branches (the legislative and executive branches) of the federal government absolute discretion over the treatment of non-citizens, by virtue of its representing the sovereign nation. This means that non-citizens have no inherent or constitutional rights but only the privileges that the political branches grant them: “They [non-

⁷² It should be noted that the Court has later held that extra-constitutional powers based on national sovereignty are subject to certain constitutional limits (Henkin 1985: 26).

citizens] are guests asserting ‘privileges’ rather than ‘members’ asserting ‘rights.’” (Rubio-Marín 2000: 139)

Non-citizens are therefore not relevant to the courts in their function of upholding rights since non-citizens are not parties to the law, i.e. right holders (Legomsky 1984: 269—270; Hahn 1982: 975—977; Aleinikoff 1990; Scaperlanda 1993: 973; *Foley v. Connelie* (1978); *Mathew v. Diaz et al.* (1976); *Harisiades v. Shaughnessy* (1952): especially Justice Frankfurter concurring; Joppke 2001b: 265; Rosberg 1977b: 316—318; Weisselberg 1995: 939; Schuck 1998b: 29—31; Taylor 2001: 170—175; Wu 2001: 69—71; Verdeja 2002: 91—92). The negative effect this doctrine has had on non-citizens’ rights is well captured by Bosniak: “Broadly speaking, the plenary power doctrine allows the government to subordinate the interests of aliens to the perceived interest of the nation.” (Bosniak 1994: 1061) The legal basis and implications of the plenary power doctrine also reveal much about its normative rationale.

The first key normative element of the plenary power doctrine is that it places the treatment of non-citizens outside the constitutional framework, and provides the citizens of the community with the right, as a sovereign nation, to pursue their collective good at the expense of non-citizens’ individual rights. The question, then, is: what underlies this notion of national sovereignty? The fact that the political institutions enjoy plenary power and are shielded from any external or higher order of law, and in this respect constitute a law unto themselves as the representatives of a sovereign nation, strongly indicates that the doctrine rests on the communitarian rationale (Weisselberg 1995: 950—951; Aleinikoff 1990: 12; Rubio-Marín 2000: 139–140; Scaperlanda 2001).⁷³

A closer analysis of the Chinese exclusion cases – two key plenary power doctrine cases – confirms this. In these cases, the Court argued that in affairs affecting foreign nations, the

⁷³ This discretionary power, *ipso facto*, cuts both ways. It can thus appear, at face value, as if the federal government could deploy this plenary power to uphold some cosmopolitan rights. However, this would be to misconstrue the nature of the plenary power doctrine. The plenary power doctrine is a doctrine of judicial deference. Thus its deployment means that the federal government is exercising discretion. That is, any rights defended under this doctrine can be changed retroactively, and are not guaranteed by the courts. This kind of right does not come with the security that enables individuals to autonomously plan their lives (*Fong Yue Ting v. United States et al.* (1893); *Harisiades v. Shaughnessy* (1952)). The fact that the federal government can preempt state legislation, both to protect and exclude non-citizens from rights, is a slightly different issue. The point here is that if the federal government bestows a right on non-citizens then this must be based on a statute not on a discretionary right to control non-citizens.

federal government must have the right to exercise national sovereignty⁷⁴ in order to safeguard its independence (Fong Yue Ting v. United States et al. (1893); Chae Chan Ping v. U.S. (1889)). The notion of exercising national sovereignty in order to safeguard the nation has two meanings. It relates, on the one hand, to territorial security (Fong Yue Ting v. United States et al. (1893); Chae Chan Ping v. U.S. (1889)). However, the term national sovereignty also includes the right and need to preserve the community or the nation. In Aleinikoff's words: "Sovereignty meant more than control of borders. It also implied a power to construct an 'American people' through adoption of membership rules." (Aleinikoff 2002b: 13–14) That is, the Court, in constructing the plenary power doctrine, has gone beyond the right to territorial self-defence and argued that a nation's right to sovereignty includes the right to defend its existence as a particular self-defined nation and to pursue its members' welfare:

The right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare... (Fong Yue Ting v. United States et al. (1893): 711)

The conceptual marriage between nation and absolute sovereignty, which is central to modern nation-states, is clearly expressed here (Evans 1991: 190). The Court has also explained what the source and the corresponding limit to national sovereignty is:

'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. Any restrictions upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of its sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.' (Chae Chan Ping v. U.S. (1889): 604, the Court is here approvingly quoting Chief Justice Marshall)

The normative rationale behind the plenary power doctrine is thus straightforward. Non-citizens must submit to the will of the American nation; or else the American nation will not be absolutely sovereign, as it will be submitting to an external or alien power, and this is not acceptable, since the nation is the sole legitimate source of its own laws. The right to wield plenary power or exercise absolute sovereignty hence rests on the nation's rights to self-determination, and this means that non-citizens can make no higher appeal than to the

⁷⁴ It is noteworthy that the term *state* sovereignty is never used.

political branches of government, which constitute the expression of popular sovereignty (Chae Chan Ping v. U.S. (1889): 602–603). The right of national self-determination hence trumps the universal values embodied in the Constitution. The question, then, is who has the right to define the nation. That is, who holds the right to communal formation, i.e. where does the power to form a sovereign nation lie? The Court has provided a clear answer to this question:

‘Every Society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war.’ ‘It may always be questionable whether a resort to this power is warranted by the circumstances, or what department of government is empowered to exert it; but there can be no doubt that it is possessed by all nations, and that each may decide for itself when the occasion arises demanding its exercise’ (Chae Chan Ping v. U.S. (1889): 607, here the Court quotes Mr. Marcy approvingly)

Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship (United States v. Wong Kim Ark (1898): 668)

The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community. (Cabell et al.v. Chavez-Salido (1982): 439–440)

The Court has also explicitly linked the government’s right to treat non-citizens discretionarily with the fact that it represents a particular nation and that its members have the right to communal self-determination:

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and their protection of their individual as well as their collective rights. (United States v. Cruikshank et al. (1875): 549)

The phrase “the people of the United States” is synonymous with “citizens”, both describing the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. (Boyd v. State of Nebraska: 150 (1892), see also; Minor v. Happersett (1874))

The idea here is thus that a political community like the U.S. is constituted by a distinct and particular people/nation. This notion, in turn, gives rise to the idea that membership is not a morally arbitrary fact. The nation is created by the people for the people; thus with membership comes the right to be of moral concern and to hold rights; and the flipside of this right is that the nation has the right to treat non-citizens discretionarily. The moral significance of membership – and non-citizens’ lack thereof – thus ultimately explains why non-citizens lack legal standing according to the plenary power doctrine, and why the Court has ruled that (Pergler 1928: 136–137, 155; Romero 2001: 169–187; Schuck 1998b: 33):⁷⁵

This right [to expel non-citizens] is based on the fact that, the foreigner not making a part of the nation, his individual reception into the territory is a matter of pure permission, of simple tolerance, and creates no obligation. (Fong Yue Ting v. United States et al. (1893): 708, here the Court is approvingly quoting Ortolan)

The normative foundation behind the plenary power doctrine is thus ultimately that the U.S. has a right to political/communal formation as an independent nation, and with this comes the right to treat non-members discretionarily, and to subordinate their interests to the interests of the nation; it is to this end that the plenary power doctrine provides the representatives of the nation plenary power over non-citizens (for the most elaborate jurisprudential analysis of the connection between communal formation and the plenary power doctrine, see Scaperlanda 2001). This is something that has not escaped legal scholars:

To account for the privileged status that federal alienage classifications enjoy in classical immigration law, we must look, I suspect, neither to the alien’s condition nor to the Constitution’s text. Rather, the explanation can be found in the classical tradition’s self-consciously political definition of national community and in its norm of extraordinary judicial deference to that choice. (Schuck 1998b: 34)

And Scaperlanda notes, in relation to the outcome of a particular plenary power doctrine case, that “Values of communal formation and protection... proved determinative.” (Scaperlanda

⁷⁵ A quick look at the historical backdrop to the plenary power doctrine further underscores this conclusion. The plenary power doctrine grew out of the anti-Asian laws, which gave the government the right to exclude uncivilised people from the American nation. The birth of the plenary power doctrine and its foundation is thus historically rooted in the notion of intrinsic differences between communities, in this case racial differences (Schuck 1998b: 33, Scaperlanda 2001; Chin 2001b: 119; Aleinikoff 2002b: 23–24, 31).

2001: 114) Scaperlanda has also elaborated on the normative roots of the plenary power doctrine, and what the normative rationale behind it represents in practical terms:

The plenary doctrine, rooted in the nineteenth century conceptions of absolute sovereignty, today stands for that proposition that members of the political community have a right superior to any claimed by a noncitizen to fashion rules governing the admission, exclusion and expulsion of noncitizens. (Scaperlanda 1997: 1595)

In sum, the plenary power doctrine is a doctrine of judicial deference that provides the political representatives of the nation discretionary powers over non-citizens. This discretionary right rests on the communitarian rationale, since it is based on the notion that the U.S. has a right to political formation and the right to pursue its collective interest at the expense of non-members by virtue of constituting a particular community. This right to plenary power, then, in the end rests on the idea that membership is prior to rights (Scaperlanda 1993: 969–975, 1001; Nafziger 1983: 822–823; Aleinikoff 1990; Scaperlanda 2001: 101, 112, 117, 158, 163; Heller 2001: 216; Martin 1983: 195–201).⁷⁶

The Aliens' Rights Doctrine

It may seem as though the plenary power doctrine undermines the notion of a tension between the cosmopolitan and the communitarian rationales in this context. However, as Aleinikoff points out: “Constitutional law... has never adopted the view that, as non-members, aliens are wholly beyond the purview of the Constitution.” (Aleinikoff 1990: 18) Shuck makes a similar point, but emphasises that the plenary power doctrine has been the dominant force:

⁷⁶ The extra-territorial argument, occasionally deployed in plenary power exclusion cases, holds that the law of the U.S. does not extend beyond its borders; hence non-citizens are not protected by it (Legomsky 1984; Scaperlanda 1993). This argument is worth special attention, since it at face value could indicate that the Court relies on a functional rather than intrinsic difference between members and non-citizens in plenary power cases.

This argument must, however, be seen in light of the fact that it depends on a legal fiction, namely the fiction of non-citizens being outside the U.S. when they apply for entry (Hahn 1982). (The fact that non-citizens are legally outside, and not physically outside, or in any other way outside the control or jurisdiction of the U.S., points to the fact that this argument is based on the intrinsic difference that membership makes, rather than on functional grounds relating to the practical exercise of authority. It is after all the U.S. that exercises its authority over these individuals on its own territory, so no functional reason for excluding non-citizens exists. This conclusion is further underpinned by the fact that the Constitution applies to the U.S.'s government when it is exercising its authority over its own citizens abroad (Hahn 1982; Reid v. Covert (1957); Ross v. McIntyre (1891)). Reid v. Covert explicitly stated that citizens are entitled to full legal protection when the U.S.'s government reaches out to punish them abroad. That is, the issue is not – in the case of citizens – one of territory, but one of who is exercising authority, whereas the opposite principle sometimes is applied to non-citizens (Reid v. Covert (1957)).

The fact that non-citizens' ties to the U.S. affect the legal protection they receive when wishing to re-enter the U.S. further underscores the fact that membership, and not physical presence, is what makes the difference in these cases (Weisselberg 1995; Chin 2001a; Landon v. Plasencia (1982)).

It is true that aliens were not wholly excluded from constitutional protection. As early as 1886, for example, the Supreme Court strongly affirmed that the Constitution safeguards *all* individuals within the United States, including aliens, from invidious discrimination by the states. Less than twenty years later, the Court ruled that even an excludable alien was entitled to at least a minimal form of administrative due process. But while these holdings demonstrated that the universalistic character of traditional liberalism retained some force during the classic period, [the period when the U.S. abandon its open borders policy and developed the plenary power doctrine] they hardly defined an expansive national community. (Schuck 1998b: 27, emphasis in original)

In fact, the plenary power doctrine has, almost from the start, co-existed with the aliens' rights doctrine (Taylor 2001: 133, 175).⁷⁷ The aliens' rights doctrine, as the very name implies, holds that certain constitutional rights are truly universal and therefore cannot be nullified by the plenary power doctrine – and hence these rights cover non-citizens. The thrust of the aliens' rights doctrine stems from the parts of the Constitution that most clearly aim at upholding *a priori* rights to individual autonomy, particularly those constitutional rights that are formulated in terms of persons. These rights constitute parts of the Bill of Rights and the fourteenth amendment, which, as discussed above, were conceived of as *a priori* rights to individual self-determination that all human beings have an equal and universal right to, simply as persons. The Court has thus in part based its alienage jurisprudence on the cosmopolitan rationale (Martin 1983: 175–178; Scaperlanda 2001: 106–109; Romero 2001: 173; Kelly 2001: 14–18; Taylor 2001: 133; Joppke 2001a: 39). This means that non-citizens' inherent rights are protected even against the federal government, representing the sovereign people/nation, in certain cases (Bosniak 1994: 1095–1096; Rubio-Marin 2000: 178).

The aliens' rights doctrine has a less elaborate history than the plenary power doctrine, and its core is constituted by two cases (Scaperlanda 2001: 113). The first case, *Yick Wo v. Hopkins*, established that the fourteenth amendment protects non-citizens. This means that states are constitutionally prohibited from depriving non-citizens of their basic individual rights to liberty, and that non-citizens enjoy protection from invidious discrimination vis-à-vis states (Taylor 2001: 175; Kelly 2001: 15). The *Wong Wing* case established that the federal government is constitutionally prohibited from depriving non-citizens of the right to due process of law and a fair trial, as laid down in the fifth and the sixth amendments (Taylor 2001: 176; Kelly 2001: 15; *Wong Wing et al. v. United States* (1896); Henkin 1985: 16). As will become clear below, the fifth and the fourteenth amendments stand at the heart of

⁷⁷ It should be noted that this doctrine sometimes is referred to as the personhood doctrine or the *Yick Wo* tradition (Romero 2001: 173; Scaperlanda 2001: 133; Bosniak 1994: 1060–1061; Scaperlanda 1993: 989).

individuals' right to liberty and equal concern, and these two cases are crucial in that they establish that there is a limit to the government's power over non-citizens – at least in certain areas.

The very nature of the rights that these amendments protect gives a strong indication that the normative rationales behind these rights are cosmopolitan. Indeed, a closer look at the core aliens' rights cases confirms this. The *Yick Wo* case involved Chinese laundrette operators. The Court mentioned in passing that the U.S. had a treaty obligation to treat Chinese citizens on par with U.S. citizens, but the case was ultimately about the interpretation of the fourteenth amendment. Thus the case was about non-citizens in general, and not only about Chinese citizens specifically:

The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court. (*Yick Wo v. Hopkins* (1886): 369)

The Court's ruling was based on the grounds that the enforcement of the statute in question constituted a transparent attempt to discriminate against non-citizens, rather than a legitimate regulation of business, and that the plaintiffs' fourteenth amendment rights therefore had been violated (*Yick Wo v. Hopkins* (1886): 365–368). The Court then quoted its established interpretation of the fourteenth amendment:

[...] the fourteenth amendment... 'undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances: that no greater burdens should be laid upon one than are laid on others in the same calling and condition; and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. (*Yick Wo v. Hopkins* (1886): 367–368)

The Court thus held that non-citizens, under the fourteenth amendment,⁷⁸ have an individual universal right to be equal before the law, that all individuals have a right to invoke the protection of the law and that all persons are 'equally entitled to pursue their happiness' (*Yick Wo v. Hopkins* (1886): 367). The Court made it very clear that these rights were universal in nature and that the petitioners' lack of membership in the community was irrelevant to their right to legal protection:

The rights of the petitioners, as affected by the proceedings of which they complain, are no less because they are aliens and subjects to the emperor of China. ... The fourteenth amendment of the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality. (*Yick Wo v. Hopkins* (1886): 368–369)

It should be noted that the first aliens' rights doctrine case pertained to the fourteenth amendment, which only applies to states. The doctrine was, however, soon expanded to the fifth and the sixth amendments, which apply to the federal government.

Applying this reasoning [that the term person is not confined to citizens] to the fifth and the sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law. (*Wong Wing et al. v. United States* (1896): 238)

The aliens' rights doctrine thus extends to the federal government. It circumscribes both the federal government's and the states' discretion over non-citizens.⁷⁹ The universality of, and inclusion of all non-members in, certain constitutional rights – in particular, rights bestowed on persons in the Constitution – has been reiterated and re-confirmed by the Court on several occasions (*Traux v. Raich* (1915): 39; *Plyler v. Doe* (1982): 210):

⁷⁸ It should be noted that the first section of the fourteenth amendment pertains to U.S. citizens' right to be citizens of the state where they reside, and establishes that 'no state shall abridge the rights of U.S. citizens' (U.S. Constitution amend. 14). The amendment then talks about all *persons*' rights to life liberty and property, the due process of law and the equal protection of laws. It is this latter part of the amendment that the Court is referring to in this case.

⁷⁹ The difference, in terms of application, between the fourteenth amendment and the Bill of Rights is, however, significant – because the fact that states do not constitute nations has implications for their right to circumscribe non-citizens' rights to equal concern *qua* individuals. This will be discussed in more detail below.

In concluding that “all persons within the territory of the United States,” including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions by the Federal Government, we reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a state. (*Plyler v. Doe* (1982): 212)

Use of the phrase “within its jurisdiction” thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of the State’s territory. That a person’s initial entry into a State or into the United States, was unlawful, and that that he may for that reason be expelled, cannot negate the simple fact of his presence within a State’s territorial perimeter. (*Plyler v. Doe* (1982): 215)

Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. (*Mathew v. Diaz et al.* (1976): 77, the Court here refers to the fourteenth and fifth amendments and approvingly cites *Wong Wing v. U.S.* and *Sung v. U.S.*)

These rulings do not rest on the fact that non-citizens are members of some sort, or on some level, of the U.S., but hold that even ‘strangers and aliens’ have these rights (*Yick Wo v. Hopkins* (1886): 369). The fact that the *Fong Yue Ting* ruling establishes that non-citizens have certain constitutional rights even though they remain ineligible for citizenship and can be deported at will, and that illegal immigrants are included in this protection, further underscores this point (*Fong Yue Ting v. United States et al.* (1893); Maltz 1996: 1151–1154; *Plyler v. Doe* (1982); *Barbier v. Conally* (1884); *Wong Wing et al. v. United States* (1896)). Neuman has succinctly summarised the universal meaning that these amendments have been given and the implications of this for Congress’ power over non-citizens:

Thus the Court held even Congress to the approach based on the mutuality of legal obligation, and confirmed that nonmembership in the social compact does not deprive individuals present within the United States and subject to the laws of the concomitant right to the protection of the fundamental law of the land. (Neuman 1996: 63)

A closer look at this doctrine also shows that these universal rights ultimately are based on the cosmopolitan rationale.⁸⁰

⁸⁰ Two slightly contradictory historical facts further support this conclusion. One, these rights were granted to ‘Chinamen’ after the 1882 Chinese Exclusion Act, which barred further Chinese immigration and stipulated that Chinese people were ineligible for citizenship (Maltz 1996: 1149; Smith 2001: 4; Chin 2001b: 132–135). It is against this historical backdrop that the expression ‘even aliens’, with the connotation of someone utterly

It is, indeed quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgement, exercised either in the pressure of opinion, or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victories progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any other material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. (Yick Wo v. Hopkins (1886): 370)

... all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; ... they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; ... no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances: (Yick Wo v. Hopkins (1886): 367)

The reference to Massachusetts' Bill of Rights is significant, as the Court's rulings in these cases must be seen in light of the underlying philosophy of Bills of Rights in U.S. jurisprudence. Individuals have, from the beginning of U.S. jurisprudence, been seen as holding universal and *a priori* rights to individual autonomy. Basic individual freedoms are not created by the government or the Constitution, but the Constitution in general, and the Bill of Rights and the fourteenth amendment in particular, exist to ensure that these universal and *a priori* rights to individual autonomy are respected (Henkin 1979: 409, 411; Rumble 1979; Cole 2003: 11–12).

The Court's decision to limit the political branches' discretionary power over non-citizens so as to uphold non-citizens' 'fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions under the reign of just and equal laws', must be understood in this context (Yick Wo v. Hopkins (1886): 370). In sum, the aliens' rights doctrine must thus be said to rest on the cosmopolitan rationale. This conclusion is based on the idea that equal personhood in itself, independent of membership, entitles all individuals to

unfamiliar, foreign and disconnected should be read. Two, the abolition of slavery had removed the most severe impediment to a universal application of the Constitution (Neuman 1996: 62).

certain rights in order to exercise individual self-determination on equal terms; and these rights lie beyond the power of popular sovereignty (Schuck 1998b: 27; Heller 2001: 203–204, 211, 216; Hull 1983a: 228; Neuman 1991: 941–943; Maltz 1996: 1158).⁸¹

In conclusion, the two case law doctrines correspond to the cosmopolitan and the communitarian rationales, and the tension between these two rationales pervades the legal discourse around non-citizens' legal standing in the U.S.:

Ultimately, it appears that that the two lines of cases are not part of a coherent whole, but rather reflect conflicting strands in our constitutionalism: one concerned with affirming the importance of membership in a national community; the other pursuing a notion of fundamental human rights that protects individuals regardless of their status. (Aleinikoff 1990: 19)

⁸¹ It should be noted that a minority of the Court at one point seemingly attempted to undermine the aliens' rights doctrine by arguing that non-citizens needed to have established a substantial connection with the U.S. in order to enjoy constitutional protection.

This attempt took place in the Verdugo-Urquidez case. This case deals with the fourth amendment, which protects the people, not persons, against unreasonable searches and seizures. Rehnquist, the former chief Justice, writing for the Court, dismissed the defence's claim that the accused was protected by the Constitution in general in a sweeping statement; in so doing he argued that the cases relied upon, among them Yick Wo and Wong Wing, were inapplicable:

These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country. ... Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not. (United States v. Verdugo-Urquidez (1990): 271, emphasis added)

If a substantial connection with the U.S., which goes beyond the fact that the U.S. is exercising its authority over the non-citizen, is a pre-condition for enjoying any constitutional protection, then the aliens' rights doctrine is no more. Rehnquist's communitarian reading of the Constitution was, however, explicitly refuted by a majority of the justices (Neuman 1991; Scaperlanda 1991; United States v. Verdugo-Urquidez (1990); see Kennedy's concurring opinion, which explicitly rejects the limited interpretation of the term people; see also Stevens, who concurred in the judgment, but also rejected the idea that a substantial connection to the U.S. was necessary for enjoying fourth amendment protection, and the protection of the Bill of Rights in general.)

The fact that the substantial connection requirement was only endorsed by a minority is natural, given that the Court, in a long series of cases, has held that all non-citizens enjoy the protection of the constitution, arguing that 'strangers and aliens' enjoy the same protection as citizens and that the notion of jurisdiction is connected to when power is exercised over a non-citizen and not to the defendant's connection to the legal community (Plyler v. Doe (1982); Wong Wing et al. v. United States (1896)). Even in *Traux v. Raich*, where the issue of being a lawful inhabitant arises, it only does so in relation to the federal prerogative to regulate immigration (*Toraio Takahashi v. Fish and Game Commission* (1948); *Traux v. Raich* (1915)). This means that the claim in the Verdugo-Urquidez is unsupported and fundamentally at odds with a core constituent of alienage jurisprudence (Scaperlanda 1991; Taylor 2001). It is thus hardly surprising that the Court reconfirmed its universal interpretation of certain parts of the Constitution, after the Verdugo-Urquidez case. The Court held in 2001, eleven years after the Verdugo-Urquidez case, that "... the Due Process Clause [of the fifth amendment] applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent." (*Zadvydas v. Davis* (2001): 693)

In sum, Rehnquist's attempt at re-interpreting the aliens' rights doctrine was a reminder that the exclusive communitarian reading of the Constitution which underlay the defence of the Alien and Sedition Acts of 1798, is alive and well; this view was, however, at no point accepted by the majority of the Court and remains *dicta* (Henkin 1996: 307; Rubio-Marin 2000: 155; Heller 2001: 203–204; Scaperlanda 1991: 213–243).

Contrasting sharply with plenary power and the membership cases, the personhood tradition [another name for the aliens' rights doctrine] takes seriously constitutional claims made by noncitizens, recognizing that noncitizens are "persons" entitled to constitutional protection. ... The personhood cases rest on the proposition that sharing "our common humanity, noncitizens are protected by all guarantees of the Constitution." (Scaperlanda 1997: 1596–1597, Scaperlanda is quoting Field's dissent in *Fong Yue Ting v. U.S.*)

This tension in the alienage jurisprudence runs very deep and it is an extension of a similar tension in the Constitution. The tension between the cosmopolitan and the communitarian rationales in U.S. alienage jurisprudence hence ultimately reflects the dual nature of U.S. constitutionalism:

Sovereignty of the people implies self-government by the people, directly or through chosen representatives. But every individual retains some of his or her original autonomy as 'rights' which are protected even against the people and their representatives. Our constitutionalism, then, has two elements: representative government and individual rights. (Henkin 1979: 408)

Section II

The second section of this case study is dedicated to deducing the normative rationales behind the 17 rights listed in the first chapter. This task will be accomplished by building on the analysis of the two case law doctrines and the nature of the Constitution that has just been carried out in Section I. In practical terms, it can be said that the task will be undertaken one realm at the time. This means that the law as it applies to the specific rights in one realm will be outlined, where after the normative rationales that underlie these laws will be deduced. This process will then be repeated until all five realms have been analysed.

The Admissions Realm

Only immigrants who fall within one of three admissions categories are currently admitted to the U.S. These categories are: labour immigrants, family immigrants and refugees (Legomsky 1997: 99; Carliner 1990: 61; Studies 2002; Committee 2004). The system for admission of labourers is fairly complicated, but labour immigrants can be subdivided into three specific categories: workers with extraordinary abilities, workers who hold advanced degrees or the equivalent, and workers who can perform skilled labour. All three categories are subjected to numerical limits. The additional requirements that no qualified native worker can fill the position and that the hiring of a non-citizen does not adversely affect the wages of native workers in the same field applies to the second and third categories (INA 203 (b), 212 (a) (5) (A–C); Legomsky 1997: 172–174; Boswell 1992: 347).⁸²

Family immigration is sub-divided into four categories (Legomsky 1997: 131; INA 201 (b), 203 (a–d)). The first sub-category is for citizens' immediate family members – defined as spouses, parents and children of U.S. citizens; the second sub-category is for spouses and unmarried children of permanent residents; the third sub-category is for married children of U.S. citizens and the fourth sub-category is for brothers and sisters of U.S. citizens. There is no numerical limit on the first sub-category, but the other three are restricted numerically (Boswell 1992: 347–348; Nedzel 1997: 135; INA 201 (b), 203 (a–d)).

⁸² There are also special provisions for so-called special immigrants. Special immigrants are people who have work/worked for the U.S. government or certain international organisations and persons who are ministers of religion. A specific provision for immigrants who are willing to make a considerable investment in the U.S. also exists (Legomsky 1997: 201–204; Aleinikoff 1998: 378; INA 101 (a) 27; 203 (b) (5)).

There is, moreover, a specific diversity category, and its aim is to increase the number of immigrants from low admission countries. Applicants for this sub-category are selected randomly, by lot from selected countries, but there are some minimal educational/skill provisions, and applicants must be admissible in general (INA 203 (c); Boswell 1992: 348; Legomsky 1997: 204–205; Nedzel 1997: 136–137, for general admissibility see below).

The U.S. offers four different kinds of relief for refugees: asylum, refugee status, withholding of removal (*non-refoulement*), and Torture Convention relief. All these forms of relief are derived from humanitarian international law (Anker 1999: 2). The difference between asylum and refugee status is mainly geographical. The difference lies in the fact that asylum seekers are present in – or at the border of – the U.S., whereas overseas refugees apply and are screened for political asylum abroad (Legomsky 1997: 750–751; Bruno 2002; INA 207–208). That is, both groups must demonstrate that they are political refugees, defined as individuals who have ‘a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion’ (INA 101 (a) (42)).

There is an overall annual limit for the number of admitted overseas refugees set by the President, who also decides on the allocation between different countries and regions. The overseas refugees are then selected according to three criteria, which are distinct from their refugee status, albeit the first criterion is concerned with the urgency of resettlement. The other two criteria relate to political and family connections to the U.S. respectively (Legomsky 1997: 760–765; Bruno 2002; Bureau of Population 2002). Asylum seekers must also demonstrate that they are entitled to political asylum, but no numerical limit applies to asylum seekers.⁸³

Asylum seekers and overseas refugees, however, have no right to be granted political asylum. That is, asylum is not a statutory right for persons who fulfil the criteria (Immigration and Naturalization Service v. Cardoza-Fonseca (1987); Immigration and Nationality Act 208). There are, moreover, a number of statutory bars to receiving asylum. Individuals who have participated in persecutions; people who are convicted or seriously suspected of a particularly serious crime; people who are ‘involved in terrorist activity; people who on reasonable grounds can be considered to endanger the security of the U.S., are barred from receiving asylum (INA 208 (b)).

The discretionary power over the granting of political asylum does not cover the two other, more basic, forms of relief. That is, *non-refoulement* is a statutory right that protects a refugee

⁸³ Save for individuals who seek asylum in order to avoid persecution in the form of coercive population policies (INA 207 (a) (5)). It should be noted, however, that U.S. immigration judges had ruled that general coercive population policies did not constitute persecution, as opposed to targeted policies of this nature. That is, Congress added this group to the list, but also added a numerical restriction (Representatives: 1996: (1)).

from being sent back to a country where her 'life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion' (Immigration and Nationality Act 241 (b) (3)). There are also a number of bars to *non-refoulement*. The bars to *non-refoulement* are more or less the same as in the case of asylum, only defined slightly more narrowly. The crime committed must be of a more serious nature, the suspicion of committed crimes must be stronger, and only individuals who have actually taken part in terrorist activities, rather than being involved as members or supporters of terrorist organisations, are excluded from *non-refoulement* (Legomsky 1997: 768–769; Anker 1999: 6, 459–460; INA 241 (b) (3)).

The Court has, moreover, ruled that a refugee must be able to establish a stronger likelihood of persecution in order to obtain *non-refoulement* relief than for receiving asylum. The standard applied in *non-refoulement* cases is that the risk of persecution is more likely than not rather than the well-founded fear of persecution standard that applies in asylum cases (Anker 1999: 6; Immigration and Naturalization Service v. Cardoza-Fonseca (1987)). The Torture Convention also provides refugees with a statutory right not to be deported to a country if there are substantial grounds for believing that they might be subjected to torture there. The substantial grounds standard has, in the U.S., been interpreted as being equivalent to the standard applied in *non-refoulement* cases. The level of protection does differ, however, as no bars from protection exist in torture relief cases (Anker 1999: 6, 419, 510–511, 518–519, 570; Barnett 2002: 4–5; Cohen 1998: 517–518). Refugees who flee natural disasters or famines do not meet the persecution criteria under U.S. law. These kinds of refugees can apply for temporary protected status – which protects them from being removed from the U.S. Temporary protected status is, however, not a statutory right and a denial is not judiciable (Legomsky 1997: 941–946; INA 242; 244).⁸⁴

Immigrants from the three main categories outlined above (labourers, family members and refugees) must not only fulfil the conditions for one of the described categories, they must, moreover, fulfil a number of general admissibility criteria (Legomsky 1997: 290). These criteria are numerous, and non-citizens can be deemed inadmissible/excludable on various economic, political, health, criminal, quasi-criminal and moral grounds (Boswell 1992: 25). More specifically, individuals are deemed inadmissible if they 'have a communicable disease

⁸⁴ It is also noteworthy that refugees no longer can be paroled into the U.S. *en masse*, but only on an individual basis (Aleinikoff 1998: 509–510; INA 212 (d) (5)).

of public health significance' (INA 212); suffer from certain mental or physical disorders; are convicted of a crime of moral turpitude; have multiple criminal convictions; are known traffickers of controlled substances; have entered illegally; have entered in order to engage in prostitution or commercialised vice; are drug addicts; or are likely to become public charges. Reasonable suspicion of involvement in terrorism, or voluntary membership of a totalitarian political party, is also grounds for being deemed inadmissible. Non-citizens whose presence would damage U.S. foreign policy are also inadmissible (Nedzel 1997: 137; Legomsky 1997: 290–320; INA 212).⁸⁵

Admission to the U.S. furthermore requires a visa, although citizens from a selected group of countries are exempted from this requirement.⁸⁶ A visa is not a right of entry, and the visa regime constitutes a pre-check whereby consular personnel abroad screen non-citizens to ensure that they are admissible. The visa regime is further shored up by so-called carrier sanctions and, occasionally, by further pre-inspection by immigration officers at designated foreign ports (Nafziger 1991: 9–12; Gibney 2003: 6; INA 212). The carrier sanctions make companies that carry those non-citizens to the U.S. who do not hold the required travel documents – such as a passport and a valid visa – liable to pay fines (Christian 1999: 216, 227–231; Gibney 2003: 6).

The effort to ensure that only admissible non-citizens reach the U.S., furthermore, includes interdiction on the high seas. These missions are carried out mainly by the Coast Guard outside U.S. territory, and the missions' purpose is to prevent illegal immigrants and asylum

⁸⁵ Overseas refugees are exempted from certain of the inadmissibility criteria. Overseas refugees do not need to obtain a labour certificate, demonstrate that they are not likely to become public charges, or be in possession of valid travel documents in order to be admitted. Most other grounds for exclusion can be waived, if the Attorney General so chooses, save for exclusion grounds related to security. Overseas refugees may also bring their spouses and children to the U.S., (and the same exceptions apply to family members). A person who is granted refugee status may also obtain permanent residency status after a year (Legomsky 1997: 760–761; Anker 1999: 4; Bruno 2002: 1; INA 207, 208, 209 (a)). Asylum seekers are already in the U.S., and the issue thus becomes one of what bars them from obtaining this status (see statutory bars for asylum above).

Individuals who are granted asylum can apply for permanent residency after a year, on the same conditions as overseas refugees. A numerical restriction, however, exists on the number of recognised asylum seekers who can receive this status each year. This means that it may take more than one year to obtain this status for recognised asylum seekers. Recognised asylum seekers are entitled to bring, as overseas refugees, their spouses and unmarried children to the U.S. (INA 209 (b); Anker 1999: 4–5, 562; Bruno 2002).

The status of persons who have obtained *non-refoulement* relief is similar to the status of asylum seekers. However, individuals who have obtained *non-refoulement* relief cannot adjust their status to permanent residency, and they can be removed to a safe country (Anker 1999: 564; Shusterman 2004).

⁸⁶ A few states are on the visa waiver list. The pre-condition for being on the waiver list is that less than 2% of previous visa applications from these states have been rejected during the last two years, that the non-visa policy is reciprocated, and that passports from the country are machine-readable (Christian 1999: 217).

seekers from reaching the shores of the U.S. Immigration officers do sometimes screen passengers for refugee status, but the Coast Guard has, since 1992, under a presidential Executive Order, had the right to interdict vessels carrying non-citizens without determining their refugee status (Guard 2006: 7; Palmer 1997; Sale v. Haitian Centers Council (1993); Executive Order 12807; Gibney 2003; Legomsky 1998: 122–123).

The Rationale(s) Behind the Admissions Realm

At the heart of the plenary power doctrine lies the idea that the U.S. as a sovereign nation has the absolute right to control admission, in its own interest:

This Court has repeatedly emphasized the “over no conceivable subject is the legislative power of Congress more complete than it is over” the admission of aliens. (Fiallo v. Bell (1977): 792, the Court is here approvingly quoting Oceanic Navigation Co. v. Stranahan)

The specific provisions regulating labour immigration fit very well with the general communitarian thrust behind the government’s right to regulate admission in the interests of the nation. Labour immigration in the U.S. is clearly designed to further the interest of the U.S., and labour immigrants in no way possess a universal individual right to seek their fortune in the U.S.⁸⁷ This normative thrust can be deduced straight from the text of the Act:

(A) In general. - Visas shall be made available... to qualified immigrants who... will substantially benefit prospectively the national economy, cultural or educational interests, or the welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States. (INA 203 (2))

The statute in itself hence clearly reveals that labour immigration is intended to serve the interest of the U.S. (Aleinikoff 1998: 351, 378; Boswell 1992: 411). The more specific

⁸⁷ Individuals in the first employment-based sub-category are not subjected to the labour certification rules (for labour certification see below). However, the admission of these individuals must, in order for them to be deemed to have extraordinary abilities, ‘substantially benefit prospectively the United States’ (INA 203 (1)).

The skilled workers are meant to benefit the U.S. more indirectly by providing skilled labour: “... for which qualified workers are not available in the United States.” (INA 203 (3) (i))

The special immigrants program covers many minor groups, but the common denominator is that they have a pre-existing relationship with the U.S. Examples include people who have served with the U.S.’s armed forces, have been adopted by U.S. citizens, or been employed by NATO etc (INA 101 (27)).

The investment program also clearly states that the condition for admission is that the U.S. as a country benefits from the investment, and the benefit to the immigrant and her family is explicitly subtracted from the equation (INA 203 (A) (5)).

Diversity immigrants are admitted as to moderate the under-representation of certain low admission countries. The admittance of this group is not related to the labour market, but these immigrants nevertheless need to meet a minimum threshold of skills (INA 203 (c)).

conditions for labour immigration are also replete with references to the national interest, such as that it must be certified that native workers are not available for the jobs in question, and that the working conditions of native workers are not adversely affected by the hiring of non-citizens, for example (INA 212 (5) (A); Legomsky 1997: 290). The fact that labour immigration is intended to serve the interest of the U.S. as a nation – and not a right non-citizens hold as equally entitled individuals – was highlighted in Congressional debates pertaining to immigration, both in 1990 and 1996 (Calavita 1992: 74–76; Representatives 1996). In 1996, the House of Representatives also outlined the general rationale behind admitting labourers, and explicated whose interest such immigration is to serve:

The entitlement theory, which seeks to fit immigration policy to the demands of those who would like to immigrate to the United States, has made it increasingly difficult to establish a policy that selects immigrants according to their ability to advance our national interest.... The key to legal immigration reform is stating clear priorities that reflect the national interest. H.R. 2202 [the bill in question] will better match the attributes of immigrants with the needs of the American economy, by increasing the number of visas available for highly-skilled and educated immigrants and by decreasing the proportion of immigrants admitted without regard of their level of skill and education. (Representatives 1996: Title V)

The right to family reunification is a slightly more complex issue. The right to family reunification was originally seen as a natural right, but one that could be limited by Congress, courtesy of the plenary power doctrine (Guendelsberger 1988: 7–11). The Circuit Court D in Oregon held, in a case that later explicitly was upheld by the Court, that (United States v. Gue Lim (1900)):

[...] a Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. The company of the one, and the care and custody of the other, are his by natural rights; and he ought not be deprived of either, *unless the intention of congress to do so is clear and unmistakable*. (In re Chung Toy Ho and Wong Choy Sin (1890): 400, emphases added)

The Court endorsed this qualification, and hence found no difficulty in upholding Congress's right to restrict family reunification (Yee Won v. White (1921); In re Chung Toy Ho and Wong Choy Sin (1890)). The strength of the plenary power doctrine is very clear in this context. The Court has, on several different constitutional grounds, protected the right to family unity (Guendelsberger 1988: 64–66). The Court has, for example, held that zoning

laws that ban extended families from living in certain areas are unconstitutional on fourteenth amendment grounds (*Moore v. City of East Cleveland* (1977)). However, when the right to family reunification clashes with the right to exclude based on the plenary power doctrine, the latter prevails (Guendelsberger 1988: 44–51; Kelly 2001: 5–6). The Court has, as described in section I, made the reason for this clear:

‘The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. ... All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.’ (*Chae Chan Ping v. U.S.* (1889): 604, the Court is here approvingly quoting Chief Justice Marshall)⁸⁸

This means that a family cannot be forced to move from one neighbourhood to another, but the government can keep a family that consists of at least one non-citizen separated (Guendelsberger 1988: 64–66). The Court makes the ultimate rationale for this disparity very clear in *Fiallo v. Bell*:

And we observed recently that in the exercise of its broad power over immigration and naturalization, “Congress regularly makes rules that would be unacceptable if applied to Citizens.” (*Fiallo v. Bell* (1977): 792, here the Court approvingly quotes *Mathew v. Diaz*)

The communitarian thrust of the plenary power doctrine is, moreover, evident in the specific provisions regulating family immigration. The preference system in this area is clearly constructed around the idea that closeness to U.S. citizens generates more favourable treatment. The same level of family connection generates different rights, depending on whether the person to be joined is a citizen or not. Thus, it is not the strength of the individual claim, but the closeness of the claimant to the national community that determines their place in the queue, and only family members of citizens have an unlimited right to admission for the purpose of family reunification (Kelly 2001: 49–50). The nation’s right to exercise sovereignty in its own interest simply outweighs the universal constitutional rights to family unity in other cases. Kelly sums up this point succinctly: “The rights enumerated in *Moore v. City of East Cleveland* have quietly joined the ranks of constitutional rights disregarded in U.S. immigration law.” (Kelly 2001: 51)

⁸⁸ The Court has even ruled that U.S. citizens do not have a constitutional right to have their alien spouses or biological children admitted, albeit they currently have a statutory right to have their children and spouses admitted (*Fiallo v. Bell* (1977); *Harisiades v. Shaughnessy* (1952)).

The communitarian thrust behind the restriction on labour and family immigration is also evident in the exclusion/inadmissibility grounds that serve to ensure that the interest of the nation is preserved. Some of these grounds are related to security, but many stem from the national community's wish, as represented by the Congress, to keep undesirable non-citizens out (see the inadmissibility grounds listed above). Boswell captures the basic rationale behind these exclusion grounds well:

The grounds for exclusion are based upon a strong concern that certain people should not be allowed to come to this country. ... The quasi-criminal or moral grounds are designed to prevent entry of persons whose behaviour is contrary to the norms of society as established by Congress when it passed the Act. ... The grounds for exclusion should be viewed as an expression by this country of which it does not like, abhors, or otherwise feels should not be allowed to become a part of this society. It is, by omission, an expression of the kind of people who might make up a perfect society. When studying these substantive grounds, it must be understood that from a legal standpoint, every nation has been recognised to have the absolute right to allow only those people whom it wishes to allow to enter the country. It should also be remembered that these grounds for exclusion do not apply to U.S. citizens. (Boswell 1992: 24–26)

Congressional powers in this area are almost absolute, and normal constitutional limitations do not apply, courtesy of the plenary power doctrine (Aleinikoff 1998: 446). The Court held, in *Kleindienst v. Mandel*, that although a first amendment right⁸⁹ was involved, the government needed only to provide 'a facially legitimate and bona fide reason' for its desire to exclude the non-citizen (*Kleindienst v. Mandel* (1972): 770). The political branches' discretionary power, as the representatives of the sovereign nation, reaches its zenith in the area of admission and expulsion, and 'Congress regularly makes rules that would be unacceptable if applied to Citizens' in these cases (*Mathew v. Diaz et al.* (1976): 79–80).

The U.S. also controls access to its shores via its visa regime and interdiction. These policies constitute part of the communitarian-based admissions control regime. The visa regime simply constitutes an extra control mechanism for ensuring that the inadmissibility criteria are enforced. The visa regime hence rests on the same communitarian rationale as the inadmissibility criteria. The fact that the visa regime constitutes an element of the communitarian-based right to exclude non-citizens is further underscored by the fact that the

⁸⁹ The right to freedom of speech/conscience.

plenary power doctrine prevents attempts to make visa decisions appealable (Nafziger 1991: 11, 30–35). The general purpose of interdiction is also to ensure that unwanted immigrants do not reach the U.S. The more particular rationale for interdictions is clear from the Coast Guard's official explanation of the policy:

Interdicting migrants at sea means that they can be quickly returned to their countries of origin without the costly processes required if they successfully entered the U.S. The Coast Guard supports the national Policy to promote safe, legal, and orderly migration. Illegal immigrants can costs [sic] U.S. taxpayers billions of dollars each year in social services. In addition to relieving this financial burden on our citizens, the Coast Guard's efforts help to support the use of legal migration system. (Guard 2006)

The fact that interdiction is pursued in the interest of the nation is furthermore reflected in the development of this policy. All non-citizens were originally screened for refugee status at sea or at Guantanamo Bay, but this system came under pressure in 1992, as tens of thousands Haitians took to the sea in a desperate effort to reach the U.S. This increased number of boat refugees left the U.S. with a choice: it could either screen these people in the U.S., or they could be repatriated via interdiction without screening. The U.S. opted for the latter choice. The fact that the U.S. made the opposite choice when it was Cubans in the water, although the number of Cuban migrants was substantially larger, further underscores the fact that this policy is based on the perceived national interest (Palmer 1997: 1573–1579).⁹⁰

In sum, labour immigrants and immigrants seeking family reunification do not have a universal right to admission. Their right to entry is subordinated to the national interest, and pre-entry policies in terms of visas and interdictions ensure that no unwanted immigrants reach the shores of the U.S.

The U.S. has a long-standing tradition of providing refugees with political asylum, and this tradition remains unbroken to this day. The underlying normative rationale has, however, changed fairly recently. The refugee admissions program that preceded the 1980 Refugee Act only granted asylum to refugees fleeing communist regimes and regimes in the Middle East. This meant that geopolitical factors trumped refugees' individual levels of need under the pre-1980 regime (Legomsky 1997: 760; Vialet 2002: 13, 23–26; Hull 1985: 116–122). This

⁹⁰ The U.S. brokered a deal with Cuba under which Cubans could apply for refugee status at the U.S. Interest Section in Havana. The U.S. further allows a relatively large number of Cubans to settle in the U.S. every year (Palmer 1997: 1578).

system changed with the 1980 Refugee Act. This act was designed to comply with, and was based on, the 1951 Geneva Convention on Refugees and its 1967 Protocol (henceforth the Geneva Convention).

The Refugee Act emphasises that the individual merits of claims, and not geographic or ideological grounds, should be determinative, although connection to the U.S. and geopolitical concerns still play a role in the admission of overseas refugees (Bureau of Population 2002: 5; Barnett 2002: 1; Hull 1985: 121; Gibney 2004: 152, 157–158).⁹¹ Traces of the old refugee policy can thus still be found in the new act. The 1980 Act is, nevertheless, a very significant step towards a refugee regime based on international humanitarian law principles, as laid down in the Geneva Convention. This is most clearly evident in the handling of asylum claims made in the U.S., where there is no foreign policy bias.

To further unravel the normative rationale behind the 1980 Act, it is necessary to look at the normative foundation of the Geneva Convention, on which the 1980 Act is based. The Geneva Convention does not enumerate specific injuries that qualify as persecution. It is instead intended to work as a broad framework that protects basic universal rights that are fundamental to human dignity, such as the right to minimal economic resources and freedom of expression/conscience, for example. The right to human dignity or the individual right to autonomy is protected by providing asylum to persons whose life and liberty are threatened on the arbitrary grounds of race, religion, nationality membership in a particular social group, or political opinion (Anker 1999: 171–266).

The concept of human dignity is ultimately based on the cosmopolitan rationale, and traces its origins to cosmopolitan thought in general, and in particular to Kant's notion that no person

⁹¹ The first selection criterion is based on refugees' individual need for resettlement. This leads to a greater diversification of resettled refugees compared to the pre-1980 regime. However, the President still decides which refugees are of special humanitarian concern to the United States. Connection to the U.S. and its foreign policy hence still counts. This could, of course, be taken to mean that the U.S. simply chooses to pay special attention to individuals who become refugees due to its foreign policy. However, this provision is a remnant of the pre-1980 policy, and it somewhat undermines the idea that the individual needs of the refugee should be solely determinative by including general foreign policy goals in the selection process (INA 207 (a) (3); Hull 1985: 119–122; Bureau of Population 2002: 5).

In conclusion, the 1980 Act is less focused on the national interest and more on universal humanitarian concerns, but it still retains a clear element of the former. This means that the shift towards a neutral/impartial refugee regime, where individual need trumps any connection to the U.S., is clear but incomplete (Hull 1985: 119–122).

should be reduced to a means so as to deprive them of their ability to live as an autonomous person (Dicke 2002; Starck 2002: 179–187). As one international jurist puts it:

What is meant by “respect” for “intrinsic worth” or “inherent dignity” of a person? ... One general answer to our question is suggested by the Kantian injunction to treat every human being as an end, not as a means. ... The first [implication of the injunction] is that high priority should be accorded in political, social and legal arrangements to individual choices in such matters as beliefs, way of life, attitudes and the conduct of public affairs. (Schatter 1983: 849)

It must, of course, be remembered that only *non-refoulement* is a statutory right in the U.S. It is, however, of note, and indicative of the change away from the notion of plenary power in refugee law, that the federal government used to have a discretionary right to expel *bona fide* refugees, but non-citizens currently have a statutory right to remain if deportation is more likely than not to put a refugee’s life and liberty at risk due to any of the enumerated grounds in the 1980 Act (*Immigration and Naturalization Service v. Cardoza-Fonseca* (1987): 429). This means that political refugees who reach the shores of the U.S. are afforded the right to protection on the cosmopolitan rationale.

The Civil Rights Realm

Non-citizens enjoy the right to freedom of speech and conscience. The Court has explicitly established that permanent residents enjoy this right under the first amendment (*Bridges v. California* (1941); *Bridges v. Wixon* (1945)). The Court has not explicitly ruled on the legal standing of other groups of non-citizens in this regard. Legal commentators, including the American Law Institute, however, assume that the right to freedom of speech and conscience extends to all non-citizens (Aleinikoff 2000: 150; Ciment 2001: 514–515; Heller 2001: 204; Henkin 1985: 16; Needelman 1997: 361; Institute 1987: 244; Rubio-Marín 2000: 131, 134). This assumption is bolstered by the fact that non-citizens in general enjoy the protection of the Bill of Rights (Bowie 1954: 675; Institute 1987: 243–244, 248; Henkin 1996: 284–285, 294).

Non-citizens also have, in general, the right to acquire and hold property. This right is guaranteed on a basic level by the fifth amendment, which protects all persons from being deprived of life, liberty and property and stipulates that nor shall private property be taken for public use, without just compensation (*Ciment* 2001: 515; *Russian Volunteer Fleet v. United States* (1931); *Carliner* 1990: 191–197). (The fourteenth amendment contains a very similar clause in relation to states.) Limited restrictions do, however, exist on non-citizens’ rights to

invest in nuclear plants, broadcasting, oil or mineral fields, defence contracts, merchant shipping, air commerce and banking (Carliner 1990: 191–197; Ciment 2001: 515; *Yick Wo v. Hopkins* (1886); *Institute* 1987: 255).⁹²

The right to freely choose one's profession is a more complicated issue. Non-citizens who are admitted to the U.S. as immigrants do, in general, have access to the labour market, including public, private and self-employment, and enjoy some protection from invidious discrimination in this sphere. This right does not apply to undocumented residents and asylum seekers (Aleinikoff 2002a: 71–74, 90). Non-citizens who are legally in the U.S. are, furthermore, protected against discrimination from the states in this area under the fourteenth amendment's due process clause (*Torao Takahashi v. Fish and Game Commission et al.* (1948); *Traux v. Raich* (1915); *Grosh* 1974: 1088–1091).

There are, however, exceptions to non-citizens' right to seek state employment under the so-called political-function exception. This exception gives the states a right to bar non-citizens from working in professions that are central to states' political formation, despite the fourteenth amendment's due process and equal protection clauses (Hull 1985: 41–46; Koh 1985: 60–87; *Sugerman v. Dougall* (1973); *In re Griffiths* (1973); *Foley v. Connelie* (1978); *Ambach v. Norwick et al.* (1979); *Cabell et al. v. Chavez-Salido* (1982); *Bernal v. Fainter et al.* (1984)). Non-citizens' protection from discrimination by the federal government under the fifth amendment's due process clause is, in general, weaker than the protection they enjoy under the fourteenth amendment, see below (*Hampton v. Mow Sun Wong et al.* (1976): 46–48; Hull 1985). The federal government has, moreover, taken advantage of its greater leeway to discriminate against non-citizens, and excludes non-citizens from most federal jobs (Ciment 2001: 511–512; Carliner 1990: 187–188; Henkin 1996: 296; Rubio-Marin 2000: 3).⁹³ Private employers, on the other hand, are not allowed to discriminate on the grounds of

⁹² The federal government has the right to regulate non-citizens' right to acquire land but has not exercised this right. It should, furthermore, be noted that there are some state restrictions on owning land (and liquor licenses). The constitutionality of the state's restrictions are, however, unclear due to the development of non-citizens' protection under the fourteenth amendment (Carliner 1990: 191–197; Ciment 2001: 515; *Institute* 1987: 247, 255).

⁹³ The Court ruled, concerning federal employment, in *Hampton v. Mow Sun Wong*, that the Civil Service Commission could not bar non-citizens from federal jobs, but it assumed that the federal government had that right (*Hampton v. Mow Sun Wong et al.* (1976)). President Ford issued an Executive Order, in the national interest, that excluded non-citizens from many federal jobs, after the *Hampton v. Mow Sun Wong* case (Carliner 1990: 187–188). The lower courts also upheld this restriction once it was promulgated by the President (Aleinikoff 2002b: 153). It should be noted that the constitutionality of this order remains unclear. The government is assumed to have this right in general but specific laws could still be unconstitutional if they are too broad and do not correspond to a legitimate state interest, for example.

alienage,⁹⁴ and non-citizens are protected from racial, sexual and religious discrimination by private employers (Aleinikoff 2002a: 74; Hull 1985; INA 274B (a)).

Non-citizens enjoy the right to protection from (arbitrary) intervention in person and property. The fourth amendment protects non-citizens' right to be secure in their 'persons, houses, papers and effects and against unreasonable searches and seizures', within the territory of the U.S. The Constitution, and federal statute,⁹⁵ also provides non-citizens with the right to *habeas corpus* – a legal writ ordering an official to bring a detained person before a court to show the reasons for the detention (Bosniak 1994: 1060–1061, 1100–1101; Heller 2001: 203–204; Ciment 2001: 514–515; Henkin 1985: 16; Almeida-Sanchez v. United States (1973); Rubio-Marin 2000: 155; Rasul et al.v. Bush et al.(2004); United States v. Verdugo-Urquidez (1990); U.S. Constitution art. 1 sec. 9 cl. 2; 28 U.S.C. 2241 (a), (c) (3), see also below and the fifth amendment for procedural protection).

Non-citizens have the right to equality before the law (protection from invidious discrimination). They explicitly enjoy this right vis-à-vis states under the fourteenth amendment (Henkin 1985: 16; Yick Wo v. Hopkins (1886); Institute 1987: 246; Henkin 1996: 294). The U.S. Constitution does not, however, contain an equal protection before the law clause, as such, in regards to the federal government. The fifth amendment, however, includes a due process of law clause, which has come to be read as largely equivalent to, or as encompassing, both the fourteenth amendment's equal protection and due process of law clauses. This broad or general protection vis-à-vis the federal government constitutes part of the development of substantive due process protection, whereby the Court deploys the due process clause in the fifth amendment to protect individuals' rights in general, and to ensure the overall fairness of laws.

Substantive due process, therefore, does not refer to specific enumerated rights or procedural rights, but is a concept that ensures fair play and individual rights, in general (Dworkin 1996: 72–73; Ogus 1990: 128–129, 147; Moore v. City of East Cleveland (1977): 501–502). This protection can take the form of striking down statutes that are incompatible with individual freedom in general, or statutes that infringe on individuals' freedom by discriminating against

⁹⁴ The exception being if the company has less than three employees or if two applicants are equally qualified; in the latter case alienage can be used as a tiebreaker (Hull 1985; Aleinikoff 2002a: 74; INA 274B (a)).

⁹⁵ A recent change to the federal law, however, means that so-called *illegal combatants* who are non-citizen are excluded from the right to *habeas corpus* under federal law (Military Commissions Act sec. 7).

a certain group of individuals (*Hampton v. Mow*; *Sun Wong et al.* (1976): 100–101). This means that a constitutional right to equal protection under the law exists in the U.S. *vis-à-vis* the federal government; non-citizens are, on a general level, included in this right under the fifth amendment (Henkin 1985: 16; *Hampton v. Mow Sun Wong et al.* (1976): 100–103; Institute 1987: 246). Non-citizens' right to protection against invidious discrimination is, however, limited *vis-à-vis* the federal government (and to some extent against the states, see the political-function exception).

This is a consequence of the fact that substantive due process does not bar the government from making distinctions between different individuals when legislating; it only demands that all persons similarly situated shall be treated equally.⁹⁶ This is the snag: non-citizens do not enjoy substantive due process protection when the issue of alienage means that they are differently placed in relation to citizens; i.e. alienage is often considered a valid ground for discrimination, and is hence not seen as an invidious discrimination ground. That is, non-citizens often are seen as differently placed than citizens, and non-citizens only enjoy a very basic substantive due process protection under the fifth amendment – although it should be noted that legal arguments in this area tend to assume equality and argue for valid exceptions (*Hampton v. Mow Sun Wong et al.* (1976); Institute 1987: 246; Henkin 1996: 294).

Non-citizens do, nevertheless, have the right to a fair trial and the right to seek legal redress (open and fair access to courts and procedural due process rights) under the fifth and sixth amendments. The enumerated rights of these amendments guarantee all persons procedural due process, or the right to a fair trial. Non-citizens also have the right to sue in federal and state courts (*Wong Wing et al. v. United States* (1896); *Ex parte Kumezo Kawato* (1942); see also *Yick Wo*; Bosniak 1994: 1060–1061, 1100–1117; Heller 2001: 203–204; Ciment 2001: 514–515; Schuck 1998a: 269–270; Carliner 1990: 197; Institute 1987: 232, 258; *Dumbauld* 1957: 92; 28 U.S.C. 1343; 42 U.S.C. 1983).

Non-citizens do not have the right to secure residency and can be deported on several grounds. These grounds include being inadmissible upon entering, breaking the conditions for

⁹⁶ The Court also deploys different standards in these cases. The Court requires that the government demonstrate a compelling necessity, and that the law be narrowly tailored if the law infringes on fundamental freedoms or if the classification is suspect, e.g. based on race or gender. However, the government only needs to demonstrate that a classification bears a fair relationship to a legitimate public interest if the interest involved is not fundamental or the classification not suspect (*Plyler v. Doe* (1982): 216–218).

admittance, committing a crime of moral turpitude, or other crimes subsequent to entry, including stalking, child abuse, child neglect and domestic violence; becoming a drug addict or seriously adversely affecting U.S. foreign policy; some additional security related provisos are also grounds for deportation (INA 237). The procedural protection is, moreover, weak in this area as deportation (and detention for the purpose of deportation) is not a criminal proceeding and is not considered penal in nature (Boswell 1992: 43–44; Schuck 1998b: 34–39; *Carlson v. Landon* (1952); *Galvan v. Press* (1954)).

This means, first of all, that actions that could not constitutionally be criminalised can, and are, used as grounds for deportation (Henkin 1985: 12); secondly it means that the basic legal protections that apply in criminal cases (generally speaking, the right to procedural due process or a fair trial) do not apply in deportation cases. This includes the protection from *ex post facto* laws (retroactive laws) and the right to counsel. Grounds for deportation also lack statutes of limitations (Boswell 1992: 43–44, 70; *Galvan v. Press* (1954); Aleinikoff 1998: 718–720, 832; Legomsky 1997: 460–461; Schuck 1998b: 31–35; Weissbrodt 1992: 66, 170–171; INA 240 (b) (4) (A)).⁹⁷ Non-citizens are not left totally without legal protection in deportation cases and the Court has established that non-citizens are entitled to a fair hearing, to prove mistaken identity for example (*Kwong Hai Chew v. Colding et al.* (1953): 596–598; *Landon v. Plasencia* (1982): 33–34; *Institute* 1987: 256–257).

The Rationale(s) Behind the Civil Rights Realm

The aliens' rights doctrine is based on civil rights and the notion that non-citizens' individual rights trump national sovereignty when basic individual rights to liberty are at stake. The notion that basic individual liberties are universal and sacrosanct is, in general, connected to the notion that individuals are endowed with certain rights that the government has not created, nor has the right to infringe upon. The core notion of U.S. constitutionalism that the aliens' rights doctrine draws upon is that no individual is *rechtlos* or lacks legal standing, just because they are not members of the community. The very notion that some individuals, albeit non-members, should be considered *rechtlos* sits very uncomfortably with the notion of the universal individual right to freedom that is so central to the U.S. Constitution. As quoted above, the Court held that 'the very idea that one man may be compelled to hold his life, or the means of living, or any other material right essential to the enjoyment of life, at the mere

⁹⁷ Three deportation grounds – public charge, alien smuggling and crimes of moral turpitude – have statutes of limitations (INA 237).

will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself' (*Yick Wo v. Hopkins* (1886): 370).

Non-citizens' right to be recognised before the law is protected both by basic constitutional law and the International Covenant on Civil and Political Rights, which applies in the U.S. since 1992. There is, moreover, a general presumption of universal equality based on equal personhood in U.S. constitutional law, and this assumption is particularly strong in the civil rights realm, where the aliens' rights doctrine and its cosmopolitan rationale is also most prevalent (Neuman 1995: 1442–1443; *Plyler v. Doe* (1982); *Wong Wing et al. v. United States* (1896); Aleinikoff 2002b: 151–152; Aleinikoff 2003: 114–115; Henkin 1996: 294). More specifically, it can be said that the protection of basic *inalienable* individual liberties is centred on the Bill of Rights (the first ten amendments), as discussed previously, and non-citizens enjoy the protection of the Bill of Rights in general (Bowie 1954: 675; Institute 1987: 243–244, 248; Henkin 1996: 284–285, 294).

It can be said more specifically that the Court has deployed the universal right to individual self-determination as the normative foundation for the right to free speech and conscience, though the argument based on this right's importance in terms of the democratic process also figures in this context (Smith 1985: 108–113; Cole 2003: 218; *First National Bank of Boston v. Bellotti* (1978): 783):

The makers of our Constitution undertook to secure conditions favourable to the pursuit of happiness. They recognised the significance of man's spiritual nature, of his feelings and of his intellect. ... These are the rights that appellant [sic] is asserting in the case before us today. He is asserting the right to read or observe what he pleases – the right to satisfy his intellect and emotional needs in the privacy of his home. ... If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. ... Nor is it relevant that the obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. (*Stanley v. Georgia* (1969): 564–566)

The first amendment protects this inalienable right in blanket terms: Congress simply 'shall make no law' prohibiting the freedom of speech and free exercise of religion (U.S.

Constitution amend. 1).⁹⁸ When it comes to non-citizens' legal standing in this regard, the Court has explicitly established that they are included in this right. As mentioned earlier, this ruling pertained to permanent residents, but it is also assumed to apply to all non-citizens, and the Court's argument did not rely on a distinction between different groups of non-citizens. The Court did, instead, invoke the universal language of the aliens' rights doctrine:

But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority. Indeed, this Court has previously and expressly recognized that Harry Bridges, the alien, possesses the right to free speech and free press and that the Constitution will defend him in the exercise of that right. (*Bridges v. Wixon* (1945): 161 concurring opinion)⁹⁹

Non-citizens' right to acquire and hold property also constitutes part of their inalienable rights as persons, and this right is central to the cosmopolitan thrust of the aliens' rights doctrine. As quoted above the Court stated in *Yick Wo* that 'all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts' (*Yick Wo v. Hopkins* (1886): 367–368). This rationale was reiterated in the second key aliens' rights doctrine case: "... even aliens shall not be held to answer for a capital or other infamous crime, unless presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law." (*Wong Wing et al. v. United States* (1896): 238; for the right to sue, see *ex parte Kumezo Kawato and Yick Wo*)

⁹⁸ It should be noted that the Court has always accepted exceptions to this ban although the wording in itself, strictly speaking, seems to preclude any exceptions (Smith 1985: 92–119).

⁹⁹ It is noteworthy that the word persons is used even though the first amendment talks about the people. This points to the fact that the Court does not make a distinction between the personal rights of the fifth, sixth and fourteenth amendments on the one hand and the term people in the first and fourth amendments on the other, but construes all these rights as universal, and as part of the constitutional protection that all non-citizens enjoy. It is also noteworthy that freedom of speech has been upheld *vis-à-vis* states under the fourteenth amendment's due process clause as an intrinsic part of basic individual freedom (Stimson 1953: 219; *Schneider v. State of New Jersey* (1939)). The fourteenth amendment's due process and equality before the law clauses are seen as guaranteeing the Bill of Rights in all states, and it is thus plausible to argue, as at least one scholar does, that freedom of speech, in the absence of the first amendment, would be protected by the fifth amendment's due process clause as a basic liberty (Institute 1987: 238, 255; Dworkin 1996: 73; Aleinikoff 2002b: 42; Fiske v. State of Kansas (1927)).

Moreover, the right to sue in court is explicitly held by all persons under current statutory law (28 U.S.C. 1343; 42 U.S.C. 1983). The right to acquire and hold property also includes protection from arbitrary state intervention. The Court invoked the same universal language of individual rights when establishing that non-citizens' property is secure from confiscation by the state under the fifth amendment:

The Fifth Amendment gives to each owner of property his individual right. The constitutional right of owner A to compensation when his property is taken is irrespective of what may be done somewhere else with the property of owner B. As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subjected to confiscation here because the property of our citizens may be confiscated in the alien's country. (*Russian Volunteer Fleet v. United States* (1931): 491–492)

It is clear here that it is not the nationality of the owner but the individual right to property that matters. The fact that other nations may not heed individuals' inalienable right to their private property does not, as the Court states, give the government of the U.S. the right to infringe on this right; to do so would be unconstitutional.

Non-citizens' right to freely choose their own profession is a more complicated issue. The Court has held that the right to freely choose one's profession is a crucial part of non-citizens' basic individual right to self-determination and that the fourteenth amendment protects non-citizens from discrimination in this context:

It requires no argument to show that the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. (*Traux v. Raich*: 41 (1915), the Court later upheld this ruling – *In re Griffiths* (1973))¹⁰⁰

The above quote obviously contains the universal language of the aliens' right doctrine. The Court has nevertheless carved out an exception to this fourteenth amendment protection that allows states to exclude non-citizens from jobs that are related to a state's political functions:

¹⁰⁰ It should be noted the Court in this latter case added arguments that were based on partial membership, thus leaving the normative rationale somewhat obscure.

The rationale behind the political-function exception is that within broad boundaries a State may establish its own form of government and limit the right to govern to those who are fully-fledged members of the political community. Some public positions are so closely bound up with the formulation and implementation of self-government that the State is permitted to exclude from those positions persons outside the political community. "The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community." (Bernal v. Fainter et al. (1984): 221, the Court is here approvingly quoting Cabello v. Chavez-Salido (1982))

The states are hence given a right to infringe on non-citizens' right to equal protection *qua* persons and to ban them from certain professions that are linked to communal formation; this is a right that private employers, in general, do not have. The basis for this exception is clear, and it is based on the states' right to political self-definition. The cosmopolitan rationale of equality, based on the equal rights of individuals, hence runs up against the communities' right to political formation. The result in this instance is that non-citizens are given a general right to be treated with equal concern and to freely choose their profession, but an exception is made in cases where the states can show that a job goes to the heart of communal formation. The political-function *exception* is thus based on the notion that the right to political formation can override non-citizens' right to equal protection of the laws, but the right to political formation, *vis-à-vis* non-citizens in general is reserved for the federal/national government.

It will be analysed below how the federal government has much more latitude in terms of denying non-citizens equal protection of the laws, *qua* individuals, due to its role as the national government. It suffices to say in this context that the federal government's right to and actual restriction of non-citizens' access to federal jobs is much greater than that of the states, and that this right is based on the same communitarian rationale as the political-function exception. It is also plain, by a reverse analogy, why private employers do not have the right to discriminate against non-citizens. Private employers can simply not make the appeal to communal formation, and hence the presumption of equality prevails in their case.

Non-citizens enjoy the right to be secure in person and property. The fourth amendment provides non-citizens with protection from unreasonable searches and seizures, as part of their universal individual right to self-determination:

It is not enough to argue, as the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. ... 'These (Fourth Amendment rights), I protest, are not mere second-class rights but belong in the catalog of indispensable [sic] freedoms. (Almeida-Sanchez v. United States (1973): 273–274, the Court is here approvingly quoting Justice Jackson)

This is a clear example of where the government's discretionary right to control immigration is limited by the universal individual and inalienable rights secured by the Bill of Rights.¹⁰¹

That the cosmopolitan rationale underlies this right is underscored by the fact that it protects non-citizens who are illegally in the U.S. (Bosniak 1994: 1060–1061, 1100–1101; Heller 2001: 203–204; Ciment 2001: 514–515; Henkin 1985: 16; Rubio-Marín 2000: 155). Non-citizens' right to *habeas corpus* has been upheld as a universal individual right to liberty that the government has no right to infringe upon. The Court has held that non-citizens have an individual right to *habeas corpus* in immigration-related detentions. The Court interpreted (in line with the tradition of interpreting statutes as constitutional) the statute in question as not allowing indefinite detention of non-citizens who could not be deported, noting that:

A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person ... of ... liberty ... without due process of law" ... But [the Court notes certain constitutional rights are not available to non-citizens outside the U.S.' territory] once an alien enters the country, the legal circumstances changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent. (Zadvydas v. Davis (2001): 690–693, the Court is here quoting the fifth amendment)

¹⁰¹ Non-citizens' fourth amendment protection was put in question by the ruling in the Verdugo-Urquidez case. This case did, however, not undermine non-citizens' right to fourth amendment protection in the U.S. It is, furthermore, unclear if non-citizens are not protected outside the U.S. or if searches outside the U.S. simply are not unreasonable in the absence of a warrant, due to the practical difficulties of obtaining a warrant abroad. Justices Kennedy and Stevens, in their two separate concurring opinions, imply that full constitutional protection does not apply abroad. They also, however, rely on the argument that it is not practically feasible to obtain a warrant abroad and that a search without a warrant abroad therefore is not unreasonable; in other words, the fourth amendment applies, but is not violated. This means that it is unclear if a majority supports the idea that the fourth amendment does not protect non-citizens abroad; nor is it clear that citizens are protected abroad (See Blackmun's dissent and Kennedy's concurring opinion for the latter point.) This means that all that can be said at this point is that non-citizens *abroad*, who have no established substantial connections with the U.S., do not enjoy the full protection of the fourth amendment (Henkin 1996: 307; Rubio-Marín 2000: 155; Heller 2001: 203–204; Scaperlanda 1991: 243). It also remains unclear on what grounds non-citizens are excluded, as two of the five justices that supported the decision explicitly rely on the argument that the fourth amendment has not been violated as it is not practically feasible to obtain warrants for searches abroad. This means that the restrictions on non-citizens' fourth amendment protection could rest on functional grounds as well as membership grounds.

The Court explicitly refers to *Yick Wo* in this case, and establishes that the aliens' rights doctrine limits even the government's right to control immigration, as certain basic constitutional rights to individual liberty are universal and apply to all persons. The Court here explicitly holds that in the limited case of the right to be secure in one's person, no person is *rechthlos* or illegal. The Court also recently – in relation to the so-called illegal combatants held at Guantanamo Bay – outlined the universal nature of *habeas corpus* and stated that the protection it provided applied to:

'all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States' (*Rasul et al. v. Bush et al.* (2004): 2692, the Court is here quoting Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.)

The Court also stated that the scope of *habeas corpus* is universal as it is the exercise of power, not membership that yields the right to *habeas corpus*:

[...] the writ of habeas corpus does not act on the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody (*Rasul et al. v. Bush et al.* (2004): 2695, the Court is here approvingly quoting its ruling in *Braden v. 30th Judicial Circuit Court.*)¹⁰²

Non-citizens have a general right to equality before the law. This right, however, differs substantially between the federal and the state levels. That is, non-citizens enjoy this right under the fourteenth amendment – the political-function exception notwithstanding – but non-citizens only enjoy this right to a limited degree under the fifth amendment (Henkin 1985: 17). There is, of course, a textual difference between the fourteenth and the fifth amendments. Both amendments stipulate that no person should be deprived of life, liberty, or property without due process of law, but only the fourteenth adds the somewhat more specific statement 'nor deny any person within its jurisdiction the equal protection of the laws' (U.S. Constitution amend. 5, 14).

¹⁰² It should be noted that the Court in this case, withstanding all its emphasis on the universal nature of a right to *habeas corpus*, did not rule on the constitutionality of depriving illegal combatants of the said right. The Court instead ruled on the narrower grounds of non-citizen illegal combatants' statutory federal right to *habeas corpus* and ultimately based its decision on that Congress had shown no intent to make any distinction between non-citizens' and citizens' statutory right to *habeas corpus*. Congress has subsequently shown such intent (Military Commissions Act sec. 7). It remains to be seen if this Act is constitutional or if the fifth amendment's due process clause encompasses a constitutional right to *habeas corpus*. As the law stands today, however, future non-citizen illegal combatants lack a statutory right to *habeas corpus*.

Citizens, however, enjoy virtually the same substantial due process protection under the two different amendments. A law that banned black people from federal jobs would undoubtedly be struck down as unconstitutional under the fifth amendment's due process clause, regardless of the fact that it does not contain an equal protection of the law clause. Indeed, the Court has held that racial segregation was unconstitutional in the District of Columbia – albeit the fourteenth amendment does not apply there, since it is not a state – under the fifth amendment's due process clause (Rosberg 1977b: 288–289; Dworkin 1996: 73; Needelman 1997: 356; Institute 1987: 238; Henkin 1996: 279).

The difference between non-citizens' due process protection *vis-à-vis* states and the federal government instead stems from the federal government's prerogative to regulate immigration in the collective interest of the nation. This makes it a legitimate and normal part of the federal government's job to make distinctions on the grounds of alienage. The right to regulate immigration, in turn, stems from the federal government's right to communal formation, which ultimately underlies the federal government's right to discriminate against non-citizens:

The federal government can constitutionally adopt alienage classifications that a state could not, because it can offer justifications based on the exercise of the broad power of national self-definition. (Motomura 1994: 209)

The clearest example of this is the difference between *Mathews v. Diaz* and *Graham v. Richardson*. In these cases, the Court has ruled that states cannot discriminate against non-citizens in administering welfare policies, whereas the federal government can. The explanation for this difference is clear:

Insofar as state welfare policy is concerned there is little, if any, basis, for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interest in administering its welfare program is concerned. Thus, a division by a State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business. (*Mathew v. Diaz et al.* (1976): 85)

The point here is that the difference between the fifth and the fourteenth amendments' due process clauses, in relation to non-citizens, does not depend on their textual disparity; nor are the readings of the two amendments at odds with one another. The difference simply stems

from the fact that the federal government defines and protects the national community and the states do not, by and large, partake in this process of national formation. The Court made this point succinctly in one of the key plenary power doctrine cases: “For local interests the several States of the Union exist, but for national purposes, embracing our relationship with foreign nations, we are but one people, one nation, one power.” (*Chae Chan Ping v. U.S.*: 606 (1889))

This, in turn, means that the full protection of the fifth amendment is not provided to non-citizens, since the plenary power doctrine gives the federal government the right to take decisions pertaining to non-citizens that would be unconstitutional if applied to citizens; the plenary power doctrine weakens non-citizens’ constitutional protection to equal protection of the laws, as it were. That the communitarian rationale underlies this difference in substantive due process protection is underscored by the fact that the states’ limited right to discriminate against non-citizens is tied to their limited role in political formation. The Court has made it very clear that the states’ right to discriminate against non-citizens is based on the communitarian rationale:

It would be inappropriate, however, to require every statutory exclusion of aliens to clear the high hurdle of “strict scrutiny” because to do so would “obliterate all the distinctions between citizens and aliens, and thus depreciate the historic value of citizenship.” The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others. The individual, at that point, belongs to the polity and is entitled to participate in the process of democratic decisionmaking. Accordingly, we have recognized ‘a State’s historical power to exclude aliens from participation in its democratic political institutions’, as part of the sovereign’s obligation ‘to preserve the basic conception of a political community’. (*Foley v. Connelie*: 295–296 (1978), the Court is here approvingly quoting first *Nyquist v. Mauclet* and then *Sugerman v. Dougall*)

The fact that non-citizens enjoy substantive due process protection only to a limited extent means that non-citizens are not as equal as citizens are before the law. Or rather, that alienage is seen as a legitimate ground for treating individuals differently in many cases. However, the fact that non-citizens are recognised as persons before the law means that there are limits to what they can be deprived of on the basis of alienage; and non-citizens do enjoy basic equal protection under the fifth amendment (*Hampton v. Mow Sun Wong et al.* (1976): 1448–1449;

Neuman 1995). Exactly where this line goes and where the limited substantive due process protection kicks in is not clear, but for a stated limit see the social rights realm.

It must not be forgotten, however, that the aliens' rights doctrine has secured procedural due process rights (the right to a fair trial) and the right to seek legal redress for non-citizens. That is, non-citizens have the right to defend themselves as equally entitled individuals in the courts. As the Court put it, 'even aliens shall not be held to answer for a capital or other infamous crime, unless presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law' (Wong Wing et al.v. United States (1896): 238). Non-citizens' right to a fair trial, and its universal rationale, was also recently reiterated by the Court in a case concerning the illegal combatants held captive at Guantanamo Bay. The Court held, on statutory rather than constitutional grounds, that:

We have assumed, moreover, the truth of the message implicit in that the charges - - viz., that Hamdan is a dangerous individual whose beliefs, if acted upon would cause great harm and even death to innocent civilians, and who would [sic] act upon those beliefs if given an opportunity. ... But in undertaking to try Hamden and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction. (Hamdan v. Rumsfeld (2006): 2798)¹⁰³

The right to deport non-citizens, on the other hand, falls squarely within the boundaries of the plenary power doctrine and is the prerogative of the political branches. Non-citizens hence do not hold a constitutional right to be secure in their abode. The reason behind the lack of constitutional protection in this area stems from the fact that deportation proceedings are not considered criminal proceedings and they are not seen as penal in nature. The rationale behind this is that the U.S., as a sovereign nation, has the right to control whom it harbours, as part of its right to communal formation (Schuck 1998b: 34–39; Boswell 1992:43–44; Carlson v. Landon (1952); Galvan v. Press (1954)). The Court has explained the nature of deportation grounds in the following terms:

That is what it [Congress] has done here. It has established classes of persons who in its judgment constitute an eligible list for deportation, of whom the Secretary is directed to those he finds to be undesirable residents of this country. ... Our history has created a common understanding of the

¹⁰³ It should be noted that this case refers to military tribunals and not civilian courts.

words 'undesirable residents' which gives them the quality of a recognized standard. (Mahler et al. v. Eby: 40 (1924))

The specific grounds for deportation that the political branches have established also reads as a list over what the national community deems to be undesirable qualities, rather than a list of criteria that aims at protecting the residents of the U.S. (Legomsky 1997: 377). The special provision for crimes involving moral turpitude (a term that refers to crimes that are intrinsically morally wrong) is especially telling in this respect. The term is fairly open-ended and is measured by 'common understandings and practices' (Weissbrodt 1992: 172). The fact that non-citizens who have not committed a crime, like drug-addicts, can be deported, further underscores the fact that the community's right to exclude non-citizens goes beyond the right to safeguard the nation (Aleinikoff 1998: 721, 726, 734).

The great level of discretion enjoyed in this area is enhanced by the fact that deportation cases are not seen as criminal but as civil proceedings, putting the standard procedural safeguards provided for criminal cases out of play. This distinction, which is of great importance, reflects the idea that deportation of non-citizens is not seen as punishment; it is simply a refusal, by a sovereign nation, to harbour individuals deemed undesirable. The Court has clearly established that the political branches have a discretionary right to exclude and deport non-citizens:

It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime; it is simply a refusal by the government to harbour persons whom it does not want. (Bugajewitz v. Adams (1913): 592)

The Political Rights Realm

The U.S.'s electorate is made up of the states' constituencies. This means, by implication, that the states have the power to decide if non-citizens are to have the right to vote in federal elections (U.S. Constitution art. 1 sec. 2; amend. 17; Raskin 1993: 1419–1420; Rubio-Marin 2000: 135). States are, however, not free to restrict suffrage as they see fit. The Constitution sets certain basic criteria. No citizen can be denied the right to vote on account of race (colour or previous condition of servitude), sex, or failure to pay poll tax or other taxes; nor can citizens over the age of eighteen be denied the right to vote on account of age (U.S. Constitution amend. 15, 19, 24, 26). The federal government has also made it a legal offence

for non-citizens to vote in federal elections, if not authorised by a state to do so (18 U.S.C. 611).

Non-citizens have historically, in some states, had the right to vote in federal elections. That said, no state has since 1926 allowed the participation of non-citizens in federal or state elections (Aleinikoff 2000: 151; Rosberg 1977a: 1099–1100; Raskin 1993: 1397).¹⁰⁴ Non-citizens are also constitutionally banned from standing for Congress and the Presidency.¹⁰⁵ Non-citizens are, moreover, excluded from many high federal offices (Hull 1985: 30; Rubio-Marín 2000: 133–134; U.S. Constitution art. 1 sec. 2 cl. 2, art. 1 sec. 3 cl. 3, art. 2 sec. 1 cl. 5).¹⁰⁶

The Rationale(s) Behind the Political Rights Realm

The states' right to bar non-citizens from voting stems from the fact that this restriction is not seen as contravening non-citizens' right to equality before the law under the fourteenth amendment. The states, as described, have very limited possibilities to discriminate on the grounds of alienage, due to the universal interpretation of the due process and equal protection clauses in the fourteenth amendment. The Court has nevertheless, as described above, carved out an exception based on the states' limited right to political formation. The political-function exception allows states to reserve for citizens jobs that lie at the heart of communal formation. The Court has deployed the same rationale to uphold the states' right to exclude non-citizens from voting (Henkin 1985: 17; Henkin 1996: 310; Institute 1987: 245, 253; Rubio-Marín 2000: 149–150; Sugerman v. Dougall (1973); Neuman 1992: 290). States thus avoid any substantial scrutiny under the fourteenth amendment in areas which pertain to their, and in this case by implication, the national, right to communal formation. This is analogous to how the federal government has a right to use alienage classifications as part of U.S.'s right to communal self-determination in spite of the fifth amendment's due process clause. The rationale behind this position is very clear:

¹⁰⁴ Non-citizens are allowed to vote in some local elections (Aleinikoff 2000: 151; Raskin 1993: 1429–1430). It is noteworthy that permanent residents count against congressional representation although they have no right to vote (Raskin 1993: 1424; Rosberg 1977: 1109).

¹⁰⁵ There is a seven years' citizenship requirement for eligibility to stand for election to the House of Representatives, and nine years for the Senate. And only natural born citizens can become Presidents (U.S. Constitution art. 1 sec. 2 cl. 2, art. 1 sec. 3 cl. 3, art. 2 sec. 1 cl. 5).

¹⁰⁶ The judiciary is an exception to this general rule (Hull 1985: 30).

It [the fact that states only need to provide some rational explanation for alienage classifications in these cases] is no more than recognition of the fact that a democratic society is ruled by its people. Thus, it is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. ... In sum, then, it represents the choice, and right, of the people to be governed by their citizen peers. ... The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved for citizens. (Foley v. Connelie (1978): 296–297)

It is clear that the notions of democracy and political rights are based on the communitarian rationale. Non-citizens' individual right to self-determination does not extend to participation in the political process that affects their lives. Political rights are hence not perceived as something all individuals hold as equally entitled autonomous persons, but something that is reserved for members of the nation/*demos*. Political rights are thus based on the notion of the existence of a distinct nation that exercises democratic power as a collective (Martin 1983: 198–200).¹⁰⁷ It is noteworthy in this respect that the amendments that curb the states' power to exclude people from the ballot explicitly refer to citizens. Furthermore, there seems to be agreement among scholars that all state constituencies are based on an exclusive concept of the people, and that non-citizens are not excluded because of practical constraints, for example (Raskin 1993: 13–97–1417; Rosberg 1977a; Rubio-Marin 2000: 132–136).¹⁰⁸

The rationale behind excluding non-citizens from political office follows the same communitarian rationale that explains non-citizens' exclusion from the ballot and jobs that pertain to communal formation (see the analysis of the limits of non-citizens' protection under the fifth amendment). This exclusion is, moreover, backed up by constitutional provisions that ban non-citizens from standing for Congress and the Presidency. The rationale behind the constitutional amendments that require that high political officials are citizens is also communitarian in nature. This will become clear when the rationale behind the right to naturalisation has been deduced. It suffices to say, at this point, that the notion behind

¹⁰⁷ It should be noted that it is unlikely that the Court would strike down a state law that re-instated non-citizens' right to vote, given the history of non-citizen suffrage. The fact that the Court has ruled that alienage is a *permissible*, and then arguably not a necessary, ground for excluding non-citizens from the ballot further strengthens this argument. Furthermore, the federal law banning non-citizens from voting explicitly does not challenge states' ability to enfranchise non-citizens (Raskin 1993: 1417–1431; Rubio-Marin 2000: 134–135; 18 U.S.C. 611).

¹⁰⁸ It was common for states to include all residing property owning white men in the ballot and to exclude women, black people and the property-less. Nowadays all non-citizens are excluded, whereas all non-criminal citizens are included. National membership has thus replaced the triplet of sex, race and property qualification (Raskin 1993: 1397–1417).

naturalisation, and thus the right to be a political representative, is centred on being accepted as a full member of an equal but exclusive national community.

The Social Rights Realm

Non-citizens used to be eligible for public benefits on more or less the same terms as citizens. This condition of general equality radically changed in 1996 with the passing of the Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). These reforms severely erode non-citizens' eligibility for public benefits. Non-citizens are currently ineligible for most of the four main public benefits programs – TANF, SSI, The Food Stamp Program and Medicaid.¹⁰⁹ These restrictions are particularly severe for those labelled as unqualified immigrants – a group that includes undocumented residents, asylum seekers and recipients of temporary protection status.¹¹⁰

That said, non-citizens were not deprived of all their social rights, and all non-citizens are still entitled to emergency medical care (save for conditions related to an organ transplant) immunisations, school meals, short-term non-cash in-kind emergency disaster relief, and services providing assistance that are necessary for the protection of life and safety, and which are provided without the individual determination of each recipient's need. The latter includes soup kitchens, crisis counselling, short-term shelters, and earthquake relief for example; nor does receiving these basic social provisions render non-citizens deportable on grounds of becoming public charges (Martin 2002: 225–226; Schlosberg 2000: 27–28, 53–54; Needelman 1997: 350–351; Abriel 1995: 1606–1607; Means 2004: Appendix J–17, 19; Fix

¹⁰⁹ The TANF program (temporary assistance to needy families) provides support to needy children and certain other family members. The SSI program (supplementary security income) provides cash payments to aged and disabled persons. The Medicaid program provides health coverage for people who receive support from TANF and SSI. The Food Stamp program provides low-income families with benefits in order to enable them to purchase food (Martin 2002: 230–231).

¹¹⁰ Non-citizens' access to these four major social programs is very limited in general, but depends largely upon whether the non-citizen is a refugee or not (refugees include individuals who are granted *non-refoulement* relief) (Kasich 1996; Martin 2002: 230–231; Forum 2003). Permanent residents are barred from SSI, TANF, the Food Stamp Program (this bar does not include children) and Medicaid. (States can, if they so choose, grant permanent residents TANF and Medicaid after five years. However, permanent residents who have worked for 40 quarters are, after five years (non-citizens can be credited with their spouse's or parents' employment record) eligible for SSI and the Food Stamp Program. Recognised refugees are eligible for SSI, Medicaid and the Food Stamp Program for seven years, and for TANF for five years. Refugees are also given refugee medical assistance for eight months if they do not qualify for Medicaid. Asylum seekers and undocumented immigrants do not qualify for any of these programs (Fix 1997: 3; Wenzel 1997: 543–545; Aleinikoff 2002: 90; Means 2004: Appendix J–12–16). Congress did backtrack to a limited extent in 1997, and this means that slightly more generous rules apply to immigrants who arrived before August 22 1996. Permanent residents who arrived prior to this date are eligible for food stamps after five years and SSI if they were already on the rolls or subsequently were disabled (Aleinikoff 2002: 90; Means 2004: Appendix J–12, 14).

2004; Wenzel 1997: 543; see 8 U.S.C. 1611). Non-citizens are also entitled to primary and secondary education (*Plyler v. Doe* (1982): 3; Morse 2003; Rubio-Marin 2000: 165; Wenzel 1997: 534, 545; Needelman 1997: 350). This means that non-citizens are entitled to the right to subsistence, the right to basic health care and the right to basic education; but that they are excluded from the right to enjoy welfare provisions on an equal basis, the right to higher education and the right to comprehensive health care.

The Rationale(s) Behind the Social Rights Realm

It is clear in general that: “The main social thrust of the immigration laws is prophylactic, aiming to exclude from entry those who might burden transfers programmes aimed at citizenship [sic].” (Heller 2001: 207) The same communitarian rationale also underlies the exclusion of non-citizens from most social rights once they are inside the U.S. (Heller 2001: 216). Congress also explicitly referred to the long tradition of ensuring that non-citizens should not make any claims on public welfare when enacting the 1996 reform. Congressman Riggs, perhaps most clearly, outlined the rationale behind this legislation (Nedzel 1997: 134; Senate 1996; Means 2004: Appendix J–1, 12; 8 U.S.C. 1601):

So that is the message that we are sending here, and we are clearly stating to our fellow citizens that we really are going to put the rights and the needs of American citizens first. (Representatives 1995: H 3412)

The communitarian rationale is further evident in the Court’s rulings in this area. The current exclusion of non-citizens from most social provisions had been given a constitutional green light as part of the discretionary power that the federal government enjoys under the plenary power doctrine. It was established in *Mathews v. Diaz* that the federal government could exclude non-citizens from the nation’s bounty under the plenary power doctrine. And ‘in the exercise of its broad power over naturalisation and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens’ (*Mathew v. Diaz et al.* (1976): 79–80). That the right to exclude non-citizens from the national bounty stems from the federal government’s right and responsibility for communal formation is underscored by the fact that the states are banned, under the fourteenth amendment, from excluding non-citizens from social provisions (Bosniak 1994; *Mathew v. Diaz et al.* (1976); Aleinikoff 2002b: 166; *Graham v. Richardson et al.* (1971)). The area of social rights thus clearly illustrates how the government’s plenary power over non-citizens extends beyond safeguarding the nation and also gives the government the general right, as the representative of a sovereign nation, to

pursue the interests of its own citizens at the expense of non-citizens (Aleinikoff 2002b: 167–168).

The 1996 reform did, however, leave non-citizens with some social rights as mentioned earlier. Non-citizens have the right to primary and secondary education and the social provisions necessary for the protection of life or safety. The Plyler ruling protects undocumented residents' right to basic education on fourteenth amendment grounds. The Court stated, in the Plyler case, that education was not a fundamental constitutional right and that undocumented residents did not constitute a suspect class given their illegal status. This meant that the state did not need to provide a compelling reason for discrimination (Plyler v. Doe (1982)).

The Court, however, argued that education was much more than a mere benefit, and the high cost to children not receiving education meant that discrimination could not be rational unless it furthered a substantial state goal; the state's aim of reserving its limited resources to lawful residents was not accepted as a substantial state goal given the cost of illiteracy, both to the directly affected children and to the society in general (Plyler v. Doe (1982): 223–225). The decision hence rests on what the dissent aptly described as a 'quasi-fundamental-rights analysis' (Plyler v. Doe (1982): 244). The Plyler case was thus a clear reminder of that: "Courts are expositors of a constitutional tradition that increasingly emphasizes not the parochial and the situational, but the universal, transcendent [sic] values of equality and fairness imminent in the due process and equal protection principles." (Schuck 1984: 58)

That said, the Court assumed that the federal government could explicitly bar undocumented residents from basic education (Plyler v. Doe (1982): 254–255). Congress, after the Plyler v. Doe ruling, as part of the 1996 welfare reforms, has in fact taken an explicit position on this issue, to the effect that the Plyler ruling should be left intact. Congress has thus explicitly stated that it wants the Court's ruling to stand (Representatives 1996: Part 1; Rubio-Marin 2000: 165). There is no comparable connection to a Court ruling when it comes to the basic social provisions granted to non-citizens. All the same, the fact that non-citizens are recognised as persons before the law, or have legal standing *qua* persons under the Constitution, means that they, even as criminals, are at the very least included in the right to emergency medical care and to protection by the police (Neuman 1995: 1448–1449).

The federal government's right to exclude non-citizens from the national bounty in the *Mathew v. Diaz* case was also conditioned upon the idea that such exclusion did not deprive non-citizens of life, liberty or property without due process of law under the fifth amendment (*Mathew v. Diaz et al. (1976)*). That is, non-citizens' right to substantive due process would kick in at some point, and the current legislation explicitly includes all non-citizens in programs that are 'necessary for protection of life and safety' (Schlosberg 2000: 27–28; Means 2004: Appendix J–19; see 8 U.S.C. 1611 (b) (1)). Congress also, in making these exceptions to the general rule of excluding non-citizens from social rights, referred to emergencies or compelling reasons, and stated that humanitarian principles prevail in limited circumstances (Gimpel 1999: 89; Reform 1997: 35). In sum, non-citizens are eligible for very few social rights, but they enjoy the right to basic education, emergency medical care and provisions necessary for life and safety simply as self-determining individuals.

The Naturalisation Rights Realm

Non-citizens must fulfil several criteria in order to be eligible for naturalisation, including demonstrating basic knowledge of English, the U.S.'s history and its political system. Non-citizens who advocate or teach communism or resistance against organised government or are affiliated with a communist or a totalitarian party are also ineligible for naturalisation. Non-citizens must also have been legal permanent residents for five years, be of good moral standing, and renounce all allegiances to other sovereigns in order to naturalise (INA 311–313, 316).

The Rationale Behind the Naturalisation Rights Realm

The federal government's right to regulate naturalisation in the interest of the nation is central in U.S. alienage jurisprudence. This right is also more direct than many of the powers that the political branches have been given under the plenary power doctrine, as the right to establish 'a uniform rule of naturalisation throughout the U.S.' is an enumerated constitutional power (U.S. Constitution art. 1 sec. 8 cl. 4). This right lies at the heart of communal formation, and the plenary power doctrine in part originated in it. Thus, the power to naturalise is linked to the very core of the notion that U.S.'s government has the right to treat non-citizens discretionarily. The Court has said as much:

The Constitution authorizes Congress 'to establish an uniform Rule of Naturalization', and we may assume that naturalization is a privilege, to be given or withheld on such conditions as

Congress sees fit. (Schneiderman v. United States (1943): 131, the Court is here quoting U.S. Constitution art. 1 sec. 8 cl. 4)

The Court has thus held that the government can set any criteria it sees fit as conditions for naturalisation (United States v. Macintosh (1931); Rosberg 1977b: 317; Rubio-Marín 2000: 174).¹¹¹ The current road to naturalisation is also cobbled with communitarian requirements. Non-citizens must, first of all, have been accepted as permanent residents, and this involves overcoming many communitarian-based hurdles for admission, as described earlier. Non-citizens must then fulfil another similar, but stricter, set of criteria in order to naturalise, as also described above.¹¹²

It is clear that acts that are legal but fall short of being deemed desirable traits render individuals ineligible for citizenship. The good character provision, which is open-ended, is but the clearest example of this, and it clearly reveals the government's intention to bar individuals who in general are seen as undesirables from citizenship (Aleinikoff 1998: 52–53). Many of the more far-reaching ideological exclusion grounds, covering teaching and being affiliated with non-desirable political ideologies, that were removed from the inadmissibility list in 1990, remain prerequisites for naturalisation (Neuman 1994: 255; compare the criteria above with the criteria for inadmissibility). It is thus clear that the right to control naturalisation rests on the communitarian rationale.¹¹³

¹¹¹ It should be said that the administrative officers who handle the naturalisation process have not been given the right to deny naturalisation on individual grounds. Hence, eligible non-citizens have, at least a *de facto*, statutory right to naturalisation. However, the federal government has a discretionary right to set the criteria that the officers are to enforce (Neuman 1994: 246, 252; Rubio-Marín 2000: 133, 174).

¹¹² Recognised refugees do not have to jump through all the hoops, since they can adjust to permanent resident status without demonstrating that they are not likely to become public charges, gain a labour certification or possess valid documentation. They must, however, comply with other criteria such as not being drug addicts, not having committed crimes of moral turpitude or carrying certain diseases (INA 209).

¹¹³ The residency requirement is, furthermore, supposed to guarantee not only familiarity with the U.S. but also to ensure that a loyalty to the nation has developed (Weissbrodt 1992: 299–316). The need to renounce any other allegiances moreover demonstrates that this attachment is seen as an exclusive one, albeit the renunciation need not lead to de-naturalisation in order to be valid (Legomsky 1997: 1053–1054).

Section III

The final part of this chapter is dedicated to outlining the U.S.'s overall normative position in terms of non-citizens' legal standing, so as to identify the normative commitments inherent in this position. This will be followed by an analysis where internal inconsistencies, in relation to the commitments inherent in the U.S.'s overall normative position, are identified in order to pinpoint what is required to achieve a normatively consistent approach to non-citizens' legal standing in the U.S.

The Normative Position of the U.S.

The notion that individuals are endowed with universal *a priori* rights as autonomous individuals is woven into the basic structure of the U.S.'s political and legal fabric. This notion is famously present in the Declaration of Independence, and it underlines much of the Constitution. Nevertheless, the development, or establishment, of federal control over immigration soon gave rise to the plenary power doctrine. The Court cobbled together this doctrine, initially by stretching several enumerated constitutional rights; but in the end the Court relied on the international inter-state law principles of absolute national sovereignty, which give the U.S. government the right to pursue its self-defined interest and put the interest of its citizens first. It is to this end that the Court provides the government with plenary power to regulate non-citizens' legal standing by largely deferring the issue to the political branches.

The political branches have also used this power to forge a legal system that mainly aims at promoting the interest of the U.S. at the expense of non-citizens' individual rights. That said, the fact that the Constitution largely rests on a cosmopolitan foundation has also left lasting imprints on alienage jurisprudence in the U.S.; it was not long after the creation of the plenary power doctrine that the Court drew a clear line in the sand, in terms of the extent to which non-citizens' universal right to equal concern as self-determining individuals could be ignored. The Court established that non-citizens enjoy the protection of the fifth, sixth and fourteenth amendments, and in doing so the Court created the aliens' rights doctrine. The Court has furthermore extended these universal rights to include the Bill of Rights.

The aliens' rights doctrine is built on the notion that there are limits to what even a legitimate democratic government can do to non-members, because basic rights to individual autonomy are sacrosanct. As the Court stated some 120 years ago: "For the very idea that one man may be compelled to hold his life, or the means of living, or any other material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (Yick Wo v. Hopkins (1886): 370) The treatment of non-citizens in the U.S. is hence an area where the presence of the tension between the communitarian and the cosmopolitan rationales is strongly felt. This tension is more specifically located at the interface between the federal government's plenary power to treat non-citizens discretionarily – stemming from its right to communal formation – and individuals' universal rights as free and self-determining individuals – stemming from the Bill of Rights and the fourteenth amendment. A closer look at this seemingly contradictory situation reveals, however, that the normative tension between the cosmopolitan and the communitarian rationales has found a reasonably consistent solution in the U.S.¹¹⁴

The federal government has the power to regulate admissions, political rights, social rights and naturalisation in the national interest, and it currently does so in a way that largely excludes non-citizens from rights in these areas. Non-citizens do, nevertheless, enjoy most civil rights, some very basic social rights, and the right to protection as political refugees – as equally entitled self-determining individuals. This means that the sovereignty of the people does not reach to the inner locus of individual liberty and that there are limits to the extent to which the U.S. disregards the rights of non-citizens (Henkin 1990: 385). What emerges here is clearly not a strong cosmopolitan perspective, because non-citizens, in general, are not treated with equal concern *qua* autonomous individuals; but nor is it a communitarian perspective, as non-citizens, in limited but distinct areas, enjoy universal rights simply as autonomous individuals. What emerges here instead is, broadly speaking, a weak cosmopolitan perspective, where the nation to a large extent prioritises its members and safeguards its right to national formation, but at the same time affords non-citizens' basic universal rights to self-determination, on the basis of equal personhood.

¹¹⁴ The notion that the Court's alienage jurisprudence combines a defence of universal individual rights and a right to communal formation in a coherent fashion is not entirely new. Scaperlanda has argued that the Court consistently invokes the plenary power when questions of political formation are at stake and the aliens' rights doctrine when they are absent (Scaperlanda 2000).

In more detail, it can be said that the U.S. controls admission to its territory in its national interest, with the exception of refugee protection. Non-citizens are, on the other hand, afforded most civil rights simply as persons. The right to equality under the law is, however, limited so as to create room for the U.S. to put the interests of its citizens first in areas that are important to national self-determination. This includes, for instance, the right to reserve jobs that are related to communal formation to citizens. This right to exclude non-citizens from areas that lie at the heart of communal formation is also carried over to the political rights realm, where rights are based on membership. Membership is also a precondition for most social rights, but non-citizens enjoy the right to subsistence, emergency medical care and basic education as equally entitled persons. The nation, finally, controls the right to membership in the interest of the nation. The weak cosmopolitan perspective is expressed in such a legal system, where the nation in general has a right to pursue its own self-defined interest, and yet also owes non-citizens certain universal rights that are essential for the exercise of individual autonomy. The U.S.'s treatment of non-citizens is in fact clearly, in general, in line with the weak cosmopolitan perspective. Important inconsistencies can, alas, be identified, and it is time to analyse these inconsistencies in detail.

Normative Inconsistencies

In the case of admissions, the absence of a cosmopolitan-based refugee policy in the U.S. used to give rise to a glaring normative inconsistency. That is, there was an inconsistency between the universal rights that all non-citizens enjoyed inside the U.S. and the refusal to protect non-citizens who suffered from a denial of these very same universal rights in other countries. The 1980 Refugee Act removed this contradiction to a significant extent. The codification of the Geneva Convention rests on the same cosmopolitan rationale as the amendments in the Constitution that protect all individuals' basic right to self-determination. The U.S.'s treatment of non-citizens is also much more coherent after these two normatively related bodies of law have been joined.

That said, the inconsistency in this area has only been partly removed, for the U.S.'s refugee regime is under-inclusive. The 1980 Refugee Act protects more than individuals' right to physical survival, as described earlier. The Refugee Act, however, limits its protection to individuals who are persecuted. This means that individuals whose lives are in danger due to

natural calamities or lethal diseases (for example) lack protection.¹¹⁵ The U.S. arguably recognises that a basic commitment to universal rights means that other grounds, besides the ones listed in the Act, give rise to the need for protection. This category of refugees can, after all, apply for temporary protected status. The problem is that this yields no right to protection, and is an absolutely discretionary, non-justiciable, decision to protect, or not to protect, non-citizens' basic universal rights.¹¹⁶

The inconsistency here thus arises because certain threats to basic individual autonomy are singled out as worthy of protection, whereas refugees whose basic autonomy is undermined by other, equally serious threats, are left without *a right* to protection. If the U.S. cannot refuse an individual basic nutrition or emergency shelter, then why can an individual be expelled to a country where such conditions await? It is incompatible with the U.S.'s basic commitment to individual universal rights to fail to protect all individuals under its jurisdiction from threats to their lives and core individual rights, regardless of the specific nature of the threat. There is no normatively consistent ground for granting one group of refugees a statutory right to protection on the cosmopolitan rationale, while only holding out the possibility of a discretionary privilege to protection to another equally deserving group of refugees.¹¹⁷ The Refugee Act removed the moral arbitrariness of only extending protection to certain nationalities, but it retained the equally arbitrary rule of only protecting refugees whose lives are in danger for the right reason, as it were.

The U.S.'s visa and interdiction policy gives rise to a further inconsistency in this area.¹¹⁸ The problem does not lie with the existence of a visa regime or with the policy of interdiction; these methods are a legitimate part of controlling admission and compatible with a commitment to upholding non-citizens' right to basic autonomy. The problem is that refugees

¹¹⁵ An additional inconsistency arises insofar as individuals are not granted protection because they are not covered by any of the enumerated grounds in the 1980 Act.

¹¹⁶ Refugees must also be admissible, save for obtaining a labour certification and being in possession of valid travel documentation, in order to receive temporary protected status. The Attorney General can waive most other grounds for inadmissibility. However, conviction of crimes of moral turpitude and drug offences, unless very minor, and inadmissibility on security grounds result in a statutory bar from temporary protected status (INA 244).

¹¹⁷ There is no need to grant non-citizens the right to stay permanently, or to become members, from the weak cosmopolitan perspective. The right to *non-refoulement* suffices, but it must be coupled with a right to be secure in one's abode once the refugee has established herself in the U.S. (More will be said on the universal right to be secure in one's abode in conjunction with the analysis of the laws regulating deportation.)

¹¹⁸ The impact on refugees of the expedited removal system, implemented in 1996, has caused much concern. This procedure does, however, give all non-citizens the right to apply for asylum before a competent officer, and the right to appeal a negative decision, albeit under a fast-tracked process (Cooper 1997: 1521–1524; Siskind 2006: 2; INA 235 (1) (B)).

are impeded, and some stopped, from seeking protection. Executive Order 12807 is specially designed to remove the legal obligation to protect refugees; that this was one of the main purposes of the order is emphasised by its last sentence: “Nor shall this order be construed to require any procedures to determine whether a person is a refugee.” (Executive Order 12807)¹¹⁹

The visa regime is also partly designed to keep refugees from gaining access to the U.S. Only countries that produce a large number of asylum seekers and overstayers face visa requirements. This means that the visa regime is, in part, designed to keep asylum seekers out. It also impedes refugees’ efforts to reach the U.S. in general by making it necessary for them to fulfil a number of requirements that are not grounds for denying them refugee protection once they have reached the U.S. (Christian 1999: 223–224; Gibney 2003: 5). It should be pointed out that overseas refugees can apply to be resettled in the U.S. via the UNHCR, and in some cases at consular missions, but the acceptance of overseas refugees is discretionary (State 2004: 6–7). Overseas refugee admission is, moreover, numerically restricted and only applies to certain selected groups. That is, this form of protection is not a universal right, but a glimmer of hope. The contradiction here is clear. The U.S. actively impedes non-citizens’ ability to seek the universal refugee protection it upholds within the U.S., and its rationale for doing so is to lower the cost to the nation, while the cost to the individual refugees is totally disregarded.

An additional inconsistency, alas, also plagues the current refugee regime. While the right to *non-refoulement* is a statutory right in the U.S., it does not cover all individuals. The terrorist provisions and the general security provisions are compatible both with the Geneva Convention and the cosmopolitan rationale, in that a nation can deny an individual protection if she endangers the lives of other persons under its jurisdiction. The problem lies with the particularly serious crime provision. This provision bars all individuals who have committed an aggravated felony and been sentenced to five years imprisonment¹²⁰ – this includes non-violent crimes – from *non-refoulement* relief.

¹¹⁹ It should be pointed out that Coast Guard vessels sometimes have immigration officers on board, who screen non-citizens for refugee status (Guard 2006).

¹²⁰ In instances in which the sentence is less than five years, the Attorney General has discretionary powers to decide if the crime is of a particularly serious nature (INA 241 (b) (3) (C)).

This bar is relatively new (it applies from 1997), and the problem is that it does not allow for the balancing of the interest of the refugee with security considerations. The bars on the right to *non-refoulement* in the Geneva Convention, on the other hand, were adopted to prevent criminals from seeking refugee status, but they balance the severity of the crime against the interest of the refugee (Anker 1999: 429–461; INA 241 (b) (3)).¹²¹ *Non-refoulement* is not intended to create a safe haven for criminals. A refugee who has committed a serious crime may, of course, be punished, or be deported to serve her sentence in her home country if her basic universal rights can be guaranteed in that country. A state's interest in protecting the people under its jurisdiction can also outweigh an individual refugee's interest in not being deported. But a refugee cannot be denied basic protection if she poses no threat to individuals under the jurisdiction of the U.S., and the fact that a person has committed theft or burglary cannot be said to establish a level of threat that would justify deportation, given that the threat to the refugee is of the gravest kind.

Thus, the statutory exclusion of persons who have committed relatively minor and non-violent offences is incompatible with a commitment to basic universal individual rights, and probably the Geneva Convention (Anker 1999: 460). This problem is aggravated both by the fact that the limit for statutory exclusion is very low in relation to the possible danger to the refugee, but also by the fact that a very high likelihood of persecution needs to be demonstrated in *non-refoulement* cases. The more likely than not criterion, i.e. at least 51 % risk of persecution, is not compatible with the equal concern of all individuals as autonomous persons, given the severity of the risk that the refugee faces. The respect for the persons as self-determining individuals would after all make it unacceptable to send an accused to prison, in criminal cases, if it simply was more likely than not that she was guilty. It should be remembered of course that in criminal cases there is at least a chance that the accused is guilty of a crime. The potential refugee, on the other hand, is at most guilty of being a *mala fide* refugee.

It seems strange, moreover, that a refugee must meet a higher standard of proof in *non-refoulement* cases than in asylum cases, given that *non-refoulement* is a more basic form of protection. This state of affairs is both mitigated and, in a way, worsened by the adoption of

¹²¹ It is noteworthy that Germany has deemed the need to take non-citizens' interests into consideration in deportation cases to be a constitutional necessity (Neuman 1990: 48–58; Federal Government Commissioner for Migration 2004: 34; Kantstroom 1993: 190–193; Rubio-Marin 2000: 211; see also the German case study).

the Torture Convention. There are no bars to protection under the Torture Convention. This means that the inconsistency stemming from denying certain individuals protection on insufficient grounds does not arise in this case. The same standard of proof, more likely than not, is nevertheless also applied in Torture Convention cases. This standard is not acceptable in *non-refoulement* cases in general, and even less so when the refugee runs the risk of being subjected to torture.

The admissions realm suffers from yet another inconsistency. The Court has stated that family unity is a very basic and natural, or *a priori*, right. It is, furthermore, noteworthy that both overseas refugees and recognised asylum seekers have the right to bring their families, without demonstrating that the whole family qualify as refugees. This, at the very least, indicates that the U.S. is unwilling to make refugee protection dependent on surrendering the right to family reunification. Nevertheless, only citizens have an unlimited and absolute right to family reunification; non-citizens wishing to join their families in the U.S. must pass the communitarian admissibility hurdles, although refugees are exempted from some criteria and only family members of U.S. citizens do not face numerical restrictions. Family members can be denied entry on grounds like drug addiction, poverty, or having committed crimes of moral turpitude, for example (INA 212).

There is thus no universal right to be admitted for the purpose of family reunification in the U.S., but only an inter-communal right holding between citizens. This state of affairs is incompatible with a commitment to basic universal rights.¹²² It is not, contrary to the Court's ruling, compatible with a commitment to basic universal rights to let Congress withhold such rights from non-citizens. Because a person's family constitutes an intrinsic part of her autonomous life, basic respect for all individuals as autonomous persons include respecting their fundamental interest in living with their families. This then means that the laws regulating family immigration are inconsistent with the U.S.' general commitment to respecting non-citizens' basic rights as autonomous persons. It could be argued that restricting the family members' right to come to the U.S. does not deprive the family of the right to be united. The family simply has to unite in the country of which they are citizens. However this would, even on the benign assumption that the whole family share one nationality or would be

¹²² This is also incompatible with the communitarian rationale, as people – who must be considered members through family connections – are not provided with an absolute right to admission. This means that only citizens are seen as full members – for reasons analysed in chapter three, this is incompatible with the communitarian perception of community and membership.

received in another country, deprive individuals of their right to remain in their abode, which is another basic universal right. Or perhaps more precisely, it would force individuals to forsake either their basic universal right to remain in their abode or their basic universal right to live with their family. (For the right to be secure in one's abode see below.)

The civil rights realm is characterised by an overall consistency, but a glaring inconsistency arises in the relation to the right to secure residency.¹²³ Non-citizens can be deported discretionarily and on almost any ground, including certain grounds that could not constitutionally be criminalised. The lack of most key procedural due process rights in deportation cases, and the fact that deportation grounds can be invoked retroactively, further add to the government's level of discretion in this area, as do the general absence of statutes of limitations.

Individuals, who have no universal right to admittance, as family members and refugees do, can be excluded on communitarian grounds according to the weak cosmopolitan perspective. The right to exclude generates a right to deport, insofar as the latter is a way of enforcing the former. However, individuals' interest in remaining dramatically increases as they establish themselves in the country.¹²⁴ The issue is not one of when a person is to be counted as a member – this is to be decided by the community – but that the ability to exercise basic individual autonomy is strongly connected to the right to remain in the society where one resides. Thus, once an individual has established herself in the U.S., she has a right to be secure in her abode. This right does not provide non-citizens with immunity from deportation once they have come to reside in the U.S. The U.S. has a right to deport non-citizens in order to protect the people under its jurisdiction, as long as the deported person's interest in remaining is weighted against the states' interest in protecting other individuals under its jurisdiction. In sum, the commitment to non-citizens' right to exercise basic autonomy is

¹²³ It should be pointed out that non-citizens' lack of fourth amendment protection outside the U.S. could give rise to an inconsistency. The U.S. is exercising authority abroad by deploying its own law enforcement officers in other countries, and this means that non-citizens cannot, in principle, be denied the same protection, just as is the case when the U.S. law enforcement officers act against them inside the U.S. That said, it might not be practically feasible to afford non-citizens or citizens the same legal protection abroad, because the level of effective authority might not be sufficient to this end. Should citizens and non-citizens alike be afforded weaker protection on such functional grounds, then no normative inconsistency arises. The legal situation in this area is unfortunately unclear, as the grounds for denying non-citizens', and possibly citizens', fourth amendment protection outside the U.S. was not made clear in the *Verdugo-Urquidez* case (*United States v. Verdugo-Urquidez* (1990)). It is thus not possible to pursue this point further.

¹²⁴ Banishment was after all the customary alternative to a death sentence in both Athens and Rome (Stimson 1953: 205).

incompatible with the discretionary deportation of resident non-citizens, as deportation causes serious harm to individuals' ability to exercise self-determination.

That the right to be secure in one's abode is a basic individual right also means that even the limited right to deport should be checked by the same procedural safeguards as are available in criminal cases; the stakes are, after all, not lower. The lack of procedural due process protection hence makes the inconsistency caused by discretionary deportations more severe. The question of statutes of limitations is especially pertinent, because it puts into question the right to deport undocumented residents independently of how long they have lived in the U.S.¹²⁵ The point is not that the violation of immigration laws does not constitute a punishable crime, or that undocumented residents cannot be deported within a reasonable time after their entry. The point is that only the severest of crimes do not have statutes of limitations, and violation of immigration laws cannot *and is not* seen as a crime of this calibre. Thus a statute of limitations, after which a breach of the immigration laws is not punishable, and the non-citizen gains a right to be secure in her abode, is required to uphold all individuals' basic rights to self-determination.

A potential counterargument is to claim that non-citizens who are in the U.S. illegally have *ipso facto* forfeited all rights, including basic procedural rights, or that an undocumented resident as a *persona non grata* has no rights. This argument, however, sits very uncomfortably with the fact that convicted felons retain many basic rights (Reich 1991: 246); alienage jurisprudence clearly recognises all non-citizens under the jurisdiction of the U.S. as having legal standing and possessing the same right as citizens in a court of law. The fact is, of course, that the U.S. government's discretionary right to deport does not rest on the notion that a violation of immigration statutes is such a heinous crime that all the rules that apply to most criminals can be dispensed with, or that undocumented residents totally lack legal standing. This discretionary right instead rests on the fact that deportation is not recognised as a criminal process that is punitive in nature, hence the questions of protection from state intervention does, to a large extent, not arise.

This state of affairs is, however, incompatible with a basic commitment to universal individual rights. The threat of being removed from one's abode for any retrospectively

¹²⁵ It is interesting in this respect that deportation grounds had statutes of limitations until 1952 (Legomsky 1997: 460–461).

invoked reason, without basic procedural rights, simply undermines the ability to lead an autonomous life, and constitutes punishment.¹²⁶ This fact did not escape one of the founding fathers:

If the banishment of an alien from a country into which he has been invited, as the asylum most auspicious to his happiness; a country where he may have formed the most tender of connexions, where he may have vested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys under the laws a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for,...if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied. (Madison 1799)

It is fair to say that the Court has acknowledged the point Madison made well over two hundred years ago. The Court has, *in principle*, recognised that the right to be secure in one's abode is a basic right, and that deportation therefore constitutes punishment and hence should be accompanied by the procedural safeguards that apply in criminal cases. The Court has, alas, always come down on the side of tradition:

If due process bars Congress from enactments that shock the sense of fair play – which is the essence of due process – one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which deportation is sought. And this because deportation, as this Court has said in *Ng Fung Ho v. White*, deprive a man 'of all that makes life worth living'; and, as is has said in *Fong Haw Tan v. Phelan* 'deportation is a drastic measure and at times the equivalent of banishment or exile'. In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognised as belonging to Congress in regulating entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only in punitive legislation, should be applied to deportation. But the slate is not clean. [...] (*Galvan v. Press* (1954): 530–531)

That aliens remain vulnerable to expulsion after long residency is a practice that bristles with severities. But it is a weapon of defence and reprisal confirmed by international law as a power

¹²⁶ It is noteworthy in this respect that undocumented immigrants who have not committed a crime, normally are granted indefinite leave to remain in the U.K. after 14 years, regardless of the fact that they have been residing in the country illegally (Shutter 1995: 209).

inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it. (*Harisiades v. Shaughnessy* (1952): 587–588)

The Court hence clearly bases its decisions on tradition. The Court recognises both that deportation is a very severe infringement on individuals' right to self-determination and that the Constitution's protection of individuals' right to self-determination in principle should apply. The reference to tradition does not, of course, do anything to remove the normative inconsistencies that arise from discretionary deportations. The U.S. must afford all longstanding residents a right to secure residency in order not to contradict its commitment to non-citizens' basic right to self-determination. To provide non-citizens with the right to defend their freedom against the state on the same terms as citizens in criminal cases, but to expose non-citizens to absolute state discrimination when considering their right to remain in their domicile, is simply inconsistent. The latter right is, after all, as central to individuals' right to live autonomous lives as the former.

Conclusion

The question of non-citizens' legal standing looks like a Gordian knot, created by liberal nation-states' dual commitment to universal individual autonomy on the one hand and national autonomy on the other hand. The U.S. is clearly strongly committed to both values but, after the underlying normative rationale behind the treatment of non-citizens in the U.S. has been unpacked, it appears that the normative rationales complement each other sufficiently to make up an overall consistent weak cosmopolitan perspective.

That said, some very important and glaring inconsistencies remain. The adherence to basic universal values is not compatible with depriving individuals, whose basic rights are threatened, of protection on the grounds that they do not suffer for the right reasons, or that they have committed minor crimes. Nor are the visa regime and interdiction policy, or the standard of proof that refugees need to meet to be admitted, compatible with the U.S.'s commitment to uphold non-citizens' basic right to self-determination. The commitment to basic universal individual rights is also incompatible with denying individuals the right to family reunification and denying them the right to be secure in their abode.

It is perhaps noteworthy that all these inconsistencies are found in immigration law, i.e. that area of the law relating to admissions and expulsions. This area constitutes the locus of the plenary power doctrine, and is where the idea that the nation has unlimited power over non-

citizens reaches its zenith. It is the unlimited reign of the communitarian rationale in this area that creates these inconsistencies, by putting the universal rights laid down in the Constitution out of play in certain areas. This means that a limited, but distinct, rollback of the plenary power doctrine is required if the U.S. is to achieve a normatively consistent approach to the treatment of non-citizens that is compatible with the U.S.'s commitment to upholding non-citizens' basic right to autonomy.

Chapter Five

The Case of Germany

Human dignity is inviolable. To respect and protect it is the duty of all state authority.

The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (Basic Law 1 (1–2))

We – the old states of the old Europe – are classic nation-states. We create our identity not by committing to an idea, but by belonging to a particular nation (*Volk*). (Schäuble, Wolfgang (Home Secretary) 1993: 53)

Section I

Germany was not born out of a revolution aiming at establishing a republic based on universal values; nor did a European monarch create the notion of a German nation. Germany was, instead, created from below and the notion of a specific German cultural nation predates the German state (Kantstroom 1993: 172; Geddes 2003: 93). This historical fact had a great impact on the perceived essence of the German nation-state, as Brubaker explains:

This prepolitical German nation, this nation in search of a state, was conceived not as a bearer of universal political values, but as an organic cultural, linguistic, or racial community – as an irreducible particular *Volksgemeinschaft*. On this understanding, nationhood is an ethnocultural, not a political fact. Comparisons between German and French understandings of nationhood go back in their basic lines, to the early nineteenth century. They were first formulated by German intellectuals, who sought to distance themselves from the allegedly shallow rationalism and cosmopolitanism of the Enlightenment and the French Revolution through a historicist celebration of cultural particularism. (Brubaker 1992: 1)

The communitarian notion of a *Volksgemeinschaft*, a sense of shared descent and/or cultural affinity, still constitutes an intrinsic part of the discourse around non-citizens' legal standing in Germany (Brubaker 1992; Hollifield 1992: 173). The Romantic idea of a *Volksgemeinschaft* is, it should be said, not the only normative notion that has influenced the

nature of the German political community. The Prussian empire, the Abraham of a succession of modern German states, was founded in the Romantic era, but it contained a strong reformist and state-centred element.

Like most other German states, Prussia based its nationality law on the principle of *jus domicili* or the notion of *domicilium facit subditum* – residence makes the subject. This means that Prussia initially had a functional approach to membership where domicile, and not cultural membership, decided privileges and obligations (Geddes 2003: 94; Brubaker 1992: 9–10, 67). This approach was, however, later abandoned in favour of the *jus sanguinis* principle (membership through descent/blood) as the desire to create a more homogenous state (and the wish to exclude non-desirables) grew stronger (Green 2000: 108). The Prussian empire thus transformed itself from being master and caretaker over a given territory to being master and caretaker of a specific nation/people. The main principle behind German citizenship law has also, until very recently, been that membership in the state (*Staatsangehörigkeit*) pre-supposes membership in the nation (*Volkszugehörigkeit*) (Brubaker 1992: 50–52, 63, 67, 69, 70–71).¹²⁷

It is important to note, the above notwithstanding, that the cosmopolitan notion that non-citizens have rights *qua* individuals was never present in Prussia, or in any other coeval German state. The prevailing notion in Germany, historically speaking, was that non-citizens, however defined, had no rights but only privileges that could be withdrawn at will (Fahrmeir 2000: 152, 196, 209). The essence of this approach to non-citizens' rights is brought to the surface by a historical contrast between German and English law in regards to non-citizens' access to poor relief:

In all German states, foreigners were excluded from public poor relief. ... In England, Scotland and Ireland, by contrast, foreigners were considered 'casual poor', and had a right to relief wherever they happened to be. ... Lord Ellenborough ruled that... 'the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, and to save them from starving.' (Fahrmeir 2000: 171, Fahrmeir quotes Lord Ellenborough)

¹²⁷ That said, the state-centred approach, emanating from Prussia, where territorial presence was the key criterion for membership, was never totally abandoned (Brubaker 1998: 145, 148; Geddes 2003: 94).

The absence of cosmopolitan rights is also very evident in early German constitutional law. The constitutional document¹²⁸ of 1849 rejected the universal ideas of natural rights and saw rights as encapsulating a positive relationship between a specific state and its members. The list of fundamental rights in the 1849 constitutional document hence did exclude non-citizens (Steinberger 1990: 205–206, 210–211; Neuman 1990: 77–78; Kommers 1995: 302).

The 1867 Constitution of the North German Federation, as well as the 1871 Constitution of the German Empire, also lacked any Bill of Rights, and did not protect universal individual rights. The Weimar Constitution of 1919 did contain a Bill of Rights, but it excluded non-citizens from many rights; nor did the Weimar Constitution invest the judiciary with the power to enforce basic rights, and its Bill of Rights was not conceived of as laying down universal inalienable rights (Steinberger 1990: 205–206, 210–211; Neuman 1990: 77–78; Kommers 1995: 302).¹²⁹ The absence of cosmopolitan rights in early German constitutionalism is very important – not least, somewhat ironically, because the absence of cosmopolitan rights in early German constitutional law paved the way for their current centrality. After Germany’s total collapse at the end of the Second World War, Germany had to reinvent itself and create a new political and legal system. The cosmopolitan tradition, and Kant’s philosophy in particular, became central to this restoration, as it had not been compromised by history, and represented an antidote to the disaster that had gone before it (Fletcher 1984: 178; Kommers 1989: 312).

The Basic Law – a normative reorientation

The Basic Law of 1949 constitutes the cornerstone of the new German state¹³⁰ that emerged from the rubble of the Third *Reich*. The Basic Law was designed to prevent the re-emergence of an aggressive, totalitarian and collectivist state; it was designed to be ‘dictatorship-proof’, to borrow Schmitt’s apt phrase (Schmitt 2000: 151). This meant that absolute restrictions on

¹²⁸ The 1849 Constitution was never put into practice, but it had a great impact on future German Constitutions (Hucko 1987: 10).

¹²⁹ Early German constitutions were hence hardly bulwarks for universal individual rights. They did, however, contain the seeds of some universal individual rights, and partly heralded later developments in German constitutional law (Steinberger 1990: 205–206, 210–211; Neuman 1990: 77–78; Kommers 1995: 302).

¹³⁰ The Basic Law contained two alternatives for German unification, the adoption of a new Constitution or an extension of the Basic Law. The five East German states opted, with the consent of the western states, for the latter alternative. This means that the Basic Law of 1949, as it now stands, constitutes the Basic Law for the united Germany. The legal solution to the unification where the former East German state (GDR) ceased to exist and the areas that use to make up GDR were incorporated into the legal entity of Germany (FRG) meant that the whole body of West German law became the law in the former east, although certain laws were subject to qualifications and transitional periods set down in specific treaties (Basic Law 146 and Preamble; Johnson 1995: 136; Kantstroom 1993: 299).

state authority and an unambiguous endorsement of universal individual rights, for the first time, became the hallmark of the German state (Steinberger 1990: 213; Kommers 1999a: 1–2). The basic thrust of this new legal order can be identified in the first article of the Basic Law:

Human dignity is inviolable. To respect and protect it is the duty of all state authority.

The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (Basic Law 1 (1–2))

The placement of the first article is hardly coincidental: it is the key to the Basic Law, and constitutes a legal meta-framework for the lawful and legitimate exercise of state authority in Germany. The first article is followed by a number of enumerated basic rights that are intended to uphold human dignity, and for which the first article constitutes the overture. (The specific content and the more precise nature of these rights will be described below.) This system of rights (the first article and the following enumerated rights) is then completed or backed up by article 19 – which states that (Kommers 1999a: 1–2; Sontheimer 1993: 213–214; Currie 1994: 10–11, 274; Bowie 1954: 621; Basic Law 2–19): “In no case may the essence of a basic right be encroached upon.” (Basic Law 19 (2)) Article 19 also grants any person the right to challenge a violation of a basic right in the courts.

This means that at the heart of the Basic Law lies a system of rights that is devised to uphold human dignity; these rights are recognised as inviolable and as something that all state authority must protect and respect. A look at the historical backdrop to the Basic Law reveals that human dignity, and the enumerated rights that are intended to uphold it, are conceived of as objective values. The Basic Law not only generally strengthened the notion of individual basic rights, compared to the Weimar Constitution, but it also inverted the order of supremacy between popular sovereignty and constitutional basic rights. The Basic Law thus explicitly rejects the Weimar Constitution’s principle of parliamentary supremacy, where all laws were ‘up for grabs’, to borrow a phrase from Waldron (Waldron 1999: 302; Goerlich 1988: 49–50, 64; Karpen 1983: 57; Ipsen 1983: 111–112; Kommers 1989: 170–171; Joppke 1998b: 284; Hucko 1987: 69–70; Gibney 2004: 88).¹³¹

¹³¹ It should be noted that two-thirds of members of parliament had to be present, and two-thirds of those present had to agree to suspend a constitutional right or provision under the Weimar Constitution, unless there was a state of emergency... (Schmitt 2000: 147, 158).

Germany is hence not only a *Rechtsstaat* (a state ruled by law), in the limited sense of being governed by explicit fixed laws adopted in accordance with stipulated procedures: the adoption of the Basic Law has transformed Germany into a state where the supreme law of the land cannot be overturned by any individual, ruler, organisation, or even the popular will. The *Rechtsstaat* created by the Basic Law constitutes a suprapositive and absolute ethical order that limits *all* state authority, including authority wielded by legitimate democratic institutions. This is the profound legal implication of the fact that the Basic Law reversed the relationship between democratic legitimacy and constitutional legitimacy (Kommers 1999b: 94–96; Joppke 1998b: 284; Kommers 1989: 170–171; Karpen 1983: 57; Ipsen 1983: 111–112; Klein 1983: 21–22).

This means that the founders of the Basic Law deliberately broke with the tenets of legal positivism, where rights are created by law and only hold for citizens or recognised subjects. The founders clearly conceived of the basic rights as universal and prior to the state, and they made this clear in the first article: “The German people therefore acknowledge inviolable and inalienable human rights *as the basis of every community*, of peace and of justice in the world.” (Basic Law 1, emphasis added) It is also natural, from this perspective, that the Basic Law does not lay down or establish basic rights, but stipulates that all state authority must respect and protect the *a priori* right to human dignity and the rights that follow from it (Dürig 1988: 13; Kommers 1989: 308; Schmitt 2000: 148; Kommers 1999a: 1–3; Kommers 1997: 33).

The fact that human dignity, and the rights that follow from it, constitute objective and universal rights has also been made clear by the *Bundesverfassungsgericht* (the German constitutional court, hereafter in this chapter the Court):

It is equally true, however, that the Basic Law is not a value-neutral document. Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights. (BVerfGE 7, 198a (1958): 363)

Justice Benda describes the same fact in a similar fashion:

The concept of human dignity claims necessarily universal validity, applying to every human being regardless of race, color, citizenship or any other factor. It also must claim validity in any

time; it is either valid no matter how the circumstances may change, or it is not valid at all. (Benda 1999: 43)

This notion of objective universality is further emphasised by article 79, called the eternity or perpetual clause (*Ewigkeitsgarantie*). This clause makes amendments that infringe on article 1, and some other key articles, inadmissible.¹³² The eternity clause constitutes a freezing of history, and it underscores the centrality, universality and the inviolability of the value of human dignity as well as the basic rights that flow from it (Steinberger 1990: 205–214; Kommers 1999a: 3; Dürig 1988: 12, 15–16; Klein 1983: 34). The objective nature of human dignity and the basic rights that flow from it is also reflected in the fact that the Basic Law withholds certain rights from the enemies of freedom. Articles 9 and 21 ban parties and associations that try to impair constitutional freedom and democracy, and articles 5 and 18 state that a number of basic freedoms are forfeited if they are used to combat the free and democratic order, for as the Court points out (Currie 1994: 214–215; Bowie 1954: 624; Hucko 1987: 75; Kommers 1989: 222, 230; Schmitt 2000: 151; Kommers 1980: 680–681; Hogwood 2004: 2–3, 15):¹³³

This Constitution is not value free; it regards certain values as fundamental and... charges the state with their protection (Article 1). [The Constitution] takes measures to protect against threats to these values and institutionalizes special procedures to ward off attacks on the constitutional order; [in sum], it creates a militant democracy (Article 2 (1), 9 (2), 18, 20 (4), 21 (2), 79 (3), 91, 98 (2)). (BVerfGE 39, 334 (1975): 234)

The fact that the German legal system is based on the notion of a universal objective right to human dignity has important implications for the normative status of the German state. The fact that human dignity is recognised as a transcendental value means that the state is not a value in itself, but rather an institution that derives its value from respecting and upholding human dignity. It also means that there are absolute limits to state action and sovereignty. The notion of an absolute right to human dignity was a deliberate move to curb the notion of the dignity of the state and to reverse the order of the dignity of the state and the dignity of the

¹³² It should be pointed out that article 79 is read by some constitutional experts as only restricting the amendment process, and not the content of another superseding Constitution, in accordance with article 146 (Neuman 1992: 270–271). Other constitutional experts, it should be said, seem to be of the opinion that article 19 exempts the basic principles of the Basic Law from change under any circumstances (Hucko 1987: 70; Starck 2002: 188).

¹³³ It should be noted that the notion of a militant democracy means that individual rights can be infringed upon, but that such infringements may not undermine the essence of basic rights, as no government action may do so (Basic Law 19).

human being. This move was clearly the result of the derailment of the Third *Reich* and its strong emphasis on the dignity of the state (Klein 1983: 16; Kommers 1999b: 107; Kommers 1997: 41; Frowein 2002: 123; Klein 2002: 146).

The notion of human dignity as a universal value, furthermore, gives rise to a special connection between national and international law in Germany:

The general rules of public international law are an integral part of federal law. They take precedence over statutes and create rights and duties for the inhabitants of the federal territory.
(Basic Law 25)

This means that the general rules of public international law (over and above the possibility of incorporating international treaties into domestic law under article 59 (2) of the Basic Law) constitute an integral part of the German legal system. The general rules of public international law are, moreover, superior to all domestic German law – save for the Basic Law. Recognised international law that falls outside the definition of general rules of public international law is furthermore directly applicable in Germany. This form of international law can, however, be contravened by federal law, but the Court has further strengthened the standing of international law by establishing that legislation in general is to be seen as intended to be compatible with international law.

The fact that the German legal system is constructed to be compatible with, and connected to, international law – so as to bridge the German state to an international community based on universal values – also means that applicable international law covers non-citizens in Germany. This is evident not only from the explicit connection made in article 25, but also from the fact that the central concept of human dignity in the Basic Law corresponds to the concept of human dignity and human rights in modern humanitarian international law (Neuman 1990: 80; Schuster 2003: 183; Goetz 1995a: 24–25; BVerfGE 1481/04 (2004)). The Court has recently described the nature of the special relationship between the Basic Law and international law in the following:

The Basic Law is intended to achieve comprehensive commitment [sic] to international law, cross-border cooperation and political integration in a gradually developing international community of democratic states under the rule of law. (BVerfGE 1481/04 (2004))

The Cosmopolitan Nature of the Basic Law

It is thus far clear that the Basic Law derives from the notion of the existence of a suprapositive legal order that connects the German state to a universal world order. It is also clear that this notion leads to the Basic Law limiting the exercise of all state authority by the need to respect and protect human dignity. To fully uncover the cosmopolitan nature of the Basic Law, the concept of human dignity must be analysed further. As the second article of the Basic Law strongly indicates, the concept of human dignity is chiefly concerned with individuals' ability to self-determination (Klein 1983: 16; Goerlich 1988: 58; Klein 2002: 149):

Everyone has the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or moral law.

Everyone has the right to life and physical integrity. The liberty of the individual is inviolable.

Intrusion on these rights may be made only pursuant to statute. (Basic Law 2 (1–2))

It is of note that the original drafting of article 2 (1) – ‘every person is free to do or not to do what he wishes’ – which captures the notion of individual self-determination in an even more straightforward manner was replaced for linguistic and not for legal reasons according to the Court (Currie 1989: 358–359). This means that the *individual* has the right to be treated as an independent end and not as a means by the state or by others. The Court has adopted the theory of objects in order to develop standards that protect and respect human dignity. This theory relates back to Kant's theory of the Kingdom of Ends, and is based on the notion that all individuals have rights as autonomous beings (Klein 2002: 150):

It is contrary to human dignity to make the individual the mere tool of the state. The principle that “each person must always be an end in himself” applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in acknowledging him as an independent personality. (BVerfGE 45, 187a (1977): 314)

The primary purpose of the basic rights is to safeguard the liberties of the individual against interferences by public authority. They are defensive rights of the individual against the state... This value system, which centers upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law (public and private). (BVerfGE 7, 198a (1958): 363)

The state violates human dignity when it treats persons as mere objects. ... The state has no right to pierce the [protected] sphere of privacy by thoroughly checking into personal matters of its citizens. [It] must leave the individual with an inner space for the purpose of the free and responsible development of his personality. (BVerfGE 27, 1 (1969): 307)

Above all, laws must not violate a person's dignity, which represents the highest value of the Basic Law; nor may they restrict a person's spiritual, political, or economic freedom in a way that would erode the essence of [personhood]. (BVerfGE 6, 32 (1957): 327)

Klein has captured the normative rationale behind the concept of human dignity in the Basic Law aptly:

Its [the Basic Law's] core is the liberty of the individual which derives from the dignity of man and from his right to self-determination, i.e. his right to decide on the pursuit of happiness for himself. Liberty is vested in man by nature: consequently the constitution is laid down to guarantee liberty, not to grant it. (Klein 1983: 16)

The fact that the core of the Basic Law is concerned with the protection of individual autonomy can be seen even more clearly if the fundamental structure of the Basic Law is further unpacked. The first article lays down the objective value of human dignity; the second article then gives substance to the concept of human dignity by connecting it to the right to free development of an individual personality; and these two articles make up a unified whole that protects individuals' right to self-determination:

The human dignity clause is almost always read in tandem with the general liberty interests secured by the personality, inviolability, and right-to-life clauses of Article 2. The relationship between Article 1 and Article 2 is symbiotic; all their provisions nourish and reinforce one another. (Kommers 1989: 305)

The second article is then followed by enumerated specific basic rights (Johnson 1995: 133). These rights are meant to further guarantee the right to individual self-determination. This means that the first articles constitute a unified system where article 1 and 2 are to be read together and uphold an absolute right to human dignity, understood as the right to individual autonomy, and this right is then backed up by enumerated rights to this end. The Court has described this basic structure in the following way:

The general personality right, as laid down in Article 2 (1) in tandem with Article 1 (1), serves to protect these values – along with other more specific guarantees of freedom – and gains in importance if one bears in mind modern developments with their attendant dangers to the human personality. (BVerfGE 65, 1 (1983): 333)

The fact that all these pieces (articles 1, 2 and the enumerated basic rights) constitute an integrated system can clearly be seen by the function of article 2, which in a sense constitutes the heart of this system of rights. The second article not only substantiates the first article, it also functions as a catch-all article. That is, the Court can invalidate laws even if no specific enumerated basic right is infringed upon, by referring to the general right to free development of an individual personality, as stipulated in article 2. That is, the second article ensures justice on the basis of individual concern, and works as an ultimate guarantee of the fairness of government action for all individuals – much in the same way as the due process and equal protection clauses in the U.S. Constitution (Currie 1989: 335–336; Rubio-Marin 2000: 189).¹³⁴ In conclusion, the core of the Basic Law joins together or connects specific individual basic rights with the respect for human dignity perceived as the right to live an autonomous life (Kommers 1989: 305); and ‘the basic rights and many other provisions show that the cornerstone of the Basic Law is to respect the choices of the individual’ (Siebert 1993: 292).

The right to an autonomous life is also seen as a right that individuals hold equally, and the right to equal concern in fact constitutes part of the overall system guaranteeing individuals the right to self-determination. The right to equality follows immediately after article 2, which guarantees individual autonomy:

All persons are equal before the law.

Men and women shall have equal rights.

No one may be disadvantaged or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. (Basic Law 3 (1–2))

That is, the notions of freedom and equality constitute an interrelated value system where all, as autonomous individuals, are seen as deserving of an even-handed treatment or chance (Würtemberg 1988: 69–70; Karpen 1983: 74–75). This is, of course, already indicated in the second article, which states that individual freedom is limited by the freedom of other

¹³⁴ It should be noted that there are other clauses in the Basic Law that have been deployed for this purpose, see article 3 and 14 for example.

individuals. Furthermore, the right to equality before the law in general, and the concept of the *Rechtsstaat* in particular, reconnect to the idea that all persons have a right to equal concern as autonomous individuals (Goerlich 1988: 63; Würtenberg 1988: 83).

It can be said that the Basic Law generally focuses on values – as a notion that encompasses but goes beyond rights. This focus on values means that the state’s requirement to respect and protect human dignity encompasses positive obligations as well, and the state must provide all individuals with the basic requirements needed for the exercise of individual autonomy. This entails creating a social order where the basic rights in the Basic Law can be exercised effectively, including the duty of providing all individuals with minimal material resources. The specific wording protect has not been the major impetus behind establishing that the state has positive obligations; this obligation has instead been derived from an overall interpretation of the Basic Law drawing on several articles including the so-called social state provisions in articles 20 and 28 (*Sozialstaat* provisions), as well as the notion of the rule of law.

The Court has, for example, interpreted the social state provisions as entitling all persons to some level of basic social assistance. That said, no specific social entitlement has been derived directly from these provisions, and the Court has, in general, left the legislative branch with a great deal of discretion in deciding on the extent and nature of the positive obligations that the Basic Law gives rise to (Currie 1994: 15–16, 21; Karpen 1983: 74–75; Kunig 1988: 201–202; Kommers 1989: 248–249; Neuman 1990: 40; Kommers 1999b: 107–108, 120). This, nevertheless, means that the Basic Law goes beyond negative rights and creates a legal obligation for the state to protect, and not only respect, individuals’ ability to exercise self-determination:

This obligation [referring to article 20 and the social state clause] is the modern trend of the Basic Law, which looks beyond classical liberalism. The social state clause imposes an obligation on the State not only to respect the dignity of man and safeguard his individual rights, but also to ensure the creation of the most equitable social conditions possible, in which the individual can develop that dignity and exercise those rights. (Sontheimer 1993: 215)

The Basic Law’s focus on the value of individual autonomy as something entailing, but going beyond negative rights, is in turn closely connected to the perception, not to say the epistemological assumption that autonomous persons are social and not atomistic beings:

The morality of duty and the principles of human solidarity implicit in this statement [referring to the Court's description of the image of man in the Basic Law] and reflected in parts of the Basic Law bear clear imprint of Kantian moral theory... Human dignity, in the eyes of the Court, requires a caring and sharing society marked by understanding and reciprocity among individuals in the presence of definite values. Individuals are to be seen and appreciated in their concrete reality and respected for what they actually represent in their familial and personal lives. These propositions, in short, add up to the Kantian injunction that human persons are to be treated as ends in themselves, not means. (Kommers 1989: 313)

This perception of the autonomous individual as a social actor also has implications for the role of the state. The state needs, on the one hand, to be limited, so as to not encroach on individuals' sacred private sphere; but the state must, on the other hand, ensure that all individuals have the ability to exercise self-determination (Kommers 1989: 245–246; Kommers 1997: 47). There is, thus, a need to balance or weigh individuals' rights against each other. This balancing act constitutes an essential part of the constitutional system in Germany. It is implied already in the Basic Law's second article – 'everyone has the right to free development of his personality insofar as he does not violate the rights of others' (Basic Law 2). The Court has also on numerous occasions elaborated on the nature of this balancing act:

The right to free development of one's personality and human dignity safeguard for everyone the sphere of autonomy in which to shape his private life by developing and protecting his individuality. ... However, according to the constant practice of the Federal Constitutional Court, not the entire sphere of private life enjoys the absolute protection of the above-mentioned fundamental rights. If an individual in his capacity as a citizen living within a community enters into relations with others, influences others by his existence or activity, and thereby impinges upon the personal sphere of other people or upon the interests of communal life, his exclusive right to be master of his own private sphere may become subject to restrictions, unless his sacrosanct innermost sphere of life is concerned. (BVerfGE 35, 202 (1973))

This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather [that] of a person related to and bound to the community. In light of this community-boundedness it cannot be "in principle unlimited". The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life; yet the autonomy of the individual has to be protected. (BVerfGE 45, 187b (1977): 316)

The image of man under the Basic Law is not that of an isolated, sovereign individual; rather the Basic Law resolves the conflict between the individual and the community by relating and binding the citizen to the community but without detracting from his individuality. (BVerfGE 4, 7a (1954): 215)

Like all basic rights, the guarantee of liberty in Article 5 (3) (1) is based on the Basic Law's image of man as an autonomous person who develops freely within the social community. (BVerfGE 30, 173 (1971): 310)

If one sees in this constitutional right [article 2 (1) the right to personal self-determination] a comprehensive guarantee of freedom of action, such a freedom can, in principle, exist only to the extent that it neither violates the rights of others, nor the constitutional order, nor morality. The image of man in the Basic Law is not that of an isolated, sovereign individual. On the contrary, the Basic Law has resolved the tension between the individual and society in favour of coordinated and interdependence with community without touching the intrinsic value of the person. (BVerfGE 4, 7b (1954): 250)

The Basic law thus clearly recognises that individuals' rights can come into conflict. The Basic Law's solution to this problem is based on its view of the autonomous individual as a social co-operator who has a right to individual freedom, but also an obligation to respect other individuals' equal right to freedom. This means that individuals must accept limits on their personal freedom so as to guarantee the equal concern of all, as individual autonomy is not a fully private affair but partly functions in a social context (Karpen 1988: 96; Klein 1983: 18–19; Kommers 1997: 37). This solution clearly does not mean that some unfortunate individual's good can be sacrificed on the altar of the common good. The idea is that individual rights sometimes must yield to the interests of other individuals and society as a whole, but that this never can lead to a situation where the essence of individual rights is encroached upon (Kommers 1997: 45–48). (The Court has developed a sophisticated mechanism to this end – see the proportionality principle below.)

In sum, the normative essence behind the Basic Law bears a close similarity to modern cosmopolitanism. The belief in a pre-existing moral order and the notion that state authority is limited is carried over from the Christian natural law tradition to Kantianism, where the notion of human dignity is substantiated and cashed out as the right to equal individual autonomy. The notion of equal right to individual autonomy then takes a further step in the

direction of modern cosmopolitanism (or reconnects to Kant),¹³⁵ where more attention is paid to ensuring the conditions under which all individuals have an actual ability to exercise individual autonomy.

This leads to an increased focus on societies' obligations to protect individuals' ability to exercise autonomy, and not just to uphold negative rights. Or to put it differently, it leads to a focus on the value of individual autonomy as something that entails, but goes beyond, the negative right to exercise individual self-determination. It is thus clear that the normative essence of the Basic Law rests on the cosmopolitan rationale, and in particular entails Kant's universal concept of an equal and mutual right to individual autonomy. This is furthermore underscored by the fact that the Basic Law's concept of human dignity is connected to international law, where the concept of human dignity carries strong Kantian connotations (Benda 1999: 36–37; Schatter 1983; Dolzer 1993: 372). Indeed, the concept of human dignity in the Basic Law draws directly on Kant and his notion of the Kingdom of Ends, as well as on other key cosmopolitan sources (Fletcher 1984: 178):

In seeking to advance human dignity as a constitutional value, both court and commentators have relied on three politically significant sources of ethical theory in postwar Germany – namely, Christian natural law, Kantian thought, and social democratic thought. As noted in an earlier chapter, we find these influences present in the constitutional text as a whole. (Kommers 1989: 312)

The Basic Law and Communitarianism

The Basic Law, for all its focus on cosmopolitan rights, also contains a strong commitment to the notion of popular sovereignty (Kommers 1999b: 96; Krüger 1999: 343). Article 20 states that: “All state authority emanates from the people.” (Basic Law 20 (2)) This means that the existence of a particular self-defined people constitutes the legitimate basis for state authority, and the right to exercise state authority rests with the German people (see the political rights realm below). The Court has described this multi-faceted constitutional order in the following:

[The order comprises of] at least the following basic principles: respect for human rights as made explicit by the Basic Law, especially the right to life and the free development of the person, the sovereignty of the people, the separation of powers...(BVerfGE 2, 1 (1952): 152)

¹³⁵ It can always be discussed to what extent the focus on the ability to actually exercise individual autonomy effectively was present in Kant's moral and political philosophy; or whether this development in modern cosmopolitanism stems more from social democratic sources.

The principle of popular sovereignty is thus also central to the Basic Law, as it constitutes the foundation for the legitimate exercise of state authority; this, of course, does not alter the fact that all state authority is limited by a suprapositive legal obligation to respect human dignity. The centrality of the principle of popular sovereignty is reflected in the fact that it enjoys the protection of the eternity clause. The fact that great significance is also attached to the notion of popular sovereignty means that membership in the nation or body politic is of great importance, and that citizenship confers a special status. This is highlighted by the fact that only Germans enjoy the protection of some of the basic rights stipulated in the Basic Law. That is, the Basic Law contains a distinction between human rights or rights for everyone (*Jedermannrechte* or *Menschenrechte*) and rights for Germans (*Deutschenrechte*) (Joppke 2001b: 348–349; Rubio-Marín 2000: 186–188; Kantstroom 1993: 168–170).¹³⁶

[...] citizenship expresses the basic relationship between the group of members legally bound and the community of the German state. Out of citizenship derives a constitutional status whereby some rights, and the guarantees for equal enjoyment of some others, are reserved for Germans. (BVerfGE 83, 37a (1990): 204)

The Court has also clarified that membership is not a functional concept, but refers to membership in the particular German nation, which holds the right to define itself:

Other provisions of the Basic Law that relates to “the people” are unequivocal in [identifying] the body politic as the German people: the Preamble declares that it is the German people who adopted the Basic Law by virtue of their constituent power; Article 33 (1) and (2) guarantee every German in every *Land* the same political rights and duties; Articles 56 and 64 require the federal president and members of the cabinet to swear that they will dedicate their efforts to the well-being of the German people. ... This does not mean that the legislator is unable to influence the composition of “the people” under Article 20 (2). The Basic Law empowers the legislator to set conditions for gaining or losing citizenship status (see Articles 73 [2] and 116) and thereby to establish the criteria for membership in the body politic. (BVerfGE 83, 37b (1990): 198)

It is hence the particular German people who hold the right to exercise state authority and national sovereignty; or put differently, the legitimacy of the German state is based on the fact

¹³⁶ The concept of German rights in the Basic Law does not preclude non-citizens from being provided with the same rights under statutory law, and non-citizens enjoy the right to freedom of assembly and freedom of association under federal law, for example. That is, the Basic Law limits the constitutional protection of these rights to Germans, but it does not invalidate an extension of these rights to non-citizens (Interior 2005d: 48).

that it represents a particular nation (Brubaker 1998: 139; Kantstroom 1993: 169–170). The German constitutional framework thus combines the notion of that rights are bestowed universally on all individuals as autonomous persons on the one hand, and on the other, the idea that a nation-state, as the representative of a particular nation, has a right to pursue the interest of its members, and to exercise national sovereignty to this end.

The German legal system clearly gives lexical priority to individual autonomy, as all state authority must protect and respect the right to individual self-determination. That said, the general right to exercise state authority rests with the people; the nation can, thus, within the universal limitation set down in the Basic Law, exercise national sovereignty. That is, popular sovereignty is not the ultimate or highest value, but it covers by far the widest area (Goerlich 1988: 58). This constitutional system – where the right to individual autonomy, as a suprapositive legal obligation, cohabits with the right to national autonomy – can be summarised in terms of jurisprudence as follows:

Gesetz, which refers to statutes, represents the will of the people (i.e., the democratic will), whereas *Recht* suggests a normative “law state” that imposes limits on the will of the majority. (Kommers 1999b: 96)

The Basic Law’s Direct Legal Implications for Non-Citizens

The first thing to note, in regards to the direct legal implications for non-citizens of this constitutional system, is that the universal individual rights in the Basic Law, in general, do cover non-citizens. Non-citizens (including undocumented residents) are protected by the three first key articles (the right to human dignity, the right to individual autonomy, and the right to equality) and most of the other enumerated basic rights; the fact that the Basic Law constitutes a system that is universal in nature, furthermore, provides non-citizens with a general legal foundation from which they can claim rights and challenge legislation (Goerlich 1988: 47; Currie 1994: 12; Bowie 1954: 624; Neuman 1990: 38, 79; Joppke 2001b: 349–350; Rubio-Marín 2000: 187; Sinn 2005: 17).

It can be said, on a more specific level, that the wording ‘all state authority must respect and protect human dignity’, and the general universal thrust of the Basic Law, have the important implication of removing the possibility of placing the issue of non-citizens’ rights outside the remit of the Basic Law (Basic Law 1). This means that a legal doctrine of deference (such as

the plenary power doctrine) is fundamentally incompatible with the Basic Law (Joppke 1999: 18).¹³⁷ The Court has, furthermore, interpreted article 2 as a supplementary human right, allowing non-citizens to challenge restrictions on their rights by invoking the general right to the free development of a personality (Hailbronner 1999: 49); non-citizens have thus acquired certain rights that normally are reserved for Germans under the auspices of this superior universal right to individual self-determination. The key notion behind the inroads into rights normally reserved for Germans is that as an individual comes to live in Germany, her ability to exercise individual autonomy becomes tied to Germany, and this further restricts the number of rights that can be denied to her (Rubio-Marín 2000: 208–212; Joppke 2001a: 46–47; Kommers 1989: 170–171).

The second thing to note, in this context, is that the universal individual rights in the Basic Law constitute directly applicable law, and the Basic Law mandates the creation of a Federal Constitutional Court to uphold these rights. The Court explicitly holds the right to judicial review of the constitutionality of legislation, as well as over other forms of public authority.¹³⁸ This means that article 1 of the Basic Law, as its third clause stipulates, constitutes more than a general and lofty commitment to human dignity: it works as a check on all exercise of all public authority (Kommers 1999a: 1–3; Dürig 1988: 13; Neuman 1990: 38; Kommers 1980: 674; Basic Law 1, 92–93). The normative idea of respecting human dignity is thus transmitted or transformed, via the Basic Law, into a legal reality that makes this norm actionable – in principle even on the supranational level (through the connection with international law).

The above amounts to a robust legal defence of non-citizens' right to individual self-determination, but it should be noted in this context that the Court seemingly has made access to *additional* protection under article 2 – albeit based on the universal right to autonomy – dependent on legal residence (Rubio-Marín 2000: 215). Nor do the inroads that non-citizens have made under the aegis of article 2 amount to a collapse of the distinction between human rights and rights for Germans (Ossenbühl 1993: 252, 275; Joppke 1999: 18–19).

¹³⁷ It should, however, be noted that the Court provides the Government with a fair amount of discretion over foreign affairs, but the connection between immigration and such affairs is not assumed, as is often the case in the U.S. (Neuman 1990: 69–70).

¹³⁸ It is noteworthy that the Court never had to establish its right to judicial review (as its U.S. counterpart did), and that its jurisdiction spans some non-constitutional areas. The Court is not, as should be mentioned, the highest court of appeal for most non-constitutional issues. The highest courts of appeal for this kind of cases are five specific federal courts (Neuman 1990: 38–39; Kommers 1997: 10).

It should, furthermore, be noted in this respect that equality before the law only bans unequal treatment based on what the Court holds to be arbitrary differences (Rubio-Marín 2000: 191; Neuman 1990: 65). The fact that the German people have a right to national self-determination also means that alienage is not always seen as an arbitrary distinction (Currie 1989: 363–364; Ipsen 1983: 129–130; Currie 1994: 322–324). More specifically, the Court has held that non-citizens do enjoy a general right to equality before the law, but the ban on distinctions on the basis of a person’s homeland does not cover non-citizens (Neuman 1990: 65; Kantstroom 1993: 191–192; Rubio-Marín 2000: 191). This means that non-citizens, on the one hand, are entitled to equality before the law as they are (at least in part) recognised as equally entitled legal subjects; but alienage is, on the other hand, also perceived as a valid classification ground, and this means that there is a chink in non-citizens’ legal armour.¹³⁹ (The details of this will emerge in the civil rights realm.)

The fact that non-citizens are protected by article 2 – the general right to individual self-determination – also gives rise to legal protection in the form of inclusion in the procedural rights that are inherent in the German constitutional system. These procedural rights are intended to ensure that the values in the Basic Law are upheld throughout the legal process. The key concept in this regard is the principle of *Rechtsstaatlichkeit* (accordance with the rule of law). The main, or overall, principle behind the concept of *Rechtsstaatlichkeit* is that the state must respect and protect individuals’ right to self-determination by making the legal process transparent and predictable, and by upholding all individuals’ right to equality before the law. This is intended to ensure that all individuals have an equal ability to plan their lives and pursue their particular aims (Currie 1989: 353–354, 358–363; Currie 1994: 18–20, 309–310, 318–320; Rubio-Marín 2000: 189–190; Kantstroom 1993: 191; Notes 1986: 316; Kommers 1997: 36, 46; Basic Law 1, 3, 19).

The basic principle of *Rechtsstaatlichkeit* is embodied in article 19 of the Basic Law. This article provides all individuals with basic procedural due process rights in cases where their basic rights are infringed upon – including the right to challenge infringements on their liberties in a court of law. The principle of *Rechtsstaatlichkeit* in the German constitutional

¹³⁹ This chink in or limitation of non-citizens’ legal armour lies at the heart of Germany’s (and the U.S.’s) effort to balance individual and national autonomy. The final legal arbitration, in particular cases, between these two values in relation to non-citizens’ rights often boils down to the question of whether alienage is a legitimate classification ground, or whether the non-citizen, as an equally entitled individual, has the right to be treated on par with citizens.

system, however, stretches beyond this basic notion of procedural due process: it includes rules that are intended to make sure that the state does not ride roughshod over individuals' rights in cases where there is a legitimate need to limit individuals' rights (Currie 1989: 353–354, 358–363; Currie 1994: 18–20, 309–310, 318–320; Rubio-Marín 2000: 189–190; Kantstroom 1993: 191; Notes 1986: 316; Kommers 1997: 36, 46; Basic Law 1, 3, 19).

The Court has established that the principle of proportionality – which is not explicitly mentioned in the Basic Law – constitutes part of the principle of *Rechtsstaatlichkeit*. The principle of proportionality is cashed out much in the same way as the concept of substantive due process in the U.S. That is, any restriction on liberties must be adapted or tailored to a specific and legitimate end, and the restriction must be necessary to that specific end; the burden imposed on the individual, furthermore, cannot be too onerous, and the legislature must choose the least burdensome means from the individual's point of view when infringing on individual liberties (Currie 1989: 353–354, 358–363; Currie 1994: 18–20, 309–310, 318–320; Rubio-Marín 2000: 189–190; Kantstroom 1993: 191; Notes 1986: 316; Kommers 1997: 36, 46; Basic Law 1, 3, 19).

The principle of *Rechtsstaatlichkeit* has developed into a comprehensive system that ensures that all individuals' rights are protected throughout the legal process, while at the same time allowing for the necessary balance of interests between different individuals and society at large. The fact that even basic rights are balanced against each other thus does not mean that the basic rights are void. The proportionality principle (in conjunction with the general right to autonomy under article 2) is a key legal instrument in this respect, as it is devised to set an upper limit on – and to control – the state's ability to circumscribe individuals' rights. This principle provides the Court with the ability to ensure the fairness or justice of all state authority. It will also become evident below that non-citizens hold several important rights under the principle of *Rechtsstaatlichkeit* in general, and under the principle of proportionality in particular (Currie 1989: 353–354, 358–363; Currie 1994: 18–20, 309–310, 318–320; Rubio-Marín 2000: 189–190; Kantstroom 1993: 191; Notes 1986: 316).

In sum, the issue of non-citizens' legal standing boils down to a balance between individual and national self-determination (Joppke 2001b: 349–350; Rubio-Marín 2000: 189–192, 195, 219–220). The current treatment of non-citizens in Germany reflects a balance between national and individual autonomy. That is, the idea that the German nation – as a particular,

bounded self-defined social sphere – has the right to self-determination constitutes the basis for its sovereignty. This national sovereignty is, however, circumscribed by individuals' universal right to self-determination *qua* persons, which all state authority must respect as well as protect (Joppke 2001c: 16–17; Rubio-Marín 2000: 227; Boswell 2003: 79–80; Kurthen 1995: 914, 918, 928; Schuster 2003: 189–190; Kantstroom 1993: 159–160, 209). As Kommers puts it: “The problem facing judicial interpreters is that they confront a constitutional text that enshrines the values of both universalism and particularism.” (Kommers 1999b: 104, for a similar statement by the Court see; BVerfGE 148/1/04 (2004))

Section II

It is now time to unearth the normative rationales behind the 17 specific rights identified in chapter one in the German context, and to look at how the balance between the cosmopolitan and the communitarian rationales is played out in Germany.

The Admissions Realm

The right to admission is limited to non-citizens who fall into the three main categories of labour, family and humanitarian immigrants. The new Immigration Act, which came into force in 2005, does contain several targeted provisions for labour immigration – although a general ban on recruiting foreign labour is in force in Germany, and labour immigration requires approval of the Federal Employment Agency (Immigration Act 18; Interior 2005f: 19). In more detail, it can be said that a foreigner *may* be admitted for the purpose of self-employment if she invests a sufficient amount of capital in Germany, where ‘overriding economic interest or special regional needs apply’ and ‘the activity is expected to have positive effects on the economy’ (Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Federal Government Commissioner for Migration 2004: 12; Office 2005: 2; Immigration Act 21).¹⁴⁰

Highly qualified non-citizens *may* also be granted the right to settle in Germany, with the approval of the Federal Employment agency, on the assumption that the non-citizen will not require state funds and that she will be able to integrate into German society (Immigration Act 19; Federal Government Commissioner for Migration 2004: 11; Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Office 2005: 2).¹⁴¹ Moreover, the Federal Employment Agency’s approval is, in general, dependent on the condition that the recruitment of non-citizens does not result in any adverse consequences for the German labour market, and that no German workers or foreigners entitled to preferential access to the

¹⁴⁰ These criteria are in general seen as fulfilled if at least 1000000 € is invested and ten jobs created (Immigration Act 21).

¹⁴¹ Highly qualified is defined as: scientists with technical knowledge, teaching personnel in prominent positions, and specialists and executive personnel whose salaries are at least twice that of the ceiling for the statutory health and insurance scheme. This group is also an exception to the general rule that non-citizens are not granted a settlement permit from the outset (Immigration Act 19).

labour market are available (Federal Government Commissioner for Migration 2004: 10; Immigration Act 39).¹⁴²

A fundamental distinction is made between EU citizens and so-called third-country nationals (between *Unionsbürger* and *Drittstaatenangehöriger*), and EU citizens' legal standing is regulated by a specific section of the Immigration Act. All EU citizens who wish to work as employees or self-employed persons, who wish to undertake vocational training, or who wish to consume services also have the right to reside in Germany – as do EU citizens who are not gainfully employed but have adequate health insurance and sufficient means of subsistence (Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Federal Government Commissioner for Migration 2004: 21–22, 24; Freedom of Movement Act/EU 2–4; Sorensen 1996: 114–115).¹⁴³

Non-citizens have a general or a *prima facie* right to family reunification under the Immigration Act:

The residence permit to enable [sic] foreigners to be joined by foreign dependents so that they can live as a family (subsequent immigration dependents) shall be granted and extended to protect marriage and the family in accordance with Article 6 of the Basic Law. (Immigration Act 27)

This general right to family reunification is, as the above quote shows, directly linked to the protection of family life as one of the universal individual rights enumerated in the Basic Law. The Court, however, ruled in 1987 that the right to family life does not extend to an absolute right of entry for the purpose of exercising the right to family unity. The right to family reunification under the Immigration Act is also conditioned on the assumption that foreign sponsors do not depend on social welfare for maintaining foreign dependents, or other foreigners living in their households,¹⁴⁴ and that they can provide adequate living space (Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Federal

¹⁴² Only the first, more general, requirement 'adverse consequences for the labour market' applies to admission of highly qualified foreigners (Immigration Act 19, 39 (5)).

¹⁴³ It should be noted that the EU's ten latest members are temporarily excluded from this right, and that citizens from these countries still need authorisation from the Federal Employment Agency, on the same conditions as third-country nationals. That said, citizens from these member states have priority over third-country nationals, and they will gain the same right as other EU citizens in 2011 at the latest (Federal Government Commissioner for Migration 2004: 21–23; Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights).

¹⁴⁴ This condition relates to the general requirement for admission stating that foreigners' livelihood needs to be secure (Immigration Act 5 (1) 1).

Government Commissioner for Migration 2004: 15–16; Hailbronner 1999: 51; for the right to restrict family reunification on economic grounds see Council Directive 2003/86/EC 4; Immigration Act 5 (2), 27–29). The Court did, nevertheless, provide non-citizens with legal protection in this area, because it ruled that the more general test of proportionality must be met.¹⁴⁵ The upshot of this ruling is that the German state has a recognised right to deny entry to individuals who seek family reunification; a denial of family reunification must, however, be measured against non-citizens' interest in living with their families, i.e. a denial of family reunification must be proportional (Neuman 1990: 59–63; Joppke 1998b: 285–286; Kantstroom 1993: 191; Rubio-Marin 2000: 207–208; Hailbronner 1999: 51; BVerfGE 76, 1 (1987)).

The right to family reunification in the Immigration Act, the above conditions notwithstanding, does cover the spouse and minor unmarried children. Other family members can only obtain the right to family reunification if they can demonstrate that a denial of this right would lead to 'extraordinary hardship' (Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Federal Government Commissioner for Migration 2004: 14). This means that non-citizens' spouses *shall* be admitted if the non-citizen holds a settlement permit or a residence permit as a recognised refugee,¹⁴⁶ or has held a residence permit for five years, or if the marriage already existed at the point when the joining spouse arrived in Germany with the stay being expected to exceed one year (Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Federal Government Commissioner for Migration 2004: 16; Knipping 1995: 292; Immigration Act 30).

The right to family reunification also states that minor unmarried children younger than 16 years of age *shall* be admitted if both parents, or the parent holding the sole custody right has a residence or a settlement permit. Minor children over 16 years of age hold the same right, provided that they are able to speak German, or if it seems likely that the child successfully can be integrated into German society.¹⁴⁷ The economic restrictions and the 16+ condition do not apply for recognised refugees (Interior 2004: 3; Federal Government Commissioner for

¹⁴⁵ It is noteworthy that the Court rejected the idea of a quota system, as this would fail to give sufficient consideration to individual cases and thus violate article 6 of the Basic Law (Hailbronner 1999: 51).

¹⁴⁶ Most temporarily admitted refugees do not have the right to be joined by family members (Immigration Act 28–29).

¹⁴⁷ Children born in Germany by a foreign mother shall be granted a residence permit if the mother holds a residence or settlement permit. Minor unmarried children may also be admitted in order to avoid hardship for the family involved and the same applies to other dependents of foreigners (Immigration Act 33).

Migration 2004: 14–18, 32; Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Knipping 1995: 292; Council Directive 2003/86/EC 12; Immigration Act 30, 32, 36).¹⁴⁸

Non-citizens who are married to, or are the children of, German citizens, on the other hand, have an unconditional right to entry. (Minor unmarried German children also have the right to be joined by their parents, even if the parents are not German citizens). The general condition that the non-citizen's livelihood is secure does not apply in these cases, and nor do the specific criteria for the right to family reunification. This means that Germans can be dependent on social welfare and/or incapable of providing sufficient living space, and still enjoy the right to family reunification; also, children over 16 joining a German citizens need not be able to speak German or be deemed likely to be able to integrate into the German society (Federal Government Commissioner for Migration 2004: 15; Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Interior 2005f: 36; Immigration Act 28–29).¹⁴⁹

EU citizens are also exempted from the restrictions on family reunification that apply to other non-citizens, and EU citizens have the right to be joined by their family members (This is in line with derivative EC law, see Neuman 1990: 59; Nascimbene 1996: 6; Hailbronner 1999: 52). EU citizens' right to family reunification covers spouses and children under 21, as well as relatives of the EU citizen or her husband in ascending and descending line for whom the EU

¹⁴⁸ It is not entirely clear whether Germany complies with the EC Directive on family reunification. The directive states that refugees are exempted from economic requirements for family reunification, unless reunification is possible in another state with which the sponsor has links, or if the application for family reunification is not submitted within three months after the granting of refugee status (Council Directive 2003/86/EC 7, 12). The Immigration Act states that children and spouses of refugees *shall* have the right to a resident permit (Immigration Act 30 (2), 32 (1)). The Act, however, also says that the economic conditions for family reunification 'may be waived' for recognised refugees (Immigration Act 29 (2) see also 30 (3)). The official explanation of these provisions hardly clarifies the situation:

The members of your [non-citizens] family *may* be refused a residence permit if you claim income support for the keep of your family members or the members of your household. However, this does not apply to those who are entitled to political asylum, Convention refugees and those who have been permitted to settle for humanitarian reasons. If you belong to one of these groups, the Aliens Department *may* allow your spouse or life-long partner and your underage children to join you even if you do not avail of sufficient accommodation space or are unable to give the assurance that you will be able to support them. (Federal Government Commissioner for Migration 2004: 15 emphases added)

The German Government has, however, stated – in terms that can only be described as mangled – that it is its intention to abide by the directive (Interior 2004: 3). That said, the Federal Government Commissioner seems, in the end, to be of the opinion that it is within Germany's discretion to deny refugees the right to family reunification on economic grounds:

Convention Refugees now have a claim to family reunification with their children and spouses, provided that sufficient accommodation space is available and maintenance assured. Even if this is not the case, the Aliens Department may at its discretion permit them to follow on. (Federal Government Commissioner for Migration 2004: 32)

¹⁴⁹ Non-citizens who are dependents of Germans are also entitled to take up work, and are in general entitled to obtain a settlement permit after three years, if there are no grounds for expulsion and the non-citizen speaks German (Immigration Act 28).

citizen or her spouse provides maintenance. This law applies to family members who themselves are third-country nationals (Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Federal Government Commissioner for Migration 2004: 7; Freedom of Movement Act/EU 3).¹⁵⁰

Refugees are recognised as a distinct and privileged group in the Immigration Act (Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights).¹⁵¹ Non-citizens who seek entry as political refugees have a statutory right to admission.¹⁵² Non-citizens *shall* be granted a residence permit if they indisputably are recognised as having the right to political asylum. There is a right to political asylum both in the Basic Law¹⁵³ and under the Geneva Convention¹⁵⁴ – previously called small (*klein*) asylum. The new Immigration Act has streamlined this double right to political asylum so that the two different provisions currently give the same level of protection and the same residence title (Interior 2005c: 2; Interior 2004: 5; Federal Government Commissioner for Migration 2004: 13, 32; Immigration Act 22, 25, 26, 60).¹⁵⁵

¹⁵⁰ It is of note that more generous rules apply to EU citizens than German citizens in this area.

¹⁵¹ Germany not only admits refugees who seek asylum, but also admits some quota refugees and Jewish immigrants from the former Soviet Union. Jewish immigrants are no longer admitted as quota refugees, but are admitted on a case-by-case basis. However, priority is given to family reunification and cases of hardship; also, as of 2006, Jewish immigrants will have to demonstrate a good command of German and that they are economically self-sufficient. The rationale behind the Jewish immigration is to preserve and strengthen the Jewish communities in Germany. Jewish immigrants have access to the labour market (Interior 2005d: 18, 56–57; Cyrus 2005: 9). Quota refugees are not admitted on the same grounds as asylum seekers, i.e. are not asylum seekers screened abroad, but are admitted 'in the context of humanitarian relief' under the Act on Measures in Aid of Refugees Admitted under Humanitarian Relief programs (Interior 2005d: 105). Non-citizens can also be granted temporary protection under the resolution by the Council of the EU, and 'shall then be granted a residence permit, unless there is serious reasons to suspect that the non-citizen is a risk to the security of Germany or the general public due to conviction of a prison term of at least three years; or if the non-citizen has committed a crime against peace, a war crime or a crime against humanity; or a serious non-political crime outside Germany' (Immigration Act 24).

¹⁵² Refugees can also be admitted on discretionary grounds, and non-citizens *may* be granted admission from abroad in accordance with international law or in urgent humanitarian needs (Immigration Act 22).

¹⁵³ Not all kinds of discrimination count as political persecution under this provision, and the treatment must ultimately be seen as incompatible with human dignity. It is noteworthy in this respect that the term political persecution in the Basic Law, for historical reasons, includes persecution on racial and religious grounds (Currie 1994: 273).

¹⁵⁴ It should, furthermore, be noted that the definitions in the Geneva Convention are extended to cover persecution on the grounds of gender and persecution by non-state actors who control areas of a state as well as against other actors if the state or the *de facto* sovereign is unable or unwilling to offer protection from persecution (Immigration Act 25, 60; Federal Government Commissioner for Migration 2004: 32; Interior 2004: 2; Office 2005: 2).

¹⁵⁵ It is noteworthy that the resident permit for refugees is not permanent and that it can be revoked as soon as the threat to the refugee is removed. After three years, a check of the preconditions for revocation is carried out, after which the refugee receives a settlement permit if the protection is not withdrawn. The refugee status can still be withdrawn after the settlement permit is granted (Refugees 2005: 16–17). Non-citizens who are admitted on other humanitarian grounds *may* be granted a settlement permit after seven years if the conditions for obtaining such permit are met (Immigration Act 26).

Non-citizens also have a right to *non-refoulement*. The *non-refoulement* protection in Germany extends beyond the Geneva Convention and the Convention against Torture, as non-citizens also enjoy protection under the Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth European Convention on Human Rights).¹⁵⁶ This means, taken together, that non-citizens cannot be returned to a state where their lives or liberty are threatened due to race, religion, nationality, membership of a certain social group or political convictions; nor can they be returned to a state where a threat of torture, capital punishment, serious and concrete danger to refugees' life, health or freedom exists (Cremer 1998: 64–68; Interior 2005f: 37–38; Interior 2006a: 3; Interior 2006c; Immigration Act 25, 60).

This right is not absolute, and non-citizens do not have a right to political asylum if they have been expelled on 'serious grounds relating to public safety and law and order' (Immigration Act 25 (1)); the prohibition against deporting refugees recognised under the Geneva Convention also does not apply when there are serious reasons for regarding the non-citizen as a security risk, a risk to the general public because of an unappealable sentence of no less than three years for a crime of a particular serious offence, or if the non-citizen has committed a crime against humanity, a war crime, a crime against peace, a serious non-political crime outside Germany, or if the non-citizen grossly breaches the obligation to co-operate with the German authorities (Cremer 1998: 64–68; Interior 2005e: 3; Interior 2005f: 54; Immigration Act 25 (3), 60).

The Government, furthermore, should not deport a non-citizen to a state where a concrete danger to his or her life and limb (health) or liberty' exists, but it is within its discretion to do so unless this violates the Basic Law. Non-citizens who are at risk of torture or face the death penalty *may not*, on the other hand, be deported under any conditions, and the state's overall discretion is in this area is limited by the fact that non-citizens enjoy the protection of the European Convention of Human Rights; non-citizens cannot be deported if it violates their rights under the said Convention, e.g. of their right to life, liberty, a fair trial, freedom of

¹⁵⁶ Germany incorporated the European Convention of Human Rights into federal law in 1953, and the Court has ruled that the European Court of Human Rights' decision also binds German courts and authorities; the Immigration Act also stipulates that non-citizens shall not be deported in violation of the Convention (Immigration Act 2 (5); BVerfGE 1481/04 (2004)).

speech/conscience, or if their family life is threatened (Cremer 1998: 64–68; Interior 2005e: 3; Interior 2005f: 54; Immigration Act 25 (3), 60).¹⁵⁷

German law hence provides refugees with strong legal protections, but refugees do not have a right to choose to seek protection in Germany, and non-citizens can be deported to so-called safe third countries (Immigration Act 25; Basic Law 16a). The introduction of safe third countries consists of two different provisions that are regulated by different procedural rules. First of all, article 16a of the Basic Law has been amended and now includes a safe country provision:

Paragraph (1) [the right to political asylum] cannot be invoked by a person who enters from a member country of the European Communities or from another third country in which application of the agreement Concerning the Rights and Fundamental Freedom is guaranteed. [...] It will be presumed that a foreigner from such a state [safe country] is not persecuted, so long as he does not present evidence justifying a claim that, contrary to this presumption, he is persecuted on political grounds. (Basic Law 16a (1–3))

This provision is based on a strong presumption of safety, and non-citizens who enter Germany from such a safe country have no right to seek political asylum or *non-refoulement* protection. The only protection non-citizens have from *refoulement* to such a safe country is that they can apply for protection from deportation to the country of their origin. But they can be deported to the safe country while their claim is pending, and only in exceptional cases can they seek protection from deportation to the safe country. The safety of these countries is, however, guaranteed by a normative ascertainment (*normative Vergewisserung*). The Court has furthermore laid down a number of conditions for the fulfilment of this normative ascertainment and a state's qualification as safe can be challenged in court.¹⁵⁸

¹⁵⁷ Non-citizens who are afforded asylum or *non-refoulement* protection are entitled to a residence permit – unless, in the case of Geneva Convention Refugees, the refugee 'has been expelled on serious grounds relating to public safety and law and order' and in the case of refugees granted *non-refoulement* on other grounds, unless the refugee has committed a serious criminal offence, a crime against humanity or poses a risk to the general public or Germany (Refugees 2005:16–18; Interior 2006c; Immigration Act 25 (1) – (3), (5)). In cases where a resident permit is not issued but deportation is not possible 'in fact or in law', the non-citizen receives a temporary suspension of deportation. But a residence permit 'is to be issued' if the deportation has been suspended for 18 months and the obstacle to departure cannot be expected to disappear in the foreseeable future (Immigration Act 60a (2); Interior 2006b).

¹⁵⁸ It is noteworthy that EU member states are deemed safe *a priori*, as they must have implemented these provisions in order to become members. This also means that their classification as safe is not justiciable (Noll 1997: 427–428, 451).

A safe state needs to be bound by the Geneva Convention (and its 1967 Protocol), the European Convention of Human rights, and provide procedures that allow all individuals to seek effective protection under these conventions. Nor is a state which returns non-citizens to states that does not fulfil these criteria considered as a safe country (Noll 1997: 424–429, 451; Asylum Procedure Act 26). It should, moreover, be noted that asylum seekers who are denied entry at the border retain their constitutional right of judicial review, and they have a right to enter Germany to pursue their appeals – although the judicial procedure under this safe country provision is fast-tracked and affords the non-citizen weaker legal protection than in regular asylum cases (Kantstroom 1993: 197; Lambert 1995: 12, 26–27, 52–54; Council Directive 2003/9/EC 21; Basic Law 16a).

The second notion of safe countries, which is based on the Asylum Act, concerns the assessment of those individual applications for political asylum where an applicant can be deemed as being safe from persecution in a third state. In such cases, the assessment of safety is undertaken by the agency dealing with each individual claim. This provision gives non-citizens the right to apply for political asylum, and it prevents immediate deportation. This means that a non-citizen has a right to have her case heard individually and that she has the right to stay in Germany while her case is pending. However, she will be denied protection if she has been provided with travel documents from a safe country, or if, before entering Germany, she resided in a safe country for more than three months, as she under these conditions will be seen as safe from persecution in that country (Noll 1997: 424–425, 429; Interior 2005e: 2; Asylum Procedure Act 27).

Ultimately, unless the non-citizen can provide *prima facie* proof that her deportation will be to a state where the threat of political persecution cannot be ruled out with reasonable certainty, protection can be denied. It should be noted that the fact that these cases are tried individually means that not just countries that have undergone normative ascertainment or have signed the Geneva Convention can be deemed safe countries (Noll 1997: 424 – 425, 429; Interior 2005e: 2; Asylum Procedure Act 27). It can be said, in terms of the general procedural process, that it is independent officials that handle asylum applications, and they have some discretion. The asylum seeker is given the opportunity to present her case in person, however, and negative decisions can be appealed to an administrative court (Interior 2005e: 2, 4; Schuster 2003: 215; Interior 2005f: 52, 54; Council Directive 2003/9/EC 21; Asylum Procedure Act 5).

There are finally some conditions that non-citizens, in general, must fulfil in order to be admitted. These conditions include having a secure livelihood (not requiring public funds), not being liable to expulsion (see grounds for expulsion below) and not compromising or jeopardising the interest of Germany (Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Federal Government Commissioner for Migration 2004: 7, 20–21; Office 2005: 1; Immigration Act 5, 7, 9). Non-citizens who are entitled to asylum or *non-refoulement* protection are exempted from the conditions of having a secure livelihood and not being liable to expulsion (Immigration Act 5 (3)).

Germany also has a visa regime in place, which aims at strengthening the control of the general conditions for entry. A visa is thus not a right of entry, but constitutes validation of a successful completion of a pre-screening process by German embassies. The visa system is further shored up by so-called carrier sanctions. These sanctions make companies that carry non-citizens – who do not hold a passport and a valid visa – to Germany liable to pay fines – unless the non-citizen is granted some form of humanitarian protection, in which case the fine is nullified under German law (Gibney 2003: 5; Interior 2005f: 33; d'Oliveira Jessurun 1991: 179; Noll 2000: 173, 178; Office 2005; Embassy 2006b).

Admitted immigrants are subsequently provided with either a residence or a settlement permit. These two categories of permit are different in nature, and a non-citizen's legal standing partly depends on which permit she holds (Office 2005; Immigration Act 4–5, 7, 9). The residence permit does not confer a permanent residence status, and its length and other conditions depend on the purpose of the stay. (That said, short-term visitors are not given residence permits but visas.) The settlement permit, on the other hand, is an unlimited residence title that cannot be made dependent on additional provisions, unless section 47 of the Immigration Act applies. This article bans non-citizens from engaging in political behaviour that leads to unrest, harms Germany's foreign policy interests, or harms other substantial interests of the German state (Federal Government Commissioner for Migration 2004: 7; Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Immigration Act 7, 9).¹⁵⁹

¹⁵⁹ The general rule is that non-citizens acquire a residence permit, which then can be upgraded to a settlement permit if certain conditions are fulfilled. A few selected immigrants are, it should be said, issued with a settlement permit from the outset (Immigration Act 19). The general conditions for obtaining a settlement permit include: having been in a possession of a resident permit for five years, having a secure livelihood, five years employment and contribution to statutory pension schemes (unless the non-citizen is unable to contribute due to

The Rationale(s) Behind the Admissions Realm

The first thing to notice is that the Basic Law specifically refers to admission. Article 16a stipulates that politically persecuted persons have a right to asylum. This does not mean that non-citizens have a general right to admission. The Court has, on the contrary, on the basis of the existence of articles 16a and 11 (guaranteeing free movement for Germans), concluded that the founders of the Basic Law did not intend to create a general right to admission, in which case article 16a arguably would have been superfluous (Neuman 1990: 75; BVerfGE 76, 1 (1987)). The Court thus established that only Germans and the politically persecuted have a constitutional right to enter and stay in Germany (Neuman 1990: 60).

The Court has also established that the right to control admission constitutes part of the legitimate exercise of the state authority invested in the German nation (Geddes 2003: 88). This means that the same dual approach that underlies the Basic Law's general approach to non-citizens' other rights also applies to the right of entry. The nation is seen as having the right to set the rules for admission in its own interest. However, it is also seen as having certain limited (but distinct) universal obligations towards non-citizens who seek refugee protection (and also to some extent towards people seeking family reunification). This dual approach is also echoed in Germany's present Immigration Act, where Germany is simultaneously trying to safeguard the economic interests of its citizens and uphold universal basic rights for non-citizens (Interior 2005f: 30). The Act's very first paragraph reads as follows:

It [the Act] enables and organises immigration with due regard to the capacities for admission and integration and the interests of the Federal Republic of Germany in terms of its economy and labour market. At the same time, the Act also serves to fulfil the Federal Republic of Germany's humanitarian obligations. (Immigration Act 1 (1))

This dual commitment has also been laid down by the Interior Ministry:

The Federal Government's new policy on immigration is oriented on [sic] the following key principles:

physical, psychological or emotional reasons), not being sentenced to a prison term exceeding six months, adequate knowledge of German, basic knowledge of the German society and possession of sufficient living space (Federal Government Commissioner for Migration 2004: 20; Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights).

- managing immigration in a more targeted way that takes Germany’s economic and societal needs into account, and limit future immigration. [...]
- fulfilling humanitarian obligations derived from the constitution and a number of internationally binding conventions and agreements. (Interior 2005f: 6)

It is hence clear that Germany tries to accommodate and balance the cosmopolitan and the communitarian rationales in terms of the right to entry, and that this balancing act mirrors the structure of the Basic Law.

In more detail, it can be said that the admission of labour immigration clearly is intended to serve the interest of Germany. Non-citizens have no right to come to Germany to seek better economic opportunities. Labour admission is instead clearly based on the needs of the German economy, and made dependent on the condition that German citizens’ chances of finding employment are not diminished (Office 2005: 2). The German Government, as well as its official Immigration Commission, outlined the basic rationale behind this rule, in the following:

The primary objective of the immigration policy in relation to the labour market is to find qualified labour with a view of creating additional employment opportunities for the domestic workforce. (Independent Commission on Migration 2001: 4)

On the contrary, said Mr Schily, [the former Home Secretary] immigration of highly qualified work force [sic] leads to new investments and jobs. Between 20 000 and 30 000 new jobs have been created because of the 10 000 skilled persons who immigrated to Germany. (Interior 2005a:1)

It is clear that the aim is to use labour immigrants as a tool for increasing the opportunities of the domestic workforce, and that labour immigrants are thus not seen as ends in themselves. The responsible minister, at the time, clarified this basic normative thrust behind the new Immigration Act:

[...] the new act is about making immigration possible ‘where it really corresponds with our own interests’ and limiting it and controlling it more effectively where there are cases of misuse. The Immigration Act will not put a strain on the German labour market. ‘By applying this process, no one will come to our country to take up employment for which a local jobseeker has shown his/her interest’, stressed Mr Schily. (Interior 2005a: 1, the quotes are from the former Home Secretary Mr Schily)

That the interest of Germans comes first is evidently part of this perspective:

The Federal Government is clearly giving German employees the first priority for job and qualification opportunities. [...] The principle of priority for German employees also applies with the new regulation on immigration. Foreign workers will only be placed in work if German workers cannot cover the demand. (Interior 2005c: 1)

This system is known as the Priority Principle (*Vorrangsprinzip*), and it is based on the principle that membership yields priority. It is noteworthy that not only members of the German nation, but also EU citizens, enjoy preferential treatment (Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Interior 2005f: 31):

This policy of restricting immigration of foreigners from non-EU/EEA countries is also in the interest of freedom of movement within the European Union which is enjoyed by workers from EU and EEA Member States (who have priority over foreigners from third countries). (Interior 2005d: 1)

The fact that the right to enter and reside in all EU member states is based on partial membership, and not on economic considerations, is underscored by the fact that this right no longer is reserved for EU workers alone but covers all EU citizens, provided that they have adequate health insurance and sufficient means of subsistence (Beauftragte der Bundesregierung für Migration 2005: Foreigners' Rights; Federal Government Commissioner for Migration 2004: 21–22; Sorensen 1996: 114–115; Interior 2005f: 76; Evans 1991: 190–191; Freedom of Movement Act/EU 2–4; Treaty Establishing the European Union 18). In conclusion, admission as a labourer depends on being a member of a set of exclusive particular nations. Non-citizens who are not EU citizens are only admitted insofar as this is beneficial to the members. The rationale behind the admission of labour immigrants is hence communitarian, in that the right to restrict labour immigration stems from the nation's right to self-determination, and this right is deployed to serve the interest of the members.

It is clear, from the above, that EU citizens enjoy a privileged status in terms of entry. EU citizens, furthermore, enjoy a privileged status in general. It is therefore worth looking specifically at the rationale behind EU citizens' privileged legal standing before continuing the analysis, as the same basic normative rationale for EU citizens' privileged position

reappears in the analysis that follows in the rest of this chapter. The first thing to notice is that EC law mainly, though not exclusively, confers rights on EU citizens (Hailbronner 1992: 65). The second thing to notice is that EU citizenship is an exclusive and membership-based status that confers a privileged standing in certain areas.

This exclusive membership is based on being a citizen of one of the member states of the EU. The Treaty Establishing the European Union clearly stipulates that the jurisdiction over nationality solely rests with the member states, and the right to EU citizenship pre-supposes membership in one of the member states (Joppke 2001b: 353–356; Joppke 1999: 27–37; Kurthen 1995: 931; Nascimbene 1996: 3; Sorensen 1996: 154–155; Treaty Establishing the European Union 17). This means that exclusion from, or loss of, national citizenship results in exclusion from EU citizenship. Thus EU citizenship constitutes an exclusive citizenship built on national membership/citizenship and the privileges that come with it depend on national inclusion and the fact that one's nation is included in an exclusive scheme of mutual recognition (Meehan 1993: 7–8; Sorensen 1996: 48–51; Morris 2002: 16, 22):¹⁶⁰

[...] one can be a European citizen only if one is of French, Belgian or German nationality, for example. In its present shape, the Citizenship of the European Union is thus, a sort of complementary supra-citizenship which confirms the existence of the cultural and political identities corresponding to the Member States of the European Union. This renewal of nationalism explains the exclusion of extra-communitarian citizens legally residing in Europe from the Citizenship of the European Union. (Martiniello 1994: 35)

[...] EU citizenship does not break the association citizenship-nationality at all but renews it in a slightly different way. (Martiniello 2000: 354–355)

The other side of this extension of rights on the supranational level has, however, been increased efforts to police the external frontiers of the Union, to co-operate on internal security measures, and to maintain a distinction at the EU level between EU citizens and TCNs [third country nationals]. Post-national universalism encounters a European regional bloc that rests on Europeanised source of legal, political and social power. (Geddes 2000: 225–226)

¹⁶⁰ It is interesting in this respect to note that the preamble to the Single European Act pays tribute to the principles of liberty, equality and social justice, but that this has come to be interpreted as referring to members only (Morris 2002: 22).

The notion that EU citizenship is a form of exclusive associated membership, and that the preferential treatment that comes with it is based on membership, has also been confirmed by the German Government:

[...] analogous to national citizenship, citizenship in the Union is to be understood as a special bond between citizens and the European Union. [...] The right of EU citizens to enter and reside in a Member State distinctly differs from that of third-country nationals. This reflects the progress made in Europe with regards to integration. (Interior 2005f: 76–77)

It is thus clear that the preferential treatment that EU citizenship confers ultimately is based on membership, and that EU citizens have been afforded partial membership in the German body politic.

The question of family immigration is somewhat more complicated than the issue of labour immigration. Non-citizens enjoy the right to marriage and family life under article 6 of the Basic Law: it is one of the enumerated human rights that protects individuals' right to self-determination (Mach-Hour 1999: 2; Geddes 2003: 83):

In the sense of classical rights, paragraph 2 and 3 of Article 6 are an acknowledgment of the freedom of the specific private sphere of marriage and family; it corresponds with a guiding idea of our Constitution; namely, the basically limited authority of all public power to affect the free individual. (BVerfGE 6, 55 (1957): 497)

This right is further shored up by the European Convention on Human Rights, to which Germany is a signatory, and which entails a universal right to family life (Morris 2002: 16). The Immigration Act, as described above, also, specifically recognises a *prima facie* right to family reunification in relation to article 6 of the Basic Law. This means that the Immigration Act's second purpose of upholding the humanitarian principles in the Basic Law and in international law covers the area of family immigration. That said, this right is limited, in cases where the sponsor is not a German or EU citizen, by economic conditions – and this means that the rights to family reunification constitute a stratified system (Morris 2002: 109).

These restrictions on family reunification are economic in nature, and the purpose of these restrictions is to ease the financial burden of family immigration on Germany. The fact that only non-citizens' right to be joined by family members must yield to the economic well-being

of Germany shows how communal priority clearly makes its presence felt in this area. It must be remembered, though, that there is a limit to communal priority in this area, as non-citizens can invoke the proportionality principle in family reunification cases. That is, the Court has recognised that there are two interests or rights at stake here: the individual's right to family reunification and the nation's right to control admission in its own interest. The Court has ruled that the nation has a right to restrict immigration even for the purposes of family reunification – but only provided that this does not disproportionately and adversely affect non-citizens, in relation to the state's legitimate interest of restricting entry.¹⁶¹ The upshot is that the Court has balanced the right to individual autonomy and the right to national autonomy, so as to create a limited and conditioned right to family reunification in Germany under article 6 of the Basic Law (Geddes 2003: 83).

Non-citizens' right to political asylum is one of the enumerated basic rights that constitute part of right to human dignity and: "Persons persecuted on political grounds shall enjoy the right to asylum." (Basic Law 16 (a)) Protection for refugees is also afforded via Germany's commitment to a number of international conventions, and the special connection between international law and German law means that these conventions create directly enforceable rights for non-citizens in Germany. Article 19, furthermore, ensures that these rights can be pursued in the courts.¹⁶²

A closer look at the definition of political persecution underscores the point that the right to political asylum constitutes part of the overarching right to human dignity. The notion of political persecution is not defined in the Basic Law, but it has been defined by the courts – drawing on the Geneva Convention – and it is based on the conviction that – out of respect for the inviolability of human dignity – no state has the right to harm or endanger the life, health or personal freedom of an individual 'for reasons of political opinion, religion or characteristics inherent to his or her unique identity' (Interior 2005f: 50). The German Government describes

¹⁶¹ The Court opted for an intermediate standard of review in this area, reviewing the legislation's justifiability (*Vertretbarkeit*). This means that the Court did not choose the weak standard of 'obvious constitutional defects' often applied in foreign affairs cases, but neither did it decide that the case called for heightened intensity scrutiny (Neuman 1990: 61–63).

¹⁶² The fact that the principle of political asylum is laid down in the Basic Law is of great importance, since it gives non-citizens a direct, enforceable right *vis-à-vis* the German state and limits the national sovereignty over admission; it is also of note that this means that the Basic Law contains an article that only pertains to non-citizens (Interior 2005d: 49–50; Joppke 1997: 273; Knipping 1995: 268; Schuster 2003: 183, 186). The constitutional status of the right to asylum has two other implications. One, no numerical limit can be applied, and two, applicants have a right to public assistance while their applications are pending (Martin 1994: 192–193).

the essence of political asylum, both in the Geneva Convention and the Basic Law, in the following:

The right of asylum protects people in hopeless situations not because of their commitment to certain political ideals, such as democracy or respect for human rights, but above all because of the general obligation to respect the inviolability of human dignity, as acknowledged in the Basic Law. (Interior 2005f: 51)

Germany's commitment to, and ratification of, several international conventions also means that non-citizens enjoy a more comprehensive protection than the right to political asylum. They enjoy the right to *non-refoulement* on a number of grounds besides suffering directly from political persecution, and non-citizens are protected if their basic right to life, liberty and health is threatened. It is, of course, of note in this respect that the protection of refugees in Germany draws together the right to human dignity in the Basic Law and international human rights law. The first article of the Basic Law stipulates that 'the German people acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world' (Basic Law 1). The Basic Law makes this norm directly actionable by giving recognised norms in international law the status of directly applicable law in Germany, thus joining together two bodies of law that both aim at protecting human dignity. The universal normative thrust behind refugee protection is thus clear, and the right to protection in German law is clearly based on the cosmopolitan rationale.

Finally it should be said that Germany, as part of its exercise of national sovereignty, has put in place general restrictions on entry that apply to most non-citizens. These restrictions are clearly aimed at safeguarding the nation. The notion of safeguarding the nation is dual. These restrictions aim to protect members from dangerous non-citizens, but also to reduce the cost to the nation, by keeping non-citizens (who are seen as potential costs) from entering the country (Immigration Act 5, 55).

The Civil Rights Realm

All non-citizens in Germany enjoy the right to freedom of speech and conscience under the Basic Law (Goerlich 1988: 47; Basic Law 4, 5). The same goes for non-citizens' right to hold and acquire property (Goerlich 1988: 47; Ossenbühl 1993: 252, 269–270; Currie 1994: 271; Basic Law 13, 14, 104). The constitutional right to freely choose one's profession and the

right to seek employment in the civil service on equal terms is, however, reserved for Germans under the Basic Law.¹⁶³ Non-citizens, moreover, do not have the right to become lifetime civil servants; this includes jobs in public nurseries and public transport (Aleinikoff 2002a: 72; Neuman 1998: 249; Krajewski 1996: 375; Basic Law 12, 33).¹⁶⁴ EU citizens are afforded better protection when it comes to the right to freely choose one's profession. This is because EC law only allows member states the right to reserve public employment to nationals when it involves public exercise of power and responsibility for safeguarding the interest of the member states, all according to a narrow interpretation of public service (Meehan 1993: 88; Niessen 1996: 9; Guild 1996: 47).¹⁶⁵

Non-citizens do, however, enjoy the right to be secure in their person and property under the Basic Law. This includes the right to be secure in one's home and workplace and the right to *habeas corpus* (Goerlich 1988: 47; Ossenbühl 1993: 252, 269–270; Currie 1994: 271; Bowie 1954: 606; Basic Law 13, 14, 19 (4), 101, 103, 104). Non-citizens also have the general right to equality before the law. Non-citizens' legal standing in terms of the right to equality before the law is, on a general level, similar to the right of equality before the law in the U.S., and as in the U.S., the judicial review or level of scrutiny is stricter when basic freedoms are involved (see the proportionality principle). Non-citizens in Germany, however, enjoy the same relatively strong protection on both the federal and the state levels, as there is no difference between the two levels in Germany in this regard (Neuman 1990: 65; Würtemberg 1988: 70–77; Kantstroom 1993: 192; Currie 1989: 367–368; Kommers 1997: 289–290).

This means that non-citizens enjoy a fairly robust right to equality before the law in Germany. That said, the Basic Law contains both a general equal protection clause and specific equal protection clauses for discrimination. Discrimination – on the grounds of sex, disability (since 1994), parentage, race, language, homeland and origin, political opinions or faith and religion – warrants a higher level of scrutiny. The Court has, however, established that discrimination against non-citizens due to their nationality does not fall within the purview of the special

¹⁶³ Non-citizens' ability to set up a business in Germany is also limited, in that non-citizens must have achieved a secure resident status before they have a right to set up their own businesses (Faist 1996: 233).

¹⁶⁴ Asylum seekers do not have a right to work, and may not work as long as they live in reception centres (maximum three months). But they can be granted a work permit after they leave the centres, if that is seen to be in the national interest (Bank 2000: 157–158). Recognised refugees, on the other hand, have free access to the labour market (Interior 2004: 5–6).

¹⁶⁵ It is of note that the EC Directive on the status of long-term residents excludes employment that 'entails even occasional involvement in the exercise of public authority', from long-term residents' right to equal access to employment (Council Directive 2003/109/EC 11).

equal protection clauses. This leaves non-citizens with a general right to equality before the law, especially in regard to basic rights, but the lack of citizenship does not constitute a suspect ground for discrimination that gives rise to stricter scrutiny. That said, non-citizens do enjoy a higher level of protection in Germany compared to the U.S., as the standard for what is seen as arbitrary or unreasonable in Germany is stricter (Neuman 1990: 65; Würtemberg 1988: 70–77; Kantstroom 1993: 192). EU citizens, in part, enjoy stronger protection in this area, as discrimination on the grounds of nationality is banned in areas covered by EC law (Sorensen 1996: 107; Guild 1996: 47; Treaty Establishing the European Union 12).

All non-citizens have a right to a fair trial with procedural safeguards, and the right to seek legal redress (Goerlich 1988: 47; Bowie 1954: 606; Basic Law 103, 104). Non-citizens, further, have the right to address public authorities, and the Court has established that all non-citizens, under article 2 of the Basic Law, have the right to challenge statutory or administrative restrictions in the courts. The right to challenge infringements on rights is also specifically guaranteed by the Basic Law (Hailbronner 1999: 49; Benda 1981: 6; Goerlich 1988: 47; Basic Law 17, 19 (4), 93).

Non-citizens do not have an absolute right to secure residency. They are vulnerable to expulsions on a number of grounds, some of which are mandatory. The latter includes receiving an unappealable sentence of a prison term of at least three years, or a two-year sentence under certain acts, e.g. the Narcotics Act; or receiving a custodial sentence for smuggling non-citizens to Germany (Interior 2005f: 59; Immigration Act 53). Non-citizens can also be deported in order to avert a special danger to the security of Germany, or to avoid terrorist threats, unless the grounds for prohibition of expulsion apply. (For grounds prohibiting expulsion see Immigration Act 60 (1–8) and below.) Deportation on special danger grounds must, it should be said, be based on facts (so-called evidence-based threat assessment), mere suspicion does not suffice and deportation on these grounds can be appealed, albeit only through a single appeal to the federal Administrative Court (Interior 2004: 4; Interior 2005b: 2; Office 2005: 3; Immigration Act 58 (a)).

Another set of (similar) grounds will, moreover, generally result in deportation. This includes being sentenced to a two-year custodial sentence; smuggling non-citizens into Germany; dealing or aiding in dealings with narcotics; being part of a crowd participating in public disturbances of public safety, or partaking in violence against persons or property; or

belonging to the leadership of banned organisations; or if justifiable facts lead to the conclusion that a non-citizen belongs to or supports¹⁶⁶ an organisation which supports terrorism. However, expulsion based on membership or supportive acts in the past may only be used if they form the basis for a present danger (Office 2005: 3; Interior 2005f: 59; Immigration Act 54).

Non-citizens who threaten the free democratic order or the security of Germany may also be expelled, as may non-citizens who mislead the German immigration authorities. Finally, 'a foreigner may be expelled if his or her stay is detrimental to public safety and law and order or other substantial interests of the Federal Republic of Germany' (Immigration Act 55). This ground for expulsion is exemplified by breaking the rules for entry procedures, breaking the law (except in minor and isolated cases), breaking legal provisions or official decrees regarding prostitution, using narcotics and refusing treatment, endangering public health or being homeless for a long duration, claiming social welfare, inciting hate against a section of the population (intellectual incendiaries), and so on (Interior 2004: 5; Office 2005: 3; Interior 2005f: 59; Immigration Act 55).

Deportation is thus not seen as incompatible with the Basic Law and its absolute protection of the right to individual self-determination. The Court has, however, ruled that deportation must meet the constitutional standards of the rule of law (*Rechtsstaatlichkeit*).¹⁶⁷ This means, for example, that deportation procedures need to be transparent, applied equally, and that there need to be effective judicial remedies against deportation. The Court has stated that non-citizens cannot be deported *en masse* and that the constitutional principle of individual examination (*Einzelfallprüfung*) applies in this area, and that only a legally valid conviction

¹⁶⁶ The use of the term support has caused worries, since it could apply to a wide range of actions. The exact line is to be drawn by the courts, and this task has as of yet not been undertaken; but it is clear that verbal support enjoys strong protection under the right to free speech (Zöller 2004: 478).

¹⁶⁷ It is noteworthy in this respect that the state has the right to incarcerate non-citizens that it intends to deport, and that this does not amount to *deprivation* of liberty in a legal sense, in which case a court would have to rule on the validity of such action according to the Basic Law (Basic Law 104 (2)). To put non-citizens in custody awaiting deportation is instead seen as a *restriction* of liberty, and such action does not require a court decision (Basic Law 104 (1)). The reason behind this classification is that the main purpose of the restriction is to enforce the obligation to leave the country, not to lock up the non-citizen in a confined space. It still remains an open question, however, whether this distinction is constitutional if such incarceration lasts beyond the end of the day after the day of the apprehension (Cremer 1998: 70). The above in no way means that deportation is seen as outside the constitutional realm; it simply means that incarceration for the purpose of immediate deportation is not seen as equivalent to an arrest in a criminal case. This system is based on a categorisation of infringements on liberty in the Basic Law and not on legal deference. This system does, nevertheless, indicate that the execution of deportation is seen as a legitimate state prerogative that is not punitive in nature. It should also be pointed out that deterrence is still seen as a valid motivation for deportation, as long as the principles of fairness and proportionality are met (Notes 1986: 323).

can constitute a ground for deportation – a suspicion or charge will no longer suffice (Joppke 1997: 238; Notes 1986: 322; Neuman 1990: 51–53).

The fact that the constitutional principle of the rule of law applies also means that deportations are subject to the proportionality test. The federal government thus has a right to set criteria for, and to deport non-citizens; but due consideration shall be given to the duration of lawful residence and to non-citizens' personal, economic and other ties to Germany, as well as to the consequences for non-citizens' families in Germany. The upshot of these rules is that the interest of the non-citizen must be balanced against the state's interest in deporting her (Federal Government Commissioner for Migration 2004:34–35; Neuman 1990: 48–74).¹⁶⁸

There is no statute of limitations in regards to deportation, but the Immigration Act, in light of the applicability of the proportionality principle and an EC Directive, affords special protection against deportation for non-citizens who are long-term legal residents. This group includes: non-citizens who possess a settlement permit and have lawfully resided in the country for five years; non-citizens who are born in Germany and hold residence permits or entered as minors and have five years of lawful residence; residence permit holders of five years who cohabit with a non-citizen in the two above categories; recognised refugees and non-citizens who cohabit with a German dependent or spouse/partner. Refugees can, moreover, only be expelled after all possibilities of appealing a decision against granting refugee protection have been exhausted (Federal Government Commissioner for Migration 2004: 34; Council Directive 2003/109/EC 3, 4, 12; Cyrus 2006: 11; Immigration Act 50–57).¹⁶⁹ This special protection from deportation means that a non-citizen may only be expelled on serious grounds pertaining to public security and law and order. Serious grounds are defined as the grounds for mandatory expulsion plus provisions dealing with terrorism, endangering the free and democratic order of Germany, and misleading the German immigration authorities (Office 2005: 3; Interior 2005f: 60; Immigration Act 56).

¹⁶⁸ The proportionality principle also applies when a non-citizen challenges a deportation order under the right to family life – article 6 of the Basic Law.

¹⁶⁹ Non-citizens enjoying temporary protection, and their spouses and minor children, can only be expelled if there are serious reasons for regarding the non-citizen as a risk to Germany's security or the general public, due to a criminal conviction of at least three years for a crime of a particular serious offence; or if there are serious reasons to assume that the non-citizen has committed a crime against humanity; or a serious non-political crime outside Germany (Immigration Act 56).

EU citizens also enjoy strong protections against deportation, as their right to live in Germany only can be withdrawn on the grounds of public order, public safety or public health – in accordance with the treaty of the European Union. A criminal conviction is not enough to meet these criteria: a current, real and sufficiently serious danger which affects a fundamental interest of society must exist; nor may deportation rest on anything but the EU citizen's personal conduct (Niessen 1996: 9; Peers 1996: 46; Interior 2005f: 60, 78; Treaty Establishing the European Union 39 (3), 46 (1); Freedom of Movement Act/EU 6). Finally, it can be said, on the procedural level, that a non-citizen has, following a deportation order, the right to establish *contact* with a legal adviser, and has to be informed of her legal entitlements and the legal remedies open to her. This includes the right to appeal in a court of law. However, the new terrorist deportation orders that take immediate effect can only be appealed directly at the Federal Administrative Court (Interior 2005f: 60–61, 68; Immigration Act 58 (a)).

The Rationale(s) Behind the Civil Rights Realm

The enumerated individual rights in the Basic Law, which uphold all persons' right to autonomy, cover most of the civil rights analysed in this thesis. The Basic Law protects the right to free speech and conscience as two separate rights that serve to respect and protect individuals' right to self-determination.¹⁷⁰ The connection between these rights and self-determination can be detected in the very wording of the Basic Law:

Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasting and films are guaranteed. There shall be no censorship. (Basic Law 5 (1))

Freedom of faith and conscience, and freedom to profess a religion or a particular philosophy are inviolable. The undisturbed practice of religion is guaranteed. (Basic Law 4 (1–2))

The Court has also directly linked the right to freedom of speech/opinion and the freedom of conscience to the free development of one's personality (although the Court stresses that freedom of speech also plays an important role in the democratic process):

¹⁷⁰ The fact that some of the rights analysed here are enumerated while some are covered by the more general right to individual freedom is of less importance. This follows from the fact that the Basic Law constitutes an integrated system that upholds human dignity, and nothing hinges upon whether a given right is enumerated or not, as the enumerated rights are neither exhaustive nor given a special standing (Rubio-Marín 2000: 187–191).

Everyone should be able to say what he thinks, even if he is unable to offer verifiable reasons for his judgment. Article 5 (1) protects freedom of opinion in the interest of individual self-realization as well as in the interest of the democratic process, for which it has constitutive significance. (BVerfGE 1423/92 (1994): 390)

The basic right to freedom of expression, the most immediate aspect of the human personality in society, is one of the most precious rights of man. (BVerfGE 7, 198b (1958))

In a state in which human dignity is the highest value, and in which the free self-determination of the individual is also recognized as an important community value, freedom of belief affords the individual a legal realm free of state interference in which a person may live his life according to his convictions. [...] The freedom guaranteed in Article 4 (1) of the Basic Law, like all the fundamental rights, has as its point of departure the view of man in the Constitution; i.e., man as a responsible personality, developing freely within the social community. (BVerfGE 32, 98 (1971): 450)

Religious freedom under Article 4 (1) of the Basic Law guarantees the individual a legal sphere in which he may adopt the lifestyle that corresponds to his convictions. This encompasses not only the (internal) freedom to believe or not to believe but also the individual's right to align his behaviour with the precepts of his faith and to act in accordance with his internal convictions. (BVerfGE 33, 23 (1972): 454)

The fact that the right to free speech and conscience encapsulates the right not to speak, not to inform oneself, and not to believe underscores the notion that the right to free speech and conscience ultimately is an individual right, which persons hold as autonomous individuals (Karpen 1988: 92–94; Kommers 1989: 372, 444–447; Kommers 1980: 685, 694). The connection between the right to freedom of speech and conscience and the right to individual autonomy becomes even clearer if one keeps in mind that these enumerated rights should be read in conjunction with the general right to freely develop one's personality.

The right to hold and acquire property also constitutes part of the enumerated basic rights in the Basic Law, which serve to uphold the right to individual autonomy (Schuppert 1988: 108–110; Kommers 1989: 256–260; Ossenbühl 1993: 269–270; Basic Law 14). The Court has made the rationale behind this right very plain:

Property is an elementary constitutional right that is closely connected to the guarantee of personal liberty. Within the general system of constitutional rights its function is to secure its holder a

sphere of liberty in the economic field and thereby enable him to lead a self-governing life. [...]
The guarantee of property is not primarily a material but rather a personal guarantee. (BVerfGE 24, 367 (1968): 339)

The property guarantee is a fundamental right, which is intimately related to individual freedom. In the total network of constitutional fundamental rights its function is to give the individual a free range within the area of proprietary interests and to enable the individual to shape his life on the basis of responsibility. (BVerfGE 53, 257 (1980): 110)

The fact that the economic right to hold property is seen as part of the universal right to individual autonomy is further underscored by the observation that the general right to commerce and industry flows from the general right to individual freedom (Kommers 1989: 247; Basic Law 2).¹⁷¹

The right to freely choose one's profession and the right to seek public employment on equal grounds, however, are German rights. These rights hence pre-suppose German membership. That these German rights rest on the communitarian rationale is underscored by the fact that an exception to the rule that only German citizens can become civil servants can be made if there is a compelling *public interest* in hiring non-citizens (Rubio-Marin 2000: 212). That said, it should be remembered that most non-citizens who reside in Germany have a statutory right to take up employment and work in most professions. All non-citizens who hold a settlement permit or are recognised refugees have these rights and labour immigrants are admitted for this very purpose. Further, non-citizens joining German citizens, and non-citizens joining other non-citizens who have the right to take up employment, are also granted this right (Interior 2004: 1, 5–6; Cinar 1999: 9; Immigration Act 9, 25, 28, 29).

Furthermore, and more importantly, non-citizens could hardly *fully* be deprived of the right to work, as this would violate their basic right to exercise individual autonomy. It is highly unlikely that the Court would not find a law that banned non-citizens from taking up employment altogether to be in violation of individual human dignity. This is because such law would make non-citizens totally dependent on others, reducing them to mere objects of the state. In other words, the general right to freedom would kick in at some point, even if certain

¹⁷¹ The fact that the rights discussed above constitute a part of the general constitutional right to individual autonomy means that the principle of the rule of law applies, which sets limits and procedural checks on any infringements on these rights (Currie 1989: 339–343).

jobs and the right to seek employment on equal grounds are legitimately reserved for Germans (Rubio-Marin 2000: 191). The Court has, after all, expanded the rights of non-citizens in other areas to cover some of the rights reserved for Germans under article 2, so as to ensure that non-citizens' basic right to individual autonomy is upheld.

Non-citizens' rights to be secure in their persons and property constitute part of their universal human rights (Goerlich 1988: 46–48). The right to be secure in one's person is derived from article 2, but it is reinforced by, and intimately connected to, the procedural rights laid down in articles 103 and 104 (limits on arrest, the ban on double jeopardy and the right to *habeas corpus*). The right to be secure in one's property is one of the universal, enumerated rights that ensure individuals' right to self-determination (Basic Law 14). The right to be secure in one's person and property also constitutes part of the principle of rule of law (which is made explicit in relation to the states in article 28). This means that the government, even when entitled to infringe on this right, may not go further than necessary, under the proportionality principle. The Basic Law further defends non-citizens *qua* persons by upholding an absolute limit on the state's ability to infringe on their basic rights to self-determination, under article 19 (2) (Currie 1989: 335–336, 352–354).

Non-citizens are protected by the general right to equal protection before the law, since this is seen as intrinsically linked to the idea of their universal right to equal concern as autonomous individuals (Würtenberg 1988: 70). The equal rights before the law protection is particularly strong where basic rights are concerned. That said, discrimination on the grounds of alienage is not banned, and the specific clause that protects against discrimination on the grounds of nationality/descent does not protect non-citizens. This system, whereby non-citizens in general enjoy a right to equality before the law while alienage still is seen as a valid ground for unequal treatment, follows naturally from the overall system of the Basic Law. That is, this level of protection reflects a recognition that nationality matters for a person's legal standing, but also that all individuals have an absolute right to basic autonomy, and to equal concern regardless of their nationality.

The right to secure residency likewise reflects a balance between the right to individual and national autonomy. The list of grounds for deportation is replete with actions that are seen as merely undesirable, rather than constituting crimes or actions that might threaten other persons under the nation's jurisdiction. Long-term residents do, however, enjoy protection from most

of the grounds for deportation listed in the Immigration Act, and can only be deported on serious grounds pertaining to public security and law and order (provided that they have received their residency title legally). Additionally, non-citizens' interest in remaining in their abode as autonomous individuals must always be weighted against the state's interest in deporting them.

The normative rationale behind the provisions in the Immigration Act that protect long-term residents can be traced to a ruling of the Court. It was held in this ruling that deportation is not unconstitutional but that individuals are protected under article 2, which grants them the universal right to individual self-determination. This is a consequence of the fact that their ability to exercise individual autonomy progressively becomes linked to Germany. The Court, in this case, rejected the argument that deportation cases, by their very nature, often result in disadvantages for non-citizens, and that deportation would become too difficult if constitutional standards were to apply:

First, such a peculiarity of deportation orders could not lead to a diminution in the protection of fundamental rights; rather, the significance of fundamental rights as the foundation of every human community [as declared in Article 1 of the Basic Law] must also be taken into account in the practice of deportation. (BVerfGE 35, 382 (1973): 53)

The principle of the rule of law in general, and the proportionality principle in particular, are devised so as to ensure that the state does not ride roughshod over individuals' rights when exercising state authority, in this case when deporting non-citizens. This means that non-citizens enjoy protection from deportation under the general right to individual self-determination, although this right is not absolute (Rubio-Marín 2000: 211; Neuman 1990: 48–58; Cremer 1998: 74; Kantstroom 1993: 190–193). That it is individuals' right to self-determination that underlies long-term residents protection from deportation is underscored by the fact that it originally was the Court's decision to apply the proportionality principle in deportation cases that gave rise to the current statutory protection in this area (Hailbronner 1999: 53; Cinar 1999: 9; Neuman 1990: 49).

The Political Rights Realm

Non-citizens have never had the right to vote and stand for public office in national elections in Germany. Two states did grant non-citizens the right to vote and stand for public office at

the state level.¹⁷² The Court, however, ruled this to be unconstitutional in 1990, on the grounds that the Basic Law reserves political rights for Germans on both the federal and the state levels (Marshall 1996: 250; Basic Law 33; BVerfGE 83, 37 (1990)). This ruling gave rise to a problem in relation to EU citizens, as under EC law they enjoy the right to vote and to stand for public office in municipal and EU parliament elections in any member state in which they reside (Treaty Establishing the European Union 19).¹⁷³ The Basic Law has subsequently been amended as to render it compatible with EC law in this respect. This means that EU citizens have the right to stand for election and to vote in municipal and EU parliament elections, but no other non-citizens have any political rights (Neuman 1998: 273; Guild 1996: 47; Basic Law 28).

The Rationale(s) Behind the Political Rights Realm

The right to vote and the right to stand for public office are not listed as rights for Germans in the Basic Law. These rights are, in fact, not directly mentioned in the Basic Law. However, several articles touch on these issues; article 28 stipulates that the people have a right to elect representatives in the states, and article 38 stipulates that the *Bundestag* (the lower house) should represent the people. Article 54 states that only Germans are eligible for the presidency, and article 33 ensures equal eligibility for public office for all Germans. That said, none of these articles reserve the right to vote and stand for election only to Germans. Indeed the reason that most scholars include these political rights among the exclusive rights for Germans stems from the fact that political rights are seen as included in the Basic Law's principle of democracy: "All state authority emanates from the people. It shall be exercised by the people through elections and voting [...]" (Basic Law 20 (2)) That is, political rights are in general seen as belonging to Germans, as those to whom the term people refers. In this context, therefore, people is understood as referring to the German people as constituting a particular *demos* (Rubio-Marin 2000: 187, 196–197; Neuman 1992: 269–272).

This interpretation of the term people (*Volk*) has, however, been contested by scholars, and different interpretations of the concept of popular sovereignty in the Basic Law have been put forward. Two main competing lines of argument about the meaning of the all state power emanates from the people clause have been put forward. The first holds that all who are

¹⁷² Only one of the statutes allowed non-citizens to stand for election (Neuman 1992: 283).

¹⁷³ It is noteworthy that the office of mayor can be reserved for citizens, and that elected non-citizens can be banned from partaking in the designation of delegates to national assemblies (Martiniello 2000: 365).

affected by the state's decisions should have an equal right in electing its leaders, thus disconnecting citizenship/membership and political rights. The proponents of this line of argument hold that this perception of democracy is the most congenial to the core value of the Basic Law, and they draw support from the fact that the Court often connects the values of individual autonomy and democracy. The counter position holds that the notion of popular sovereignty depends on the existence of a particular people, and can be described as the no-democracy without a *demos* argument. This position draws its strength from the fact that the Basic Law clearly contains a notion of a particular German nation. The Basic Law's preamble refers to the unity and self-determination of the German people, and the Basic Law reserves certain rights to Germans. This position makes political rights dependent on membership in the particular German nation (Rubio-Marín 2000: 199–203; Neuman 1992: 269–272, 276–282).

This debate was settled, in legal terms, in 1990, when the Court invalidated the two new federal statutes that granted non-citizens the right to vote and to stand for public office at the local level; in doing so the Court came down on the side of the no democracy without a *demos* side of this constitutional debate. The Court's decision hinged upon the meaning of the term people or nation (*Volk*). The Court held that popular sovereignty could not be seen simply in the abstract, but must be seen as referring to a particular community which has the right to define itself and which is bound in unity. The term people must hence be seen as referring to the specific German people and political rights thus depend on citizenship (Neuman 1992: 260, 284–291; Rubio-Marín 2000: 199–203; Neuman 1998: 273; BVerfGE 83, 37 (1990)). The Court outlined its core argument in the following:

There can be no democratic state without a body politic that is both subject to and object of the state authority vested in it and exercised through its organs. This does not mean that all state decisions must be approved by the people [affected by the decision]; rather it means that the subject of state authority must be a cohesive, unified group. ... [And] If the Basic Law conceives being [sic] German as necessary to being part of "the people" as the subject of state authority, then it must follow that [being German] is a precondition of the right to vote, which is a direct exercise of state authority possessed by the people. This does not mean that the legislator is unable to influence the composition of "the people" under Article 20 (2). The Basic Law empowers the legislator to set conditions for gaining or losing citizenship status (see Articles 73 [2] and 116) and thereby to establish the criteria for membership in the body politic. (BVerfGE 83, 37b (1990): 198)

The Court thus established that the concept of democracy in the Basic Law does not allow for a decoupling of political rights and citizenship; in so doing the Court explicitly rejected the idea that being affected by the exercise of state authority yields the right to vote or to stand for election (Hailbronner 2002: 122; Benhabib 2004: 202–205):

It is incorrect to state that an increase in the population of foreigners within the FRG changes the constitutional concept of “the people”. Underlying this misperception is the concept that democracy and the inherent concept of freedom demand [complete] congruence between those who hold democratic rights and those who are subject to state domination. This is the correct starting point, but it cannot eliminate the relationship between being German and being a member of the body politic, and thus vested with state authority. The Basic Law does not permit such a devolvement. (BVerfGE 83, 37b (1990): 198–199)

It is clear that the Court recognises the connection between autonomy and democracy. The Court, however, ruled that this connection between individual autonomy and democracy could not break or undermine the connection between the existence of a particular nation and the right to exercise state authority; this due to the fact that the Basic Law invests the power of exercising state authority in the German people. This decision gives the notion of democracy in the Basic Law a distinct meaning, and it draws a clear line in the sand by banning non-citizens from participation in the election process. That is, the ruling does not simply mean that only Germans are constitutionally *guaranteed* the right to political rights: the ruling also deems a cosmopolitan perception of democracy unconstitutional. The implications of this decision for a valid democratic process are clear:

[...] the democratic principle within the meaning of the Basic Law is only satisfied if the election gives effect solely to the will of the geographically limited portion of the people of the state, i.e., is conducted by the Germans residing in the boroughs. Elections in which aliens are also entitled to vote cannot convey democratic legitimation. (BVerfGE 83, 37c (1990): 287)

The Court built on this communitarian notion of democracy when it ruled on the constitutionality of the Maastricht Treaty. The Court held that the treaty was constitutional, on the grounds that the EU predominately is an organisation for inter-state co-operation and lacked *Kompetenz-Kompetenz*, i.e. lacks the ability to decide where power rests, and hence cannot enhance its own powers. The Court did, however, add that Germany could only surrender real sovereignty provided that the German nation’s right to self-determination was

not thereby undermined, as state authority must stem from a specific nation. This, the Court stated, follows from articles 20 (establishing that all state power emanates from the people) and 38 (establishing the rules for democratic elections). The Court also indicated that such a transfer of substantial sovereignty depended on the future existence of a parallel European *demos*¹⁷⁴ (Goetz 1995a: 23; Ress 1995: 59–62, 67–68; BVerfGE 89, 155a (1993)):

If the peoples of the individual states continue to provide democratic legitimation through their national parliaments, then the principle of democracy limits the extension of the European Community's powers and functions. The origin of state power in each member state is the people of that state. It follows then, that the Bundestag must retain functions and powers of substantial importance [...] (BVerfGE 89, 155a (1993): 185)

[...] Article 38 prevents the legitimisation of state power through elections and popular control of the exercise of power from becoming meaningless owing to the transfers of duties and competences away from the Bundestag. Otherwise, the principle of democracy rendered inviolable by Article 79 (3), in conjunction with Article 20 (1) and (2) [sic] Basic Law, would be violated. (BVerfGE 89, 155b (1993): 60)

The nature of the Court's interpretation of the meaning of democracy in the Basic Law, and the implication of this interpretation, has been aptly summarised by both German and American constitutional scholars:

The Federal Constitutional Court, in contrast [to the U.S.], has recently confirmed the prevailing opinion that the FRG's Basic Law impliedly adopted a nationalist-communitarian version reflecting the historical development of German Statehood. Alien suffrage is not compatible with democracy within the meaning of the Basic Law. (Neuman 1992: 335)

Nationality remains rooted in the cultural concept of 'Volk'; the Constitutional Court has declined to redefine this notion in the light of the multi-national character of modern German society, with the result that non-Germans can achieve political participation through the ballot box only by virtue of naturalisation. (Goetz 1995b: 164)

It should be pointed out that this does not indicate a radical new interpretation of the Basic Law based on a strict communitarian approach. To the contrary, these decisions are very

¹⁷⁴ The Court also established that the fact that democratic legitimacy rests with the nations, and that the nations thus ultimately set the scope and limits to the EU's exercise of power meant, in the German context, that the Court holds the ultimate right to control the legality of the EU decisions (Ress 1995: 62–64).

much in line with the dual structure of the Basic Law, where universal individual rights limit the exercise of state authority but do not constitute its source. The notion of democracy in the Basic Law does not rest on, or re-connect to, the principle of individual autonomy, but is derived from the principle of communal self-determination. Under the latter, the self-defined German people have a right to exercise state authority according to democratic principles. This explains why the ultimate normative rationale for excluding non-citizens from the ballot and to stand for public office is that non-citizens simply do not belong to the particular German people (Faist 1994: 59; Kommers 1999b: 100, 111–112; Benhabib 2004: 202–205).¹⁷⁵

The Social Rights Realm

Germany has a fairly comprehensive system of social rights and the analysis below will only include the major social provisions: Social Assistance (*Sozialhilfe*), Rental Assistance (*Wohngeld*), Social Housing, Child Assistance (*Kindergeld*), Old Age Pension (*Rentenversicherung*), Unemployment Insurance (*Arbeitslosenversicherung*), Health Care and Health Insurance (*Krankenversicherung*), and Grants or Loans for Higher Education (*Ausbildungsförderung*), and Primary and Secondary Education (Aleinikoff 2002b: 80–82).¹⁷⁶

Territorial presence, not nationality, is the key principle for the distribution of social rights in Germany, and non-citizens are in general included in the social rights sphere. That said, there are minor differences based on nationality (Wenzel 1997: 540–541; Hailbronner 1998: 206; Geddes 2003: 90; Guiraudon 2000: 79). It can be said, on a more detailed level, that EU citizens and recognised refugees have a right to Social Assistance. By contrast, other legal non-citizens have limited access to Social Assistance, and asylum seekers only receive Aid to Subsistence in-kind. All legal non-citizens have access to Rental Assistance, Social Housing

¹⁷⁵ EU citizens' political rights are also connected to membership, and as associated members non-citizens have the right to participate in local elections and the joint European elections, whereas the national level remains the sole prerogative of citizens.

¹⁷⁶ The nature of some of these programs may need further explanation. Social Assistance is a form of means tested assistance for needy individuals, which can be received in cash or in-kind; Rental Assistance is a means tested allowance for accommodation; Social Housing is provided through state subsidised housing projects, which can only then be rented out to persons on low incomes; Child Assistance is provided to families with children, Old Age Pension is a contributory pension, which individuals who have worked for a certain amount of time can apply for; Unemployment Insurance is a contributory insurance for individuals who have participated in the labour market and subsequently become unemployed; Health Care and Health Insurance provides medical coverage mainly through contributory schemes via employers, but the state does provide certain groups with health care and health insurance; Primary and Secondary education constitute basic education provided by public means, whereas Grants or Loans for Higher Education are state financed grants for tertiary education (Aleinikoff 2002b: 80–82).

and Child Assistance save for asylum seekers, who are housed in special accommodation and are ineligible for Child Assistance. Eligibility for Old Age pension and Unemployment Insurance depend on previous contributions, and all legal non-citizens are entitled to these provisions save for asylum seekers, who only are eligible for Unemployment Insurance (Aleinikoff 2002a: 80–82; Faist 1996: 251–258; for long-term residents' equal right to core social security and social assistance see also Council Directive 2003/109/EC 11).

The duration of other non-citizens' access to Unemployment Insurance is also limited. Health Care and Health Insurance are provided to all legal non-citizens save for asylum seekers who only are eligible for emergency medical care. All legal non-citizens are entitled to Primary and Secondary Education, as well as to Grants or Loans for Higher Education (Aleinikoff 2002a: 80–82; Faist 1996: 251–258; for asylum seekers' right to education, health care and subsistence, see also Council Directive 2003/9/EC 10, 13, 15).¹⁷⁷ This means that legal non-citizens have a right to subsistence, the right to basic health care, the right to basic education, the right to comprehensive health care, the right to funding for higher education and, with minor exceptions, the right to a share of welfare provisions on an equal basis.

Undocumented residents constitute an important exception to this general rule of inclusion. Undocumented residents are, however, in theory entitled to emergency medical care and to social assistance in emergency cases (Morris 2002: 117; Faist 1995b: 186–187; Wenzel 1997: 541–545; Faist 1996: 254–257; PICUM 2005: 1; Sinn 2005: 56; Kieser 2000: 6). That said, two statutes undermine these rights. The first of these holds that all public bodies 'shall notify the competent foreigners authority forthwith if they obtain knowledge of the whereabouts of a foreigner who does not possess a required residence title or any other grounds for expulsion' (Immigration Act 86–87). The question of which public authorities must verify non-citizens' status is somewhat unclear, but legal experts argue that public bodies only have an obligation to contact the immigration authorities if they need this information to perform their task. Although this would arguably exclude social service providers such as teachers and doctors, in general all persons dealing with the financial aspects of providing social services are under an obligation to alert the immigration authorities, and hence cannot legally provide social services to non-citizens (Sinn 2005: 57; Immigration Act 86–87).

¹⁷⁷ Non-citizens are not entitled to non-contributory provisions like Social Assistance, Child Assistance and Social Housing if they entered the country with the intention of receiving these benefits. Furthermore receiving Social Assistance may result in that resident permits will not be renewed and Unemployment Insurance can be withdrawn for certain non-citizens after a year if they are deemed unable to regain employment (Faist 1996: 252; Wenzel 1997: 541).

The second statute includes all persons, as it makes it a crime (punishable with imprisonment) in general to render assistance to (several) undocumented residents and to render any assistance that makes continued illegal residence (a crime in itself) possible (Sinn 2005: 57–59; Immigration Act 96). The combined effect, or the upshot, of these two statutes is that undocumented residents have no social rights, save for the social rights provided during the deportation process. This follows from that providers of social rights, in many cases, face a positive legal obligation to report non-citizens' illegal status to the immigration authorities, and always face serious legal sanctions if they aid undocumented residents. This lack of social rights in turn means, as the Federal Office for Migration and Refugees points out, that:

[... even] medical care of illegally resident immigrants has a predominantly charitable character and that it depends on the commitment of individual persons or charitable organisations. (Sinn 2005: 57)

The Rationale(s) Behind the Social Rights Realm

It is clear, momentarily ignoring undocumented residents, that non-citizens enjoy a wide range of social rights in Germany *qua* persons. Asylum seekers have least social rights but they are entitled to survival in conditions of human dignity under the Basic Law, which requires that asylum seekers' human dignity, as individuals, be upheld. This includes, shelter, basic social provisions and medical care as well as basic education (Bank 2000: 159–162; Kieser 2000: 6–9).

Other non-citizens are better off, as they qualify for more social provisions, including full access to medical care, although different groups of non-citizens hold slightly different social rights depending on their specific status. Non-citizens' general right to inclusion is reflected in the fact that non-citizens are covered by the social state principle. This principle obliges the state to provide all persons with basic social rights in order to guarantee the effective enjoyment of their universal right to self-determination. It should, of course, be remembered that the social provision principle has never been deployed in order to uphold a specific right, as discussed earlier. That said, all non-citizens enjoy basic social rights, and are guaranteed aid to subsistence, education and healthcare as part of their basic right to human dignity under the Basic Law (Thränhardt 1999: 31; Rubio-Marin 2000: 193–196; Guiraudon 2000: 79–85).

Non-citizens have been awarded additional legal protection, in the social rights realm, with reference to the right to equality before the law. The Court has ruled that discrimination on the basis of alienage in social security schemes violates non-citizens' right to equality before the law. The Court does provide political institutions with some leeway in these cases, but the Court's protection of non-citizens' rights in this area contrasts sharply with the U.S. Supreme Court's decision, in *Flemming v. Nestor*, which stated that such discrimination is valid unless 'patently arbitrary' (*Flemming v. Nestor* (1960)). The notion behind the German protection of non-citizens in this area is that the political institutions may not have to grant non-citizens access to the labour market, but if they do, they are also under a legal obligation to ensure equality and fairness in terms of the social rights connected to the labour market. That is, this is another area in which the Court deploys the overarching right to individual freedom in article 2 (in conjunction with the right to equality) to ensure that non-citizens effectively enjoy the right to individual autonomy in a situation that the founders of the Basic Law did not foresee, i.e. the existence of a large number of residing non-citizens in the country (Rubio-Marín 2000: 193–196; Guiraudon 2000: 79–85; Joppke 1997: 275; Thränhardt 1999: 31; Neuman 1990: 68–72; *Flemming v. Nestor* (1960)).

The approach to undocumented residents in this area is very different and rests on the opposite rationale. The German state totally subordinates undocumented residents' rights in this area to its right to control admission as a sovereign nation (Kieser 2000: 10–11). This means that:

[...] a "state-control" approach, which regards illegal immigrants first and foremost as a violation of applicable law... has been adopted by the Federal Ministry of the Interior and the state interior ministries. (Sinn 2005: 6)

This contrasts with the human rights approach, which 'emphasises the rights of illegally resident migrants and demands that minimum standards of social protection' be granted to undocumented residents (Sinn 2005: 6). The ultimate rationale behind the state control approach was made very clear when Germany added explanatory remarks to its ratification of the 1990 UN Rights of the Child Convention. This Convention provided undocumented residents with the right to education, but the German government undermined this right by adding some remarks to its ratification:

On signing the Convention, however, the Federal Government has added some explanatory remarks to the effect that no part of the convention could be interpreted in a way that would legalise illegal residence or infringe on the sovereign powers of the Federal Republic of Germany to regulate migration inflows and outflows and differentiate between citizens and foreign nationals. (Sinn 2005: 16–17)

This communitarian approach also explains why Germany has refrained from ratifying the UN Charter on the Protection of the Rights of Migrant Workers and their Families, as it is seen as providing undocumented migrants/workers with too many rights (Kieser 2000: 8).

The Naturalisation Rights Realm

In Germany, non-citizens can currently be naturalised in two ways. The government has a discretionary right to naturalise non-citizens who are not deportable, have accommodation and are economically self-sufficient (Nationality Act 8–9). Non-citizens also have a statutory right to naturalise if they fulfil a number of requirements (Winter 2004: 9–13; Interior 2005f: 88).¹⁷⁸ The criteria that must be met are: eight years legal residence (seven if the non-citizen has completed an integration course), confirming a commitment to the Basic Law, holding a residence or settlement permit on other grounds than education and refugee protection, having the ability to ensure subsistence for oneself and one's dependents without recourse to social assistance (unless the non-citizen is under 23 or is not responsible for the need to receive social assistance or unemployment assistance), giving up or losing one's previous citizenship (unless this entails particularly difficult conditions), and not being convicted of a crime (save for minor offences).¹⁷⁹

This right to statutory naturalisation also covers non-citizens' spouses and children. Non-citizens are, however excluded from this right if they do not have adequate knowledge of the German language, if there are concrete grounds to assume that non-citizens have supported activities that aim at subverting the free constitutional system, or if the non-citizen is liable for expulsion on the grounds of supporting a terrorist organisation or endangers the free democratic order by violence or publicly incites violence (Nationality Act 10–12). A person born in Germany of non-citizens becomes a German citizen according to the *jus soli* principle,

¹⁷⁸ This statutory right (*Rechtsanspruch*) constitutes the highest level of certainty in German law, and is stronger than the in general entitled to (*Regelanspruch*) that first replaced the discretionary state right in this area (Cinar 1994: 54; Green 2000: 111).

¹⁷⁹ Minor offences are defined as convictions leading to small fines or custodial sentences of up to six months that were 'suspended upon probation and quashed upon the expiration of the probation' (Nationality Act 13).

provided that: one parent has been a legal resident in Germany for eight years, or one parent is an EU/EEA citizen, or one parent has a settlement permit. These citizens, however, lose their citizenship if they fail to renounce any other citizenship and declare their wish to retain their German citizenship, in writing, between their 18 and 23 birthdays; this group of citizens can also apply for dual nationality until their 21 birthday if surrendering a second nationality is impossible or causes unreasonable hardship (Nationality Act 4, 10–12, 29) (Geddes 2003: 94; Martin 1994: 209; Rittstieg 1994: 113; Joppke 2000: 152; Embassy 2006a: 2; Winter 2004: 5–7; Nationality Act 4, 10–12, 29).

The Rationale(s) Behind the Naturalisation Rights Realm

The first thing to notice is that the right to set the rules for naturalisation or membership belongs to the German people, as part of their right to exercise state authority:

This does not mean that the legislator is unable to influence the composition of “the people” under Article 20 (2). The Basic Law empowers the legislator to set conditions for gaining or losing citizenship status (see Articles 73 [2] and 116) and thereby to establish the criteria for membership in the body politic. (BVerfGE 83, 37b (1990): 198)

Article 73 provides the federal legislative branch with the exclusive right to legislate in a number of areas that are essential to the unity of Germany, and the right to set citizenship criteria is one of the enumerated rights; others include foreign affairs, defence, migration, standard of time and currency and so on. The federal legislative branch has made extensive use of this right lately and has made citizenship more readily available to long-term residents. These new rules contrast rather starkly with the laws that previously regulated naturalisation. The previous naturalisation regime famously traced its roots to the naturalisation act of 1913 (*Reich- und Staatsangehörigkeitsgesetz* of 1913), and was based on a strict *jus sanguinis* principle that extended German citizenship to all people of German stock, but all but barred non-Germans from citizenship. Discretionary naturalisation of non-Germans was an exception, only to be made if it was in the public interest. German citizens were born, not made. The previous naturalisation law must, however, be seen in its historical context. West Germany was, officially and in legal terms, an incomplete state aiming at reunification, and its citizenship law made it the homeland of all Germans. The rationale behind this law was, the historical context notwithstanding, clearly communitarian.

This fact was perhaps best illustrated by the (non-binding) guidelines of the old naturalisation regime. These guidelines famously stated that ‘Germany is not a country of immigration; it does not seek deliberately to increase the number of German citizens through naturalisation’ (Green 2000: 110). It stipulated that non-citizens only could naturalise once they had demonstrated a commitment to German culture (*Bekanntnis zum deutschen Kulturkreis*), and provided that they had lived a clean life (*unbescholtenen Lebenswandel geführt hat*), over and above not being convicted of a crime. The present law, on the other hand, is not based on this thick concept of cultural integration, and provides long-term residents with the statutory right to naturalisation on the condition that they fulfil certain criteria. The radical change of the naturalisation law was a major political event in Germany, and it touched a raw nerve by changing the conception of membership in the German nation (Joppke 1999: 21–27; Boswell 2003: 81; Green 2000: 114; Kantstroom 1993: 179–180; Neuman 1998: 268; Joppke 2000: 151–156; Koopmans 1999: 630; Geddes 2003: 93–95).

The move away from an exclusive *jus sanguinis* principle, however, does not mean that membership is open to all on an equal basis, or that the current naturalisation law rests on the cosmopolitan rationale. Membership is still exclusive, and not all long-term residents have the right to become members; the fact that only individuals who are prepared to give up any other citizenship (and who have not committed a crime) are accepted as members provides the clearest example that membership remains exclusive and that it is not simply based on residence. The fact that citizenship is not open to all residents on an equal basis is also reflected in the fact that the principle of *jus sanguinis* still applies for all children born of German citizens, and that persons born of non-citizens still are treated differently to persons born of citizens, in terms of citizenship in Germany.

Section III

The Normative Position of Germany

The clarity of the Basic Law – in terms of which rights are universal and which rights belong to members – makes it easier to discern the rationales behind non-citizens' legal standing; it also, more importantly, has a very fundamental impact on non-citizens' legal standing. The Basic Law's clear commitment to universal values as an absolute check on all exercise of state authority means that no aspect of the treatment of non-citizens can be pushed outside the remit of the constitutional order. This means that the German constitutional system is seen as co-extensive with the German polity, and that the Basic Law limits ALL state authority (Kommers 1997: 39). The Basic Law clearly commits Germany to the cosmopolitan rationale, but also to the communitarian rationale. The cosmopolitan rationale underlies the system of individual rights that carve out a sphere of *inalienable* rights, guaranteeing that all individuals have the right to exercise self-determination. This sphere of rights controls, and sets the boundaries for, all exercise of state authority in Germany.

The right to exercise state authority is, however, not derived from the right to individual self-determination. Rather, it is legitimised by the fact that state authority constitutes the expression of the democratic will of the particular German nation, which alone holds the right to communal self-formation and national sovereignty. The right to exercise state authority hence rests on the communitarian rationale, whereas the limits for the exercise of this right rest on the cosmopolitan rationale. This creates a dual constitutional structure that engenders the need to balance the rights to communal and individual self-determination. This has been solved in Germany by providing non-citizens with a right to basic individual autonomy, while rights that are central to the political formation of the nation are reserved for Germans.

What has emerged in Section I and II is, generally speaking, clearly a weak cosmopolitan approach, where individual and national autonomy are balanced so as to leave room both for national and individual self-determination. In more detail, it can be said that the right to control admission, in general, rests with the sovereign nation, and that many specific statutes concerning admission are constructed as to serve the interest of its members. Exceptions to this general rule are, however, made on the grounds that non-citizens' basic right to autonomy

must be respected. Thus, refugees have the right to protection and non-citizens who seek to be reunited with their families, in general, are entitled to admission.

Non-citizens' civil rights are also upheld under this universal right to individual self-determination. This includes a basic, but not complete, right to equality before the law, as a right to complete equality would undermine Germany's ability to exercise national self-determination and to reserve certain rights for members. The German state's level of discretion, provided by the limitations to non-citizens' equal law protection, is restricted in general, and particularly when it comes to basic rights, and the state cannot infringe on the essence of non-citizens' universal right to individual autonomy. Certain constitutional rights are, however, reserved for Germans alone, including the right to freely choose one's profession.

Political rights are also seen as belonging to Germans, as the German democratic system presupposes a particular nation as the source of democratic legitimacy. Most non-citizens are, on the other hand, included in almost all social provisions, and have the right to 'survival in conditions of human dignity', under the Basic Law (Bank 2000: 159–162; Kieser 2000: 6–9). The right to control naturalisation remains, all the dramatic changes withstanding, the nation's prerogative, and only non-citizens deemed suitable are allowed to naturalise. In sum, Germany is clearly committed to a weak cosmopolitan perspective where non-citizens' basic rights to individual autonomy is combined and balanced against Germany's right to protect the interest of the German nation. This balance upholds Germany's right to put the interest of Germans first, in limited areas. The German approach is, alas, not perfectly consistent. Four important inconsistencies can, in fact, be identified and these will be analysed in detail below.

Normative Inconsistencies

Germany's commitment to admitting refugees is directly reflected in the Basic Law as well as in Germany's ratification of several international conventions. This means that non-citizens have a right to protection, not only if they face political persecution, but also if they face threats of torture or capital punishment, or serious and concrete dangers to their lives, health or freedom. The glaring inconsistency caused by only granting protection to political refugees hence does not arise in Germany. That said, Germany's use of safe third countries provisions has attracted much criticism, and raises the question of whether Germany effectively has withdrawn refugees' right to protection. It is clear that the safe country rule

deprives refugees of the right to choose Germany as the country where they will seek protection, and that this rule is part of a game where states try to shift the perceived burdens of protecting refugees to others (Thielemann 2003).

This does not, however, mean that Germany fails to protect refugees by putting them in harm's way, as only non-citizens who can be returned to states that afford refugees substantial protection – including protection from deportation to another state where they may suffer persecution or their lives might be at risk – are denied the right to protection. This is ensured either by the normative ascertainment of safe states or by an individual evaluation of particular cases as described earlier (Knipping 1995: 278–279; Kommers 1999b: 110).¹⁸⁰ And as long as a refugee is not deported to a country where her basic rights will encroached upon, her universal right to refugee protection is upheld, though she is denied a choice of where to seek protection (Neuman 1993b: 505, 520).

The visa regime has received less attention in Germany, but it is here that the inconsistency arises. The problem is not the existence of a visa regime; this is a legitimate part of controlling admission, and is compatible with a commitment to basic universal rights for non-citizens. The problem is that the current visa regime halts many non-citizens' attempts to seek admission even from non-safe states. Non-citizens must first of all demonstrate that they have adequate funds for their trip and stay, health insurance with a coverage of 30,000 €, and that they intend to return home in order to obtain even a Schengen visa.¹⁸¹ Germany (like the other members of the Schengen Convention) has, moreover, actively put countries that are seen as producing too many refugees on a list of countries whose citizens require a visa to travel to Germany.

¹⁸⁰ It should be noticed that the difference between states' *implementation* of these Conventions makes it difficult in practice for Germany to assess where these non-citizens eventually end up (Noll 2000: 209). This issue will, however, not be pursued further here, as it falls outside the scope of the thesis as an issue of implementation. It should be noted, however, that a normative inconstancy arises in this area if safe third countries fail to protect all refugees' basic right to individual autonomy.

¹⁸¹ A Schengen visa is required for short-term stays, the rules for obtaining a resident or a settlement permit have been discussed earlier. The Schengen Convention of 1995 abolished internal border controls among its signatories, including Germany. The Convention and a set of key measures taken by the signatories were incorporated into the Treaty of Amsterdam in 1999 and hence constitute EU law. The Convention was accompanied by so-called compensatory measures, designed to ensure the interests of the parties, these measures include a common visa regime for short-term visitors. This means that the rules for short-term visas to Germany are set at the EU level and constitute EC law (Commission 2006). Schengen visas are not of direct concern to the analysis at hand as they pertain to short-term visitors, who are not included in the analysis. Schengen visas are, however, of indirect interest as they affect many refugees' ability to reach Germany in order to seek protection.

While the visa regime in general aims at upholding immigration laws, it also is in part designed to keep out refugees (Gibney 2003: 5; d'Oliveira Jessurun 1991: 179; Collinson 1995: 80; Phuong 2003: 12; Noll 2000: 165–166; Embassy 2006b). The fact that Germany deliberately tries to reduce the burden of upholding the recognised right to refugee protection is underscored by the fact that German embassies, contrary to some other European states, do not accept asylum applications; that is, the very same officials who handle visa applications do not deal with asylum applications (ECRE 2006; Noll 2000: 181, 441–444). It should be noted that exceptions to visa requirements *can* be made for refugees under the Schengen Agreement, but there is no rule guaranteeing such an exception under German law, which to the contrary states that:

In *exceptional cases*, the Schengen visa *may be issued* when the requirements for issuance as stipulated in the Convention Implementing the Schengen Agreement are not fulfilled, for reasons of international law or on humanitarian grounds or to safeguard the interests of the Federal Republic of Germany. (Immigration Act 6 (2a) emphases added)

It is also clear that the carrier sanctions are designed to discourage companies from bringing potential refugees to Germany. The companies cannot, after all, assess who will be recognised as a refugee, and are liable to pay a fine for all non-citizens they carry without a visa who are not later recognised as refugees. Meanwhile, the *economic cost* associated with denying *bona fide* refugees to travel with the company is limited to the potential lower demand for tickets. Part of the aim of the visa regime and the carrier sanctions is hence to reduce the number of refugees making it to Germany, so as to lower the cost to the German state (Noll 2000: 173, 177–182; ECRE 2006). This means that the German visa regime clearly undermines refugees' ability to seek protection, and it is incompatible with Germany's commitment to the basic universal right to individual self-determination.¹⁸² To actively impede individuals from enjoying the right to refugee protection, on the grounds that they are trying to receive the very entitlement which is a recognised legal right in the first place, is the equivalent to being committed to providing something to another person and holding it out with one hand whilst impeding the receiver from taking it with the other hand. This is clearly normatively inconsistent, not to say Kafkaesque.

¹⁸² It arguably also violates Germany's legal obligation under international law, as the indiscriminate use of visa requirements deprives non-citizens of the right to apply for protection although they have come within the jurisdiction of Germany (and can apply for a visa) (Noll 2000: 441–444).

Non-citizens have a right to family reunification in Germany. This right is derived both from the Basic Law, which protects the right to family life, and the European Convention on Human Rights (Rubio-Marin 2000: 215). This is also reflected in the Immigration Act, which gives residents the right to be joined by family members who are non-citizens. Germany does hence treat the right to family reunification as one of the basic rights owed to all persons as part of their right to individual self-determination. The problem is that individuals enjoy this universal right under different conditions. Non-citizens who are not EU citizens must fulfil certain economic requirements in order to be able to exercise this right. It could possibly be argued that the universal right to family reunification could be restricted if the state could not cope with the economic cost generated by this right, although the Court has ruled out a quota system as this does not guarantee individual examination of all cases. There is, however, no need to pursue the question of whether this right can be restricted in a way that is compatible with a commitment to basic universal rights, because Germany fails the more basic test of providing this basic right on an equal basis by only restricting certain individuals' right to family reunification.¹⁸³

Nor can the current distinction be defended on the ground that less well-off non-citizens have a lesser interest in living with their families than other individuals. For as Rainsbourogh, the great English political activist, stated in the Putney Debates in 1647 'the poorest he in England has a life to live as much as the richest he'. A basic right can simply not coherently be withdrawn from a sub-section of individuals on economic grounds.¹⁸⁴ The combination of lack of membership and economic means are not a valid discrimination ground for a universal individual right. These grounds instead reflect the government's desire to reduce the cost to the nation and give priority to its members, making it clearly incompatible with a commitment to provide all individuals with their basic individual rights to autonomy on equal grounds. Indeed, it seems difficult to imagine a more invidious ground for discrimination than the combination of lack of membership and economic means, as a person fitting this description is likely to be, if anything, in greater need of the right to live with her family than a wealthy individual living in her native country.

¹⁸³ It is noteworthy that refugees are in a better position in this respect than other non-citizens, bar for EU citizens, as refugees initially can apply for family asylum, which means that the whole family (spouse and unmarried minor children) receives refugee status, even if only one family member qualifies directly for political asylum. The economic conditions for family reunification can also be waived for refugees (Asylum Procedure Act 26; Immigration Act 29).

¹⁸⁴ It is of note that the French Supreme Court, in effect, recognised a constitutional right to family reunification in 1978 (Joppke 1998b: 285).

That said, the inconsistency in this area is mitigated by the fact that non-citizens can challenge the denial of family reunification under the proportionality principle. The limited protection that the proportionality principle provides in this case, although valuable, does not remove the inconsistency however, as individuals still do not enjoy this basic right on equal terms. Non-citizens who are well-off, German citizens, and EU citizens enjoy this right without having to demonstrate that a denial of this right places a disproportionate burden on them, whereas poor non-citizens have to prove that it does in order to enjoy this right. The notion that the guaranteed rights in the Basic Law only, or only fully, apply to individuals who are financially well off, contradicts the Basic Law's strong commitment to equal freedom based on personhood. This is all the more so given the fact that the Basic Law specifically recognises that all individuals must be guaranteed a certain amount of resources as a part of the state's obligation to uphold the universal right to individual self-determination.

Non-citizens can be deported on a number of different grounds in Germany, but they can still be said to enjoy the right to be secure in their abode. This follows from observing that long-term residents are protected from deportation, and that they can only be deported if they constitute a real danger to the German community.¹⁸⁵ Non-citizens also enjoy the right to have their deportation cases tested individually, and their interests are weighted against the state's interest in upholding national security, according to the proportionality principle. The fact that non-citizens do not have a right to legal representation in deportation cases does, however, give rise to an inconsistency, as full procedural protection ought to be awarded when fundamental interests are at stake. The importance of fundamental procedural rights in deportation cases is, after all, something that the Court itself has emphasised:

¹⁸⁵ The fact that non-citizens and citizens are not treated in the same way in this respect, as citizens cannot be banished under any circumstances, is compatible with a commitment to a universal right to basic autonomy. This follows from noting that there simply is nowhere to deport citizens to, and it should be remembered that citizens' right to movement within the state can be restricted to protect other individuals. Non-citizens also must have a connection to the country to which they are deported, beyond the right to live as a citizen in another state. The level of connection that a given non-citizen has with the country of which she is a citizen varies, of course, but it is these kinds of factors that are taken into account when a court rules on the proportionality of the deportation. This argument could, *prima facie*, be applied to family reunification as well. This argument is, however, not applicable to family reunification cases. This follows from the fact that it is a universal right to live with one's family in one's abode, and not simply anywhere. The above argument fails in this context even on the benevolent assumption that the parent and child share a common citizenship. The grounds for restricting family reunification for some non-citizens in practice is, moreover, not based on any potential difference between the need of citizens and non-citizens, which in theory could be justified, but on purely economic and membership grounds.

First, such a peculiarity of deportation orders could not lead to a diminution in the protection of fundamental rights; rather, the significance of fundamental rights as the foundation of every human community [as declared in Article 1 of the Basic Law] must also be taken into account in the practice of deportation. (BVerfGE 35, 382 (1973): 53)

It is especially difficult to see why the right to legal counsel does not apply in deportation cases when the right to be secure in one's abode is recognised as a basic right.¹⁸⁶ The lack of full procedural due process protection in deportation cases also raises the question of why there are no statutes of limitations (another cornerstone of procedural due process) in deportation cases. Illegal residency is a crime in Germany, and it takes its place among unforgivable crimes, such as murder and genocide, as offences to which no statute of limitations apply (Cyrus 2003: 9; Cyrus 2006: 11; Strafgesetzbuch StGB (Criminal Code) 78 (2)). This makes no difference to legal long-term residents as they enjoy protection from deportation, and can only be deported on serious security grounds once they have established themselves in the country. This protection is, however, not available to undocumented residents, who perpetually remain subject to deportation.

It is debatable whether individuals can be denied procedural safeguards like statutes of limitations, but that need not concern us here as it is absolutely clear that it is incompatible with a commitment to equal concern of all, in cases where basic rights are concerned, to treat individuals differently due to their membership; and this is what Germany does, given that comparable crimes have statutes of limitations. (See the U.S. case study for a more detailed analysis of why the absence of any statute of limitations on violations of the immigration laws is inconsistent with the basic right to individual autonomy.)¹⁸⁷

It is particularly striking in this regard that the Court has held that lifetime imprisonment without a chance of parole is incompatible with human dignity. This decision was based on the argument that all punishments must be proportional to the crime, and the state cannot turn offenders into mere tools of its aims. This in turn means that a person, as an autonomous being, must be given the chance to atone and re-enter society. Much of the reasoning in this

¹⁸⁶ The fact that non-citizens can be deported on general preventive grounds, as long as the hardship is seen as proportional, also seems inconsistent with the dignity of all human beings, as this means that particular individuals are treated as a means to an end, as Zuleeg points out (Notes 1986: 323).

¹⁸⁷ From a legal perspective, under German law, undocumented residents are often treated as non-citizens abroad. This means that they are deprived of the added protection that socially established non-citizens enjoy under the proportionality principle, for example (Rubio-Marin 2000: 215).

case seems to contradict the sole focus on the state control approach deployed with reference to undocumented residents:

The free human person and his dignity are the highest values of the constitutional order. The state in all its form is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself. ... The individual must allow those limits on his freedom of action that that the legislature deems necessary in the interest of the community's social life; yet the autonomy of the individual has to be protected. This means that [the state] must regard every individual within society with equal worth. ... The basic principle "*nulla poena sine culpa*" [no punishment without guilt] has the rank of a constitutional norm. Every punishment must justly relate to the severity of the offense and the guilt of the offender. ... [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected rights to social worth and respect. (BVerfGE 45, 187b (1977): 316)

The fact that prisoners serving lifetime sentences (the above case refers to a man who shot his victim from behind at point-blank range) have a right not to become mere tools for the state's legitimate desire to prevent crime, and that the severity of a crime must be taken into account when a person is punished, sits uncomfortably with the fact that undocumented residents never are pardoned for their crimes. One possible justification for this difference that is sometimes voiced is that since undocumented residents are not living within the society, they should therefore not be afforded any rights. This explanation, however, sits very uncomfortably with the notion that the Basic Law protects all individuals against all forms of state action, on the basis that all persons have a universal right to self-determination. An individual immigrant can hardly be seen as lacking this feature, which should entitle her to basic rights and equal concern, and she should thus, just like a murderer, not be turned into a mere tool of the state's legitimate right to enforce the law.

The problem of the absence of statutes of limitations, moreover, spills over to the social rights realm, as long-term undocumented residents are deprived of basic social rights due to the fact that they cannot legalise their status, meaning that that schools and social services cannot provide them with services. This situation is incompatible with a commitment to all individuals' equal right to basic autonomy. It is, for example, hard not to agree with the U.S. Supreme Court when it states that:

Illiteracy is an enduring disability... The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause (*Plyler v. Doe* (1982): 222).

It is indeed hard to see how a denial of the right to basic education is compatible with protecting and respecting the human dignity of all, as 'illiteracy is an enduring disability' that undermines the ability to individual self-determination, not least in a modern society (*Plyler v. Doe* (1982): 222). It is of note that Germany, which is at the forefront of international humanitarian law and has made the basic principles of international humanitarian law part of national law, has ducked the consequences in terms of undocumented residents' rights, by not ratifying one Convention and adding exculpations to another, in order to uphold its state control approach to undocumented immigration. The undocumented status of a child in need of education, or the undocumented status of a person in need of shelter and food, does not make these needs any less pressing; to withhold these social rights on the grounds that the person or her parents have committed a relatively minor crime, often in the distant past, is incompatible with a commitment to respect and uphold the human dignity of ALL.

Conclusion

Germany has, after the collapse of the Third *Reich*, put the balance between national and individual autonomy at the very heart of its legal system. This means that Germany is well equipped to solve the tension between the cosmopolitan and the communitarian rationales in the area of non-citizens' legal standing. Indeed Germany's approach to non-citizens' legal standing is normatively consistent on the whole. Germany has achieved this by delineating a sphere of basic rights relating to individual autonomy which all state authority must uphold and respect; it has thus clearly limited the right of the political branches to infringe on non-citizens' basic rights. The German approach is, nevertheless, inconsistent in certain limited, but important aspects, as described above.

These inconsistencies are partly a result of the fact that the rights non-citizens enjoy under the Basic Law are insufficient in terms of family reunification and procedural rights in deportation cases. There is, however, a more systematic problem in relation to undocumented residents. This problem emanates from an overly legalistic perspective, where the fact that undocumented residents' ability to live autonomous lives becomes tied to Germany is

disregarded, due to their undocumented status. This leads to a situation where the right to human dignity, which is a universal right that covers prisoners as well as non-citizens, is undermined by undocumented residents' illegal status, which deprives them of certain basic universal rights.

In sum, if Germany is to fully live up to its commitment to all individuals' rights to exercise basic autonomy, it needs to stop actively impeding non-citizens from reaching its borders in order to claim their universal right to protection as refugees. It also needs to provide non-citizens with full procedural rights in deportation cases, to provide the right to family reunification on an equal basis, and to stop withholding basic rights to undocumented residents. This task is an urgent one for two reasons. One, these inconsistencies have severe negative consequences for non-citizens in Germany. Two, these inconsistencies fit poorly with the German legal system in general and the Basic Law, which constitutes the core of the German political community, in particular.

Chapter Six

Final Conclusions and Comments

This thesis set out to fulfil two specific aims. The first was to deduce the normative rationales behind the laws that regulate non-citizens' legal standing in the U.S. and Germany. The second was to conduct an analysis of the internal normative coherence of non-citizens' legal standing in these two countries. These two aims have been fulfilled in the case studies in chapters four and five, which, in turn built on chapters one to three.

This means that this final chapter can raise the perspective and the level of abstraction somewhat. More specifically, this chapter will do two things. It will first draw together the main strands of the thesis so as to be able to analyse the thesis' major findings and contributions. This chapter will then take a second look at the case studies. The purpose of looking at the case studies again is not to reiterate the detailed analysis of the normative rationales behind non-citizens' legal standing, or the analysis of the consistency of Germany's and the U.S.'s positions. The aim here is instead to shift the focus and look more closely at the overall structure of the two legal systems that were analysed in chapters four and five. The purpose of this is to provide a deeper analysis of both why these legal systems generate generally coherent positions and why they fall short in specific areas. As part of the attempt to provide a deeper analysis of these legal systems' overall structures, a comparison between the two will be made.

Overall Findings and Contributions

This thesis took the most profound and intrinsic normative tension in liberal nation-states as its point of departure: the tension between the cosmopolitan and the communitarian perspectives. The centrality of this tension in liberal nation-states was outlined in the first chapter, and subsequently put in the very specific context of non-citizens' legal standing.

The second chapter was devoted to identifying the rationales behind the cosmopolitan and the communitarian perspectives. What emerged from this chapter were two philosophical rationales that embody the two main alternatives for the foundation of rights in a liberal nation-state. It became clear from this analysis that the tension between the cosmopolitan and the communitarian rationales is not only very central to liberal nation-states, but also runs

very deep. It was shown in chapter two that what is contested is not merely the content of rights but ultimately the grounds on which rights should be based and therefore who should hold rights.

The third chapter was devoted to spelling out coherent approaches to the treatment of non-citizens based on these two contrasting normative rationales. A considerable part of the third chapter was devoted to delineating the weak cosmopolitan perspective, which combines the two rationales into a consistent perspective. The construction of the weak cosmopolitan perspective rests on the deployment of a distinction between rights that are essential for individuals' ability to exercise basic autonomy and rights that are not.

The fourth and fifth chapters presented the two case studies. The case studies drew on the insights of the preceding chapters in several ways. The first and second sections of the case studies connected the theoretical rationales drawn out in the second chapter to the actual laws that regulate non-citizens' legal standing. This made it possible to deduce the normative rationales behind the treatment of non-citizens in the U.S. and Germany. The third section of the case studies, in turn, drew on the third chapter in order to identify inconsistencies in the actual treatment of non-citizens in each case.

The connection between political theory and the actual laws that regulate non-citizens' legal standing constitutes the heart of the thesis. It is this connection that has made it possible to see behind the contents of the law and deduce the underlying normative rationales. This means that the thesis has not only been able to clarify what rights non-citizens' are included in or excluded from, but also what the normative rationales behind the exclusion or inclusion are in each case. The result is that the thesis has been able to provide a truly political theoretical analysis of non-citizens' actual overall legal standing. The thesis then built on this connection and the conclusions obtained from it, and proceeded to conduct a critical analysis of the normative consistency of the treatment of non-citizens in the U.S. and Germany. The depth and width of the analysis made it possible to identify the normative commitments the U.S. and Germany implicitly have made in relation to non-citizens' rights. This, in turn, made it possible to put forward a detailed and critical agenda for analysing changes to the treatment of non-citizens based on the U.S.'s and Germany's own normative commitments.

So in what way has this analysis and the fulfilment of these two aims contributed to the discourse surrounding the treatment of non-citizens? The fulfilment of the first aim has resulted in the outcome that it has been clarified that a weak cosmopolitan perspective underlies non-citizens' legal standing in both the U.S. and Germany. This thesis has thus shown that it is possible to combine the cosmopolitan and the communitarian rationales both in theory and practice. This means that what is often presented as a fatal contradiction is, in reality, an intrinsic but not insuperable tension. The complexity – created by the fact that both the U.S. and Germany are partly open to non-citizens and include them on the universal cosmopolitan rationale, and are partly closed to non-citizens and exclude them on the communitarian rationale – has hence been shown not to be the problem but the starting point for understanding the treatment of non-citizens in these two countries. The first contribution this thesis has made is thus to have identified the relevant starting point for a debate over possible changes to non-citizens' legal standing in the U.S. and Germany. This is an important contribution, in that in order to discuss where we ought to go we need to understand where we stand and the nature of the current position.

More specifically, this thesis has shown that normative contributions that are based solely on one of the rationales, often in direct opposition to the other rationale, will fail to resonate with most people, appearing to them as too simplistic. These two liberal nation-states cannot be seen as either simply protecting the interests of their members or as simply being neutral arbitrators between autonomous individuals; they are doing, and are committed to doing, both. That is, this thesis has shown that normative contributions that aim to affect non-citizens' legal standing in the short or medium-term must be based on the fact that the cosmopolitan and communitarian rationales can be combined in a consistent way in a weak cosmopolitan perspective; and that this weak cosmopolitan perspective is deeply entrenched in the existing legal systems of the U.S. and Germany.

It must be remembered that the intention never has been to discredit or discourage political theorists who look beyond the present normative horizon and work on ideals for the future; to account for widely held beliefs is, after all, not necessary for all forms of political theory. The contribution that this thesis has made is instead to provide political theorists – some of who want to account for widely held and deeply entrenched normative notions – with a clear picture of what the normative nature of the current system is.

The fulfilment of the second aim has generated a more critical contribution. The internal coherence analysis has produced a detailed and direct criticism of the current state of affairs from a normative perspective. The thesis' main contribution in this respect is hence its detailed demonstration of that there are good reasons for improving non-citizens legal standing in limited, but distinct and important areas. This means that the thesis has put forward an agenda for change and identified the core areas that urgently need reform. This agenda is, moreover, contextualised – in the sense that the proposals for changes are tied to specific laws and situated in the existing legal systems of the U.S. and Germany.

This thesis has also made a more general contribution. This contribution pertains to the larger question of what implications the normative structures of liberal nation-states have in terms of how they relate to non-citizens when acting in the world in general. This thesis has shown that at least the U.S. and Germany are committed in principle to respect non-citizens' basic right to individual autonomy when acting in the world, but that they are not committed to treat non-citizens and citizens alike in all areas. To the extent that the U.S. and Germany fail to respect non-citizens' basic right to autonomy when acting in the world, they contradict the normative foundation of their societies. On the other hand were they to give citizens and non-citizens equal concern in all cases, they would likewise contradict the normative foundations of their societies. The question of how Germany or the U.S. should relate to a given person can hence not be reduced to a question of membership or to a question of individual autonomy. The normative structures of these two countries necessitates that both the question of membership and what is at stake in terms of the ability to exercise basic autonomy are made part of the equation.

The need to take both these factors into consideration is often overlooked and the U.S. and Germany, as well as other liberal nation-states, often invoke one or the other rationale depending on the context. The fact that liberal nation-states often talk about individual rights to self-determination one minute, just to turn around and talk about national sovereignty the next, often leads to confusion and charges of hypocrisy. The current U.S. administration's combination of calling for the spread of the rule of law and respect for universal individual rights as part of its war on terror, while initially only extending the protection of the rule of law to those illegal combatants who were U.S. citizens, is only one example of this wider problem. This problem runs deep, and liberal nation-states in general seems to lack a clear vision of how they could combine their communitarian and cosmopolitan commitments. It is

here that the this thesis has made a contribution, by showing that a policy based on both the cosmopolitan and the communitarian rationales does not necessarily lead to inconsistencies, but that a consistent approach nevertheless demands that all rights that are essential for the exercise of basic autonomy are upheld. This finding, in turn, constitutes a theoretically and practically tenable model on which liberal nation-states' could base their international co-operation in order to clarify and thereby increase the legitimacy of their policies towards non-citizens.

The Case Studies

Most of the basic rights analysed in the thesis have come before the constitutional courts, which have sought to balance the cosmopolitan and communitarian strands in their respective constitutions. Indeed the analysis of the case studies immediately showed that the cosmopolitan and the communitarian rationales lie at the heart of alienage jurisprudence in both the U.S. and Germany. In fact, the basic doctrines and principles of alienage jurisprudence in these two countries are directly linked to the cosmopolitan and the communitarian rationales. In the relatively few cases where the basic rights had not been subject to a constitutional test but simply been decided by the political branches of government, the balance between the cosmopolitan and the communitarian rationales was also very much in evidence.

The weak cosmopolitan perspective had left barely visible imprints in the political theoretical debate, and it had to be reconstructed with less support than the strong cosmopolitan and communitarian perspectives. The weak cosmopolitan perspective, however, emerged all the more clearly from the analysis of the actual treatment of non-citizens. It became clear that the distinction between basic and non-basic cosmopolitan rights was essential to making normative sense of the actual treatment of non-citizens; and that the overall normative foundation behind the treatment of non-citizens in Germany and the U.S. is that of weak cosmopolitanism.

It can be said in more detail, regarding the U.S., that the Constitution bears clear marks of the cosmopolitan rationale. The notion that the state's power is limited by individual inalienable rights to self-determination is intrinsic to the U.S.'s constitutional and political system. That is, the U.S. Constitution does not endow the nation and its democratic government with an absolute right to national sovereignty. The democratically elected representatives of the nation

are bestowed with great powers, but they are bound to respect certain universal individual rights to self-determination. The bulk of the individual rights to self-determination are, furthermore, truly universal and the Supreme Court protects non-citizens' basic rights under the aliens' rights doctrine. The ultimate rationale behind this doctrine is that non-citizens, as self-determining individuals, have an *a priori* right to pursue their own lives and hence the constitutional protections of this right cover citizens and non-citizens alike. The U.S., however, developed a strong sense of national sovereignty as it successfully asserted itself on the international stage, and in the wake of this historical development, the plenary power doctrine was born. This doctrine gives the democratically elected representatives of the U.S. great plenary powers by placing certain aspects of the treatment of non-citizens beyond the purview of the Constitution. This discretionary power ultimately rests on the notion that the elected representatives express the will of a particular nation, which in turn enjoys the right to national sovereignty by virtue of constituting a bounded political community based on shared social meanings and internal solidarity.

This combination of a Constitution that guarantees universal individual rights of self-determination and a plenary power doctrine that places part of the regulation of non-citizens beyond the purview of the Constitution and in the hands of the nation sets the scene for a complicated balancing act. The key question in terms of understanding non-citizens' legal standing is thus not whether the rights in the Constitution are based on the cosmopolitan rationale, but one of under which circumstances non-citizens can avail themselves of these rights. The key question is hence: to what extent does the Constitution constrain the government's exercise of power over non-citizens?

The Supreme Court has created a system for determining non-citizens' constitutional standing that in general can be said to revolve around two questions. One, how basic the right is in terms of individual self-determination; and two, how sensitive the issue is in terms of national sovereignty. In cases where the issue at hand is considered sensitive in terms of national sovereignty, the Supreme Court in general invokes the plenary power doctrine, e.g. admission, deportation, political rights and naturalisation. In cases that are not sensitive from the perspective of national sovereignty and that involve fundamental individual rights, on the other hand, the Supreme Court in general chooses to protect non-citizens' individual rights under the aliens' rights doctrine, e.g. most civil rights and basic social rights. This, broadly speaking, generates a weak cosmopolitan perspective on non-citizens' constitutional rights.

This weak cosmopolitan perspective has been further strengthened by statutory legislation that on the one hand provides non-citizens with rights that are essential for the ability to exercise basic individual autonomy, e.g. refugee protection and basic social rights, and on the other hand excludes non-citizens from rights that are not essential to the exercise of basic autonomy, e.g. non-basic social rights and political rights.

This does not, alas, amount to a fully consistent weak cosmopolitan approach. The most serious inconsistencies in the U.S. position result from the fact that refugees enjoy insufficient protection, that non-citizens lack the right to family reunification, and that they are denied the right to be secure in their abode. It is not consistent with upholding all individuals' basic right to self-determination to deny non-political refugees who risk losing their lives refugee protection; or to deny persons who belong to a family consisting of at least one person who is a non-citizen the right to live together; nor is it consistent with upholding all individuals' basic right to self-determination that non-citizens perpetually are subject to deportation on discretionary and/or retroactive grounds.

The structural cause of the inconsistencies can be traced to the nature of the Supreme Court's chosen way of balancing non-citizens' right to individual autonomy against the nation's right to national sovereignty. The Supreme Court has always been willing to seriously constrain the political branches' right to national sovereignty in cases that pertain to the treatment of non-citizens. The Supreme Court has resisted all attempts to weaken non-citizens' basic rights to a fair trial. The government's attempts to usurp non-citizens' property and to restrict non-citizens' right to free speech have also been declared unconstitutional. The political branches have nevertheless, with the blessing of the Supreme Court, encroached upon non-citizens' basic right to individual autonomy in the areas of admission and expulsion. The reason for the Supreme Court's unwillingness to protect non-citizens' basic individual rights in admission and expulsion cases is not that restrictions in these areas would circumscribe national sovereignty more than in other areas, where the Supreme Court staunchly has upheld non-citizens basic individual rights. Nor is the explanation that no basic rights are at stake in these areas.¹⁸⁸ So what is it in the structure of the U.S. legal system that leads to inconsistency?

¹⁸⁸ The right to family reunification has been called a natural right by the Court and is upheld vis-à-vis citizens; non-political refugees are recognised as in need of protection, but there is no right to be given temporary protection status; discretionary deportation has been recognised as unfair and as contradicting the basic ethos of the Constitution.

At first, the explanation seems to be the power of *stare decisis*. The Supreme Court has simply stuck with decisions made early on. This explanation, however, only begs the question of why the Supreme Court went down this route to begin with. The underlying answer to this question is that the Supreme Court ultimately has based the plenary power doctrine on the nation's absolute right to communal formation, and that admission and expulsion cases are seen as connected to the nation's right to communal formation. That is, the ultimate structural reason behind the fact that the government can exercise plenary power in these areas is that the nation is seen as holding an absolute right to decide who can live in its midst, as part of its national right to communal formation. Hence the difference between the strong protection non-citizens enjoy in a court of law and in terms of being secure in property, home and person on the one hand, and the weak protection non-citizens enjoy in deportation cases on the other, can best be explained by the fact that the latter areas are seen as being essentially related to communal formation. In sum, the structural weakness that generates the main normative inconsistencies in the U.S. constitutional system is that the Constitution is regarded as inapplicable in cases that are seen as central to communal formation. National sovereignty hence enjoys priority, and instead of balancing national and individual sovereignty in these cases, the Supreme Court chooses to negate non-citizens' basic rights. The result of this is that the Constitution fails to fulfil its primary function of checking absolute power. That is, the partial disablement of the Constitution opens the door for the exercise of absolute power, with the predictable result of that individuals' basic rights is encroached upon.

The U.S. does not need to surrender all rights to national sovereignty in these areas in order to achieve normative consistency. All that is required to solve this problem is that non-citizens' basic rights be made part of the equation, so that the government's need to control admission and expulsion is weighted against non-citizens' individual rights. This can be done much in the same way as the Supreme Court balances non-citizens' right to equality before the law against national sovereignty in other areas, such as social rights and the right to freely choose one's profession. There is thus no need to invalidate the plenary power doctrine altogether in order to remedy this normative inconsistency; it is perfectly possible to combine the plenary power doctrine and the aliens' right doctrine. What is needed, however, is an extension of the aliens' right doctrine at the expense of the plenary power doctrine, so as to allow the aliens' rights doctrine to extend its protective shield to all rights that are necessary for the exercise of basic autonomy. There also needs to be an extension of non-citizens' statutory rights, not least in the area of refugee protection.

It can be said in more detail regarding Germany, that the Basic Law thoroughly commits Germany to both the cosmopolitan and the communitarian rationales. The Basic Law clearly limits the exercise of all state power by stipulating that it must respect and protect all persons' individual rights to self-determination; the cosmopolitan rights are relatively few, but they enjoy lexical priority, as it were. The foundation of state power is, on the other hand, based on the existence of a particular German nation which, as an exclusive collective, holds the right to exercise state authority and national self-determination. This means that membership and the right to participate in the national political process is exclusive to persons that have been recognised as members of the particular German nation, but that the nation nevertheless must respect all individuals' rights to exercise basic autonomy.

The strong commitment to upholding non-citizens' basic rights to individual autonomy is reflected in the Basic Law's very first paragraph. It is also reflected in the fact that the Basic Law contains a fundamental right that only pertains to non-citizens – the right to political asylum – and the fact that the Basic Law explicitly incorporates basic principles of humanitarian international law into German domestic law. That the right to exercise state authority rests with the German nation is equally clear from the Basic Law. The *Bundesverfassungsgericht* has also clarified that the concept of the German nation does not refer to all the residents of Germany, but refers to a particular, exclusive German citizenry that alone holds the right to define itself. The structure of the German legal system is hence clearly a weak cosmopolitan one.

This means that the question of when non-citizens are to be included in a particular right turns on whether the right is considered to be a basic right or not. The Basic Law contains an article that provides all persons with a general right to human dignity as well as enumerates basic rights. The *Bundesverfassungsgericht* makes use of both to uphold the cosmopolitan thrust of the Basic Law, and no aspect of non-citizens' legal standing falls outside the remit of the Basic Law. Statutory law in this area, especially the implementation of key international conventions, further strengthens this weak cosmopolitan system by providing non-citizens with several important additional cosmopolitan rights.

The structure of the German legal system is thus straightforward and robust. Alas, inconsistencies have nonetheless arisen. The fact that the protection non-citizens enjoy in the

area of family reunification is too weak does give rise to some limited inconsistencies. The more severe inconsistencies, however, arise in relation to undocumented residents.

Undocumented residents remain liable to deportation indefinitely, and are denied basic social rights. There are, of course, perfectly good and consistent reasons for treating transgressors of the law differently. The problem here is that undocumented residents are deprived of certain basic rights so as to encroach upon their absolute right to human dignity, and that they are deprived of rights that other transgressors of the law enjoy.

The Basic Law protects all individuals, and being documented or legal is not a requirement for possessing human dignity. German law also clearly recognises that the right to exercise autonomy is intrinsically linked to basic social rights and the right to secure residency. The question is thus one of why undocumented residents are denied certain rights that have been recognised as basic, and part of individuals' right to human dignity. It should be said that there still is hope that the *Bundesverfassungsgericht* will protect undocumented residents' basic rights in this area. This does, however, look unlikely. Germany clearly pursues a state control approach where undocumented residents are seen purely as subjects of state control rather than individuals who have broken the law but who retain basic rights. The *Bundesverfassungsgericht* has not indicated that it will rule this unconstitutional and the notion that a legal resident status is a precondition for full protection of the Basic Law seems to have crept into the German legal system; and it is this notion, whereby universal cosmopolitan rights partly become dependent on a legal resident status, that lies behind the structural shortcoming of the German legal system.

To remedy this inconsistency, Germany needs simply to modify its state control approach to recognise that the deportation of undocumented residents ought to be covered by the rule of law in general and the proportionality principle in particular. Germany also needs to abolish the laws that put providers of basic social services under a legal obligation to report the immigration status of their clients, as well as the legal sanctions against persons who provide undocumented residents with services that enable these non-citizens to live basic autonomous lives.

In sum, both the U.S.'s and Germany's legal systems have structures that make the distinction between basic universal rights and other rights an intrinsic part of these systems. This

structure is anchored in constitutional law, but much statutory law enhances rather than undermines this basic distinction. It is these structures that lie behind the fact that the U.S.'s and Germany's overall treatment of non-citizens is largely consistent and follows a weak cosmopolitan perspective. The systems, nevertheless, have flaws that generate inconsistencies. The major problem in the case of the U.S. is that non-citizens' basic rights fall outside the purview of the Constitution in cases that are seen as related to communal formation. The major problem in the German case is that documented status has partly become a requirement for inclusion in cosmopolitan rights.

A Comparison of the two Case Studies

It is of note that the similarities between the case studies are greater than the differences. Both the U.S. and Germany are strongly committed to the weak cosmopolitan perspective. That is, the structure of both these two liberal nation-states' legal systems is based on the premise that the exercise of state authority and national sovereignty are limited. This limitation is also, in both cases, based on the idea that individuals have a universal right to basic self-determination, and that the state must respect this *a priori* right. The cosmopolitan rights are predominantly found in the civil rights realm, but both countries also uphold rights to refugee protection, which are derived from international humanitarian law, (mainly) on a statutory basis. The joining together of humanitarian international law with national constitutions that put an emphasis on cosmopolitan rights is also central to the broadly coherent weak cosmopolitan approaches of both countries. Both Germany and the U.S., moreover, deploy the same general system for deciding when the cosmopolitan and the communitarian rationales apply. That is, both these liberal nation-states in general exclude non-citizens from rights unless a right is fundamental to individuals' ability to exercise basic autonomy.

So much for the overall similarities; there are, however, also particular similarities in terms of the inconsistencies that have been identified. The two most striking of these are that undocumented residents indefinitely remain subject to deportation, and that visa regimes prevent non-citizens from accessing their recognised right to refugee protection. Visa regimes have simply been used to separate the issues of admission and refugee protection, so as to decrease the costs of the obligations both Germany and the U.S. have recognised that they have vis-à-vis refugees. The fact that undocumented residents perpetually remain subject to deportation is a consequence of there being no statutes of limitations for illegal entry and

illegal residence in the U.S. and Germany. The root of this problem is not that undocumented residents are treated as criminals, but that they are not treated as ordinary criminals.

The reason for depriving undocumented residents of the rights that ordinary criminals enjoy is sometimes said to be that deportation constitutes an element of a state's ultimate function – to secure the nation's borders, whereas the prosecution of other crimes is part of the maintaining order within the borders. This is clearly a false distinction, as the undocumented residents have established themselves within the borders and pose no overall threat to the security of the state. The notion that the U.S. and Germany are being invaded by undocumented residents that pose a threat to the peace might be a powerful image. The fact is, however, that undocumented residents do not pose a greater threat to the peace of the U.S. and Germany than other criminals. Undocumented residents may be a serious problem, but so is crime, and neither is comparable to an organised territorial threat; in fact many undocumented residents play a constructive part in society. The argument that the states' discretionary power over undocumented residents is required by the specific threat they pose hence clearly fails.¹⁸⁹ Indeed the reasons why undocumented residents are deprived of the rights that ordinary transgressors of the law enjoy are more mundane. In the U.S., deportation falls squarely within the plenary power doctrine; hence non-citizens enjoy no Constitutional protection in this area. This, combined with that the political branches of the government have found it expedient to deprive non-citizens of this basic right, explains why non-citizens remain liable to discretionary and/or retroactive deportation in the U.S. No plenary power doctrine exists in Germany, and legal residents enjoy a right to be secure in their abode. Undocumented residents, however, perpetually remain liable to deportation. The reason for this is that Germany partly has made legal status a requisite for enjoying protection under the Basic Law, leaving undocumented residents exposed to infringements of their universal right to basic self-determination.

There are also interesting differences between the two case studies. The differences can largely be traced back to the structures of the two constitutional systems at hand. The German system is characterised by clarity in terms of non-citizens' legal standing. The focal point of the Basic Law is its first paragraph, which stipulates that all state authority must respect and protect the human dignity of citizens and non-citizens alike. The Basic Law, moreover, makes

¹⁸⁹ The argument that transgressors of immigration laws belong to the exclusive minority of criminals that are so heinous that no statutes of limitations need apply fares no better, as discussed in detail earlier.

a distinction between universal rights that cover all individuals and rights that only cover Germans. The fact that the framers of the Basic Law were sensitive to the need to regulate non-citizens' rights has resulted in the outcome that the German constitutional system has a stable foundation for dealing with the issue of non-citizens' legal standing. In this respect, the framers of the Basic Law benefited from recent history, which has demonstrated the inherent and immense danger of placing non-citizens outside the realm of moral concern.

The framers of the U.S. Constitution had not benefited from this historical lesson, and they did not set out a clear framework for non-citizens' legal standing. That said, it is clear that many of the rights secured in the U.S. Constitution rest on a cosmopolitan rationale and apply to all individuals as persons. What is not clear, in contrast to the German system, however, is that the political branches of government have a general legal obligation to always respect non-citizens' basic right to individual autonomy. Technically speaking, this difference is a consequence of the fact that the fifth amendment in the U.S. Constitution has not been given the same general universal scope as the first and second articles of the Basic Law. This means, on a practical level, that non-citizens in the U.S. have been deprived of virtually all legal protection in areas where non-citizens in Germany enjoy the protection of the proportionality principle. The cases in point are family reunification and the right to secure residency for non-citizens who are legal residents.

This means that the U.S. government's right to national sovereignty is not balanced against non-citizens' individual right to self-determination in all cases, as it is in Germany. This difference is a matter of degree and should not be overstated. The Supreme Court does engage in this balance act in certain areas, and non-citizens are in general covered by the fifth amendment's due process clause. That said, the fifth amendment has not played the same central role for non-citizens' legal standing in the U.S. as the first and second articles of the Basic Law have done in Germany. This is not due to a difference in the nature of the rights that the fifth amendment and the two first articles of the Basic Law are to protect. The fifth amendment and its due process of law clause uphold individuals' right to basic self-determination just as the two first articles of the Basic Law and the principles of the rule of law and proportionality do. The difference is that the fifth amendment has not been given the same universal scope and does not protect non-citizens in all cases. This is an effect of the fact that plenary power puts the protective force of the Constitution out of play in certain areas in a way that is not comparable to the German system. The plenary power doctrine

hence, to a large extent, deprives non-citizens of the strong general protection of cosmopolitan rights embodied in the fifth amendment. This means that the Supreme Court has decided what rights non-citizens enjoy with reference to particular parts of the Bill of Rights instead of with reference to a general right to basic self-determination. The result of this is that no absolute limit to the state's discretionary power over non-citizens exists, as the extent of the state's power depends on the particular area of law. It is this feature of U.S. alienage jurisprudence that has resulted in the outcome that the U.S. encroaches on non-citizens basic right to self-determination in certain areas. These encroachments subsequently give rise to inconsistencies in the U.S.'s treatment of non-citizens. Non-citizens enjoy stronger legal protection in Germany than in the U.S., and Germany has as a consequence of this avoided several of these inconsistencies that arise in the U.S. The main structural explanation for this is that the Basic Law does not permit any area of state authority to be placed outside constitutional constraints, i.e. does not allow for a plenary power doctrine.

This is, however, not the only factor behind the fact that Germany's treatment of non-citizens is more normatively coherent than the U.S.'s. The different standing of international law in the two constitutions is another key factor. This difference also stems from the fact that the Basic Law so clearly recognises that no aspect of state authority, international or domestic, is absolute. The Basic Law's connection to, and incorporation of, humanitarian international law is natural from this perspective. The attractiveness of international humanitarian law that bestow individuals with cosmopolitan rights is less clear from a U.S. perspective, where the Constitution's validity in the international arena is a more moot point and where there is a sense that the government has the right to exercise absolute power over non-citizens in certain areas. It is natural from this perspective that the U.S. has ratified fewer international conventions that restrict the government's authority over non-citizens compared to Germany. That this is a natural difference does not change the fact that the U.S. would avoid some of the inconsistencies that plague its treatment of non-citizens were it to adopt Germany's approach to international law.

Germany's position is, however, not more consistent in all respects. Undocumented residents enjoy a stronger legal standing in the U.S., since undocumented residents in the U.S. enjoy basic social rights under the aegis of substantial due process. This means that the U.S. has avoided some of the inconsistencies that have arisen in Germany, by staying clear of Germany's pure state control approach.

In sum, the U.S.'s and Germany's treatments of non-citizens are very similar, and this is a consequence of the fact that their legal systems have the same basic structure. Both countries have constitutions that uphold many cosmopolitan rights, and both countries have implemented international conventions that uphold cosmopolitan rights for refugees, in particular. The main difference, and explanation for the fact that Germany's position is more coherent, is that the Basic Law precludes the possibility of putting any aspects of the treatment of non-citizens beyond the highest law of the land, and that Germany has gone much further in incorporating humanitarian international law into its domestic law. The clarity of the German constitutional system in terms of non-citizens' legal standing hence makes Germany's treatment of non-citizens more consistent and transparent compared with the U.S. The U.S. has, however, been more sensitive than Germany to the fact that undocumented residents, despite their illegal status, have the right to education and subsistence. This means that the U.S. avoids some of the inconsistencies of the German system on this score and that both countries can learn from each other in terms of developing a more consistent approach to the treatment of non-citizens.¹⁹⁰

The Final Conclusion

This thesis has shown that both Germany and the U.S. are deeply committed to both the cosmopolitan and the communitarian rationales, and that the treatment of non-citizens in each of these liberal nation-states represents a balancing act between these two values. The answer to the title question – persons or aliens? – is hence both. Everyone has the right to life, liberty and property as autonomous individuals, and in that respect non-citizens are persons. The foundation of the German and U.S. states is, however, that they constitute particular nations and as such they have a right to communal formation and sovereignty. Citizens hold the exclusive right to decide political formation as well as the exclusive right to equal concern in all areas, and in that respect non-citizens are aliens.

This dual commitment reflects a longstanding philosophical and legal tradition of embracing both individual and communal sovereignty. This tradition stretches back to and connects

¹⁹⁰ It is also of note that an almost entirely consistent approach emerges if one combines the legal protections non-citizens enjoy in these two liberal nation-states. That said, non-citizens still would have insufficient procedural rights in deportation cases, insufficient protection in the area of family reunification and undocumented residents would still lack the right to secure residence (a right they enjoy in other liberal nation-states, as discussed earlier).

modern day Germany and the U.S. with the ancient Greek and Roman civilisations. The fact that the treatment of non-citizens is based on both the cosmopolitan and the communitarian rationales is not all together surprising from this perspective. What is more surprising is the finding that this dual commitment does not give rise to a hopelessly normatively contradictory approach to the issue of non-citizens' legal standing. To the contrary, it has been demonstrated, the listed inconsistencies notwithstanding, that an overall consistent approach to the treatment of non-citizens already exists in these two liberal nation-states. That said, this thesis has also put forward a detailed agenda for reform based on the existing normative commitments.

These are important findings, and it is hard not to think that much would be gained if the discourse around non-citizens' legal standing in the U.S. and Germany would pay heed to the fact that these states must be understood as weak cosmopolitan states, and that this is a tenable normative position which Germany and the U.S. could achieve with some adjustments to the current law. This would not, of course, end the debate or result in a consensus on non-citizens' legal standing. It would, however, lead to a more focused debate that corresponds to the kind of polities these two states actually are and that pertains to how this very large group actually is treated.

This means that the thesis' main contributions are that it has clarified what the existing normative commitments in these two states actually are; that is, it has clarified where we stand today. It has also put forward a critical and detailed agenda for change based on existing normative commitments. The value of implementing these changes is foremost normative, but it would also strengthen the legitimacy of current systems by making them clearer and more coherent. A consistent approach to the treatment of non-citizens could, moreover, be useful as a general guiding framework for liberal nation-states' interactions with non-members in other areas. That is, it could partly remedy liberal nation-states' general problem of that their dual commitment to the cosmopolitan and the communitarian rationales often result in their policy towards non-members being seen as hypocritical.

To finish where we started, it is very interesting to note that Sidgwick argued, some one hundred years ago, that the treatment of non-citizens was based on the communitarian rationale, and that the cosmopolitan rationale remained an ideal for the future (Sidgwick 1897: 308). What this thesis has clarified is that the future Sidgwick hoped for has partially

arrived. It has done so in force, and the cosmopolitan rationale currently underlies much of the actual treatment of non-citizens. Whether our future holds a continuation of this process, so that the cosmopolitan rationale will ultimately underlie all laws regulating the treatment of non-citizens and liberal nation-states will be turned into cosmopolitan states, remains to be seen. What is clear at this point is that the prevalent persons or aliens dichotomy fails to capture the normative basis behind non-citizens' legal standing as well as the possibility of a coherent weak cosmopolitan approach. Non-citizens are both persons and aliens, and this is generally speaking a coherent position. That said, this thesis has laid bare normative inconsistencies that Germany and the U.S. must remove in order to be true to their weak cosmopolitan positions and traditions.

Bibliography

- Abriel, E. (1995). "Rethinking Preemption for the Purposes of Aliens and Public Benefits." UCLA Law Review 42: 1597–1630.
- Ackerman, B. (1980). Social Justice in the Liberal State. New Haven, Yale University Press.
- Aleinikoff, A. (1990). "Citizens, Aliens, Membership and the Constitution." Constitutional Commentary 7: 9–34.
- Aleinikoff, A. (2000). Between Principles and Politics: U.S. Citizenship Policy. From Migrants to Citizens: Membership in a Changing World. Ed. Aleinikoff, A and Klusmeyer, D. Washington, Carnegie Endowment for International Peace: 119–175.
- Aleinikoff, A. and Klusmeyer, D (2002a). Citizenship Policies for an Age of Migration. Washington, Carnegie Endowment for International Peace.
- Aleinikoff, A. (2002b). Semblances of Sovereignty: The Constitution, the State, and American Citizenship. Cambridge, Harvard University Press.
- Aleinikoff, A. (2003). Between National and Postnational: Membership in the U.S. Towards Assimilation and Citizenship: Immigrants in Liberal Nation-State. Ed. Joppke, C. Hampshire, Palgrave Macmillan: 110–129.
- Aleinikoff, A., Martin, D and Motomura, H (1998). Immigration and Citizenship: Process and Policy. St. Paul.
- Anker, D. (1999). Law of Asylum in the United States. Boston, Refugee Law Center, Inc.
- Arendt, H. (1968). The Origins of Totalitarianism. New York, Harcourt.
- Arieli, Y. (2002). On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights. The Concept of Human Dignity in Human Rights Discourse. Ed. Kretzner, D and Klein, E. The Hague, Kluwer Law International: 1–17.
- Aristotle (1992). Politics. London, Penguin Books.
- Aristotle (1998). Nicomachean Ethics. Oxford, Oxford University Press
- Aurelius, M. (1964). Meditations. London, Penguin Books.
- Avineri, S. (1992). Introduction. Communitarianism and Individualism. Ed. Avineri, S and De-Shalit, A. Oxford, Oxford University Press.
- Bader, V. (1997a). Fairly Open Borders. Citizenship and Exclusion. Ed. Bader, V. London, Macmillan Press: 28–60.

- Bader, V. (1997b). Conclusion. Citizenship and Exclusion. Ed. Bader, V. London, Macmillan: 175–189.
- Bank, R. (2000). Europeanising the Reception of Asylum Seekers: The Opposite of Welfare State Politics. Immigration and Welfare: Challenging the Borders of the Welfare State. Ed. Bommes, M and Geddes, A. London, Routledge: 148–169.
- Barnett, D. (2002). The Coming Conflict Over Asylum: Does America Need a New Asylum Policy? Washington, Center for Immigration Studies: 1–7.
- Barry, B. (1998). International Society from a Cosmopolitan Perspective. International Society: Diverse Ethical Perspective. Ed. Mapel, D and Nardin, T. Princeton, N.J., Princeton University Press: 144–163.
- Barry, B. (1999). Statism and Nationalism: A Cosmopolitan Critique. Global Justice. Ed. Shapiro, I and Brilmayer, L. New York, New York University Press: 12–66.
- Bauböck, R. (1994). Transnational Citizenship. Aldershot, Edward Elgar Publishing.
- Beauftragte der Bundesregierung für Migration. (2005). A Manual for Germany. Berlin, Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration.
- Beitz, C. (1983). "Cosmopolitan Ideals and National Sentiment." The Journal of Philosophy 80 (10): 591–600.
- Beitz, C. (1991). Sovereignty and Morality in International Affairs. Political Theory Today. Ed. Held, D. Cambridge, Polity Press: 236–254.
- Beitz, C. (1994). Cosmopolitan Liberalism and the States System. Political Restructuring in Europe: Ethical perspectives. Ed. Brown, C. London, Routledge: 123–136.
- Beitz, C. (1995). Political Theory and International Relations. Princeton, Princeton University Press.
- Beitz, C. (1998). International Relations, Philosophy of. Routledge Encyclopaedia of Philosophy. London, Routledge: 826–833.
- Beitz, C. (1999a). Political Theory and International Relations. Princeton, Princeton University Press.
- Beitz, C. (1999b). "International Liberalism and Distributive Justice: A Survey of Recent Thought." World Politics 51(2): 269–296.
- Benda, E. (1981). "Lecture: Constitutional Jurisdiction in Western Germany." Columbia Journal of Transnational Law 19: 1–13.
- Benda, E. (1999). The Protection of Human Dignity. Conference Report: Fifty Years of German Basic Law. Washington, American Institute for Contemporary German Studies. John Hopkins University: 35–46.

- Benhabib, S. (2004). The Rights of Others. Cambridge, Cambridge University Press.
- Bosniak, L. (1994). "Membership, Equality, and the Difference that Alienage Makes." New York University Law Review 69: 1047–1149.
- Boswell, C. (2003). European Migration Policies in Flux: Changing Patterns of Inclusion and Exclusion. Malden, Blackwell Publishing.
- Boswell, C. and Carrasco, G (1992). Immigration and Nationality Law: Cases and Materials. Durham, Carolina Academic Press.
- Bowie, C. (1954). Studies in Federalism. Boston, Little Brown and Company.
- Brubaker, R. (1989a). Introduction. Immigration and the Politics of Citizenship in Europe and North America. Ed. Brubaker, R. Lanham, University Press of America.
- Brubaker, R. (1992). Citizenship and Nationhood in France and Germany. Cambridge, Harvard University Press.
- Brubaker, R. (1998). Immigration, Citizenship, and the Nation-State in France and Germany. The Citizenship Debates: A Reader. Ed. Shafir, G. Minneapolis, University of Minnesota Press: 131–164.
- Bruno, A. and Bush, K (2002). Refugee Admissions and Resettlement Policy. Washington, Congressional Research Service (CRS): 1–10.
- Buchwalter, A. (2001). Law, Culture, and Constitutionalism: Remarks on Hegel and Habermas. Beyond Liberalism and Communitarianism. Ed. Robert, W. Albany, State University of New York: 207–227.
- Bureau of Population, Refugees and Migration. (2002). Proposed Refugee Admission for FY 2003 – Report to Congress. Washington, Department of State: 1–24.
- Calavita, K. (1992). U.S. Immigration Policy Responses: The Limits of Legislation. Controlling Immigration: A Global Perspective. Ed. Cornelius, W., Martin, P and Hollifield, J. Stanford, Stanford University Press: 55–82.
- Calhoun, C. (2002). The Class Consciousness of Frequent Travellers: Towards a Critique of Actually Existing Cosmopolitanism. Conceiving Cosmopolitanism. Ed. Vertovec, S and Cohen, R. Oxford, Oxford University Press: 86–109.
- Cancik, H. (2002). 'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105–107. The Concept of Human Dignity in Human Rights Discourse. Ed. Kretzner, D and Klein, E. The Hague, Kluwer Law International: 19–40.
- Caney, S. (2005). Justice Beyond Borders. Oxford.
- Carens, J. (1989). Membership and Morality: Admission to Citizenship in Liberal Democratic States. Immigration and the Politics of Citizenship in Europe and North America. Ed. Brubaker, R. Lanham, University Press of America: 31–49.

Carens, J. (1992). Migration and Morality: A Liberal Egalitarian Perspective. Free Movement: Ethical Issues in the Transnational Migration of People and Money. Ed. Barry, B and Goodin, R. Hertfordshire, Harvester Wheatsheaf: 25–47.

Carens, J. (1994). The Rights of Immigrants. Group Rights. Ed. Baker, J. Toronto, University Toronto Press: 142–163.

Carens, J. (2000). Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness. Oxford, Oxford University Press.

Carliner, D. (1990). The Rights of Aliens and Refugees. Carbondale, Southern Illinois University Press.

Chin, G., et al., Ed. (2001a). Immigration and the Constitution: Discrimination and Equality in Contemporary Immigration Law. Immigration and the Constitution. London, Garland Publishing, Inc.

Chin, G. (2001b). Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration. Immigration and the Constitution: Origins of the Constitutional Immigration Law. Ed., Chin, G. et al. London, Garland Publishing, Inc. 1: 121–194.

Christian, B. (1999). "Visa Policy, Inspection and Exit Controls: Transatlantic Perspectives on Migration Management." Georgetown Immigration Law Journal 14: 215–237.

Cicero (1991). On Duties. Cambridge, Cambridge University Press.

Cicero (1994). DE RE PUBLICA. Cambridge, Massachusetts, Harvard University Press.

Ciment, J., Ed. (2001). Encyclopaedia of American Immigration. New York, Sharpe Reference.

Cinar, D. (1994). From Aliens to Citizens: A Comparative Analysis of Rules of Transition. From Aliens to Citizens: Redefining the Status of Immigrants in Europe. Ed. Bauböck, R. Aldershot, Avebury: 49–72.

Cinar, D. (1999). "Comparing the Rights of Non-Citizens in Western Europe." Research Perspectives on Migration 2: 8–11.

Cohen, W. (1998). "Implementing the U.N. Torture Convention in U.S. Extradition Cases." Denver Journal of International Law and Policy 26 (4): 517–532.

Cole, D. (2003). Enemy Aliens. New York, New Press.

Cole, P. (2000). Philosophies of Exclusion: Liberal Political Theory and Immigration. Edinburgh, Edinburgh University Press.

Coleman, J. (2000). A History of Political Thought – From Ancient Greece to Early Christianity. Oxford, Blackwell Publishers.

Colish, M. (1990). The Stoic Tradition From Antiquity To The Early Middle Ages. Leiden, E.J. Brill.

Collinson, S. (1995). Visa requirements, Carrier Sanctions, 'Safe Third Countries' and 'Readmission': The Development of an Asylum 'Buffer Zone' in Europe. London, Royal Institute of International Affairs: 76–90.

Commission. (2006). Abolition of Internal Borders and Creation of a Single EU External Frontier. Brussels, European Commission: 1–12. Available at <www.ec.europa.eu/justice_home/fsj/freetravel/frontiers/wai/fsj_f.f> [Accessed 27 December 2006].

Committee, C. (2004). Green Book: Background Material and Data on the Programs within the Jurisdiction of the Committee on Ways and Means. Washington, Issued by the Majority of the Ways and Means Committee under the Authority of the Majority Chairman William, Thomas.

Cranston, M. (1973). What are Human Rights? New York, Taplinger Publishing Co.

Cremer, H-J. (1998). International Controls and Actual Removals of Deportable Aliens. Immigration Controls: The search for Workable Policies in Germany and the United States. Ed. Hailbronner, K., Martin, D and Motomura, H. New York, Berghahn Books: 45–115.

Crèvecoeur, J. (1976). Welcome to My Shores Distressed European. Immigration and the European Tradition. Ed. Rischin, M. Indianapolis, Bobbs-Merill Company: 21–33.

Currie, D. (1989). "Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany." The Supreme Court Review: 333–372.

Currie, D. (1994). The Constitution of the Federal Republic of Germany. London, University of Chicago Press.

Cyrus, N. (2004). Aufenthaltsrechtliche Illegalität in Deutschland – Sozialstrukturbildung – Wechselwirkungen – Politische Optionen. Nürnberg, Sachverständigenrat für Zuwanderung und Integration: 1–87.

Cyrus, N. (2006). Stellungnahme zur öffentlichen Anhörung des Innenausschusses des Deutschen Bundestages zum "Entwurf eines Gesetzes zur Verbesserung der sozialen Situation von Ausländerinnen und Ausländer, die ohne Aufenthaltstitel in Deutschland leben". Berlin, Deutscher Bundestag: 1–12.

Cyrus, N. and Vogel, D (2003). EU and U.S. Approaches to the Management of Immigration. Brussels, Migration Policy Group: 1–36.

Cyrus, N. and Vogel, D (2005). Current Immigration Debates in Europe: A Publication of the European Migration Dialogue. Brussels, Migration Policy Group: 1–35.

Declaration of Independence (1776). The U.S. Declaration of Independence 4 July 1776.

Dicke, K. (2002). The Founding Function of Human Dignity. The Concept of Human Dignity in Human Rights Discourse. Ed. Kretzner, D and Klein, E. The Hague, Kluwer Law International: 111–120.

d'Oliveira Jessurun. (1991). Fortress Europe and (Extra-communitarian) Refugees: Cooperation in Sealing off the External Borders. Free Movement of Persons in Europe: Legal Problems and Experiences. Ed. Schermers, H. et al. Dordrecht, Martinus Nijhoff Publishers: 166–181.

Dolzer, R. (1993). The Path to Germany Unity: the Constitutional, Legal International Framework. Germany and its Basic Law. Ed. Kirchof, P and Kommers, D. Baden-Baden, Nomos Verlagsgesellschaft: 365–390.

Doppelt, G. (1978). "Walzer's Theory of Morality in International Relations." Philosophy and Public Affairs 8 (1): 3–26.

Dowty, A. (1987). Closed Borders: The Contemporary Assault on Freedom of Movement. New Heaven, Yale University Press.

Dumbauld, E. (1957). The Bill of Rights: And What it Means Today. Norman, University of Oklahoma.

Dunn, J. (1985). Rethinking Modern Political Theory. Cambridge, Cambridge University Press.

Dunn, J. (1990). Interpreting Political Responsibility. Cambridge, Polity Press.

Durst, D. (2001). The End(s) of the State in Hegel's Philosophy. Beyond Liberalism and Communitarianism. Ed. Robert, W. Albany, State University of New York Press: 229–247.

Dworkin, R. (1996). Freedom's Law: The Moral Reading of the American Constitution. Cambridge, Harvard University Press.

Dürig, G. (1988). An Introduction to the Basic Law of the Federal Republic of Germany. The Constitution of the Federal Republic of Germany. Ed. Karpen, U. Baden-Baden, Nomos Verlagsgesellschaft: 11–24.

Eckert, J. (2002). Legal Roots of Human Dignity in German Law. The Concept of Human Dignity in Human Rights Discourse. Ed. Kretzner, D and Klein, E. The Hague, Kluwer Law International: 41–53.

ECRE (2006). Germany – Legal Conditions. London, European Council on Refugees and Exiles. <www.ecre.org> [Accessed 21 March 2006]

Embassy. (2006a). Reform of Germany's Citizenship and Nationality Law. London, German Embassy in London: 1–4. <www.london.diplo.de/Vertretung/london/en/startseite.html> [Accessed 6 July 2006]

Embassy. (2006b). Requirements for the Issue of Short Stay (Schengen) Visas. Washington, German Embassy in Washington: 1. <www.london.diplo.de/Vertretung/london/en/startseite>

.html> [Accessed 6 July 2006]

Evans, A. (1991). "Nationality Law and European Integration." European Law Review 16: 190–215.

Fahrmeir, A. (2000). Citizens and Aliens: Foreigners and the Law in Britain and the German States, 1789–1870. Oxford, Berghahn Books.

Faist, T. (1994). "How to Define a Foreigner? The Symbolic Politics of Immigration in German Partisan Discourse, 1978–1992." West European Politics 17 (2): 50–71.

Faist, T. (1995a). "Ethnicization and Racialization of Welfare-state Politics in Germany and the USA." Ethnic and Racial Studies 18 (2): 219–250.

Faist, T. (1995b). Boundaries of Welfare States: Immigrants and Social Rights on the National and Supranational Level. Migration and European Integration: The Dynamics of Inclusion and Exclusion. Ed. R. Miles, D and Thränhardt, D. London, Pinter Publishers: 177–195.

Faist, T. (1996). Immigration, Integration, and the Welfare State: Germany and the USA in a Comparative Perspective. The Challenge of Diversity. Ed. Bauböck, R., Heller, A and Zolberg, A. Aldershot, Avebury: 227–258.

Federal Government Commissioner for Migration. (2004). The New Right of Residence: Questions and Answers on the Immigration Act. Berlin, Federal Government Commissioner for Migration, Refugees and Integration: 1–36.

Fine, R. and Cohen, R (2002). Four Cosmopolitanism Moments. Conceiving Cosmopolitanism. Ed. Vertovec, S and Cohen, R. Oxford, Oxford University Press: 137–162.

Fix, M. and Zimmermann, W (2004). The Legacy of Welfare Reform for U.S. Immigrants. International Migration: Prospects and Policies in the Global Market. Ed. Massey, D and Taylor, E. Oxford, Oxford University Press: 335–351.

Fleiner-Gerster, T. (1990). Federalism, Decentralisation, and Rights. Constitutionalism and Rights: The influence of the United States Constitution Abroad. Ed. Henkin, L and Rosenthal, A. New York, Columbia University Press: 19–37.

Fletcher, G. P. (1984). "Human Dignity as a Constitutional Value." University of West Ontario Law Review 22: 171–182.

Frowein, J. (1992). The Federal Republic of Germany. The European Convention for the Protection of Human Rights: International Protection versus National Restrictions. Ed. Delmas-Marty, M. London, Martinus Nijhoff Publishers: 121–129.

Frowein, J. (2002). Human Dignity and International Law. The Concept of Human Dignity in Human Rights Discourse. Ed. Kretzner, D and Klein, E. The Hague, Kluwer Law International: 121–132.

- Galloway, D. (1993). "Liberalism, Globalism, and Immigration." Queen's Law Journal 18: 266–305.
- Geddes, A. (2000). Thin Europeanisation: The Social Rights of Migrants in an Integrating Europe. Immigration and Welfare: Challenging the Borders of the Welfare State. Ed. Bommes, M and Geddes, A. London, Routledge: 208–226.
- Geddes, A. (2003). The Politics of Migration and Immigration in Europe. London, Sage Publications.
- Gibney J, M. (1999). "Liberal Democratic States and Responsibilities to Refugees." The American Political Science Review 93(1): 169–181.
- Gibney J, M. (2004). The Ethics and Politics of Asylum. Cambridge, Cambridge University Press.
- Gibney, M. (1986). Strangers or Friends: Principles for a New Alien Admission Policy. New York, Greenwood Press.
- Gibney, M. and Hansen R (2003). Asylum Policy in the West: Past Trends, Future Possibilities. Helsinki, United Nations University – World Institute for Development Economic Research (Wider): 1–23.
- Giddens, A. (2000). The Globalizing of Modernity. The Global Transformations Reader. Ed. Held, D and McGrew, A. Cambridge, Polity Press: 92–98.
- Gimpel, J. and Edwards, J. (1999). The Congressional Politics of Immigration Reform. Boston, Allyn and Bacon.
- Glaser, D. (1995). Normative Theory. Theory and Methods in Political Science. Ed. Marsh, D and Stoker, G. London, Macmillan Press: 21–41.
- Goerlich, H. (1988). Fundamental Constitutional Rights: Content, Meaning and General Doctrines. The Constitution of the Federal Republic Of Germany. Ed. Karpen, U. Baden-Baden, Nomos Verlagsgesellschaft: 45–66.
- Goetz, K. and Cullen, P (1995a). The Basic Law after Unification: Continued Centrality or Declining Force. Constitutional Policy in Unified Germany. Ed. Goetz, K. and Cullen, P. London, Frank Cass: 5–46.
- Goetz, K. and Cullen, P (1995b). Concluding Theses on Constitutional Policy in Unified Germany. Constitutional Policy in Unified Germany. Ed. Goetz, K. and Cullen, P. London, Frank Cass: 162–178.
- Goodwin-Gill, G. (1990). The Status and Rights of Nonnationals. Constitutionalism and Rights: The Influence of the United States Constitution Abroad. Ed. Henkin, L and Rosenthal, A. Albert. New York, Columbia University Press: 151–175.
- Green, S. (2000). "Beyond Ethnoculturalism? German Citizenship in the New Millennium." German Politics 9 (3): 105–124.

- Grosh, D. (1974). "Immigrants, Aliens, and the Constitution." Notre Dame Law 49: 1075–1100.
- Guard, U. S. Coast Guard. (2006). Alien Migration Interdiction: 1–3. <www.uscg.mil/hq/g-o/g-opl/AMIO/AMIO.htm> [Accessed 15 May 2006]
- Guendelsberger, J. (1988). "The right to Family Unification in French and Unites States Immigration Law." Cornell International Law Journal 21: 1–102.
- Guild, E. (1996). The Legal Framework of Citizenship of the European Union. Citizenship, Nationality and Migration in Europe. Ed. Cesarani, D and Fulbrook, M. London, Routledge: 30–54.
- Guiraudon, V. (1998). Citizenship Rights for Non-Citizens: France Germany and the Netherlands. Challenge to the Nation-State: Immigration in Western Europe and the United States. Ed. Joppke, C. Oxford, Oxford University Press: 272–318.
- Guiraudon, V. (2000). The Marshallian Triptych Reordered: The Role of Courts and Bureaucracies in Furthering Migrants' Social Rights. Immigration and Welfare: Challenging the Borders of the Welfare State. Ed. Bommers, M and Geddes, A. London, Routledge: 72–89.
- Gutman, A. (1992). Communitarian Critics of Liberalism. Communitarianism and Individualism. Ed. Avineri, S and De-Shalit, A. Oxford, Oxford University Press: 120–136.
- Habermas, J. (1993). "Struggles for Recognition in Constitutional States." European Journal of Philosophy 1(2): 128–155.
- Habermas, J. (1994). Citizenship and National Identity. The Condition of Citizenship. Ed. van Steenbergen, B. London, Sage Publications: 20–35.
- Habermas, J. (1994). "Human Rights and Popular Sovereignty: The Liberal and Republican Versions." Ratio Juris 7 (1): 1–13.
- Habermas, J. (1996a). Between Facts and Norms. Cambridge, Polity Press.
- Habermas, J. (1996b). The European Nation-state – Its achievements and its Limits: On the Past and Future of Sovereignty and Citizenship. Mapping the Nation. Ed. Balakrishnan, G. London, Verso: 281–294.
- Hahn, R. F. (1982). "Notes Constitutional Limits on the Power to Exclude Aliens." Columbia Law Review 82: 957–997.
- Hailbronner, K. (1999). Fifty Years of the Basic Law – Migration, Citizenship and Asylum. Conference Report: Fifty Years of German Basic Law. Washington, American Institute for Contemporary German Studies. The Johns Hopkins University: 47–70.

Hailbronner, K. (2002). Germany's Citizenship Law under Immigration Pressure. Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe: The Reinvention of citizenship. Ed. Hansen, R and Weil, P. New York, Berghahn Books: 121–135.

Hailbronner, K., Martin, D and Motomura, H (1998). Conclusion. Immigration Controls. Ed. Hailbronner, K., Martin D and Motomura, H. New York, Berghahn Books: 203–224.

Hailbronner, K. and Polakiewicz, J (1992). "Non-EC Nationals in the European Community: The Need for a Coordinated Approach." Duke Journal of Comparative and International Law 3: 49–88.

Halfmann, J. (1999). Two Discourses of Citizenship in Germany: The Difference Between Public Debates and Administrative Practice. The Postwar Transformation of Germany: Democracy, Prosperity and Nationhood. Ed. Brady, J., Crawford, B and Wiliarty, S. Michigan, University of Michigan Press: 378–398.

Hall, S. (2002). Political Belonging in a World of Multiple Identities. Conceiving Cosmopolitan. Ed. Vertovec, S and Cohen, R. Oxford, Oxford University Press: 25–31.

Hammar, T. (1990a). Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration. Aldershot, Avebury.

Hart, H. L. A. (1955). "Are There Any Natural Rights?" The Philosophical Review 64 (2): 175–191.

Heater, D. (1990). Citizenship: The Civic Ideal in World History, Politics and Education. London, Longman.

Heater, D. (2002). World Citizenship: Cosmopolitan Thinking and its Opponents. London, Continuum.

Hegel, F. (1967). Philosophy of Right. Oxford, Oxford University Press.

Held, D. (1995). Democracy and the Global Order – From the Modern State to Cosmopolitan Governance. Cambridge, Polity Press.

Held, D. (2000). Regulating Globalization. The Global Transformations Reader. Ed. Held, D and McGrew, A. Cambridge, Polity Press: 420–430.

Held, D. (2002a). "Law of States, Law of Peoples: Three Models of Sovereignty." Legal Theory 8 (2).

Held, D. (2002b). "Globalization, Corporate Practice and Cosmopolitan Social Standards." Contemporary Political Theory 1 (1): 59–78.

Held, D. (2002c). Culture and Political Community: National, Global and Cosmopolitan. Conceiving Cosmopolitanism. Ed. Vertovec, S and Cohen, R. Oxford, Oxford University: 48–58.

Held, D. (2004). Global Covenant. Cambridge, Polity Press.

- Held, D. et al. (1999). Global Transformations. Cambridge, Polity Press.
- Heller, T. (2001). Change and Convergence: is American Immigration still Exceptional. Citizenship in a Global World. Ed. Kondo, A. New York, Palgrave Publishers: 196–224.
- Henkin, L. (1979). "Rights: American and Human." Columbia Law Review 79 (3): 405–425.
- Henkin, L. (1985). "The Constitution as a Compact and as Conscience: Individual Rights Abroad and at our Gates." William and Mary Law Review 27: 11–34.
- Henkin, L. (1987). "The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and its Progeny." Harvard Law Review 100: 853–886.
- Henkin, L. (1990). Constitutionalism and Human Rights. Constitutionalism and Rights. Ed. Henkin, L and Rosenthal, A. New York, Columbia University Press: 383–395.
- Henkin, L. (1996). Foreign Affairs and the United States Constitution. Oxford, Clarendon Press.
- Hesse, S. (1959). "The Constitutional Status of the Lawfully Admitted Permanent Resident Alien." The Yale Law Journal 68 (8): 1579–1625.
- Hirst, P. and Thompson, G (2000). Globalization – a Necessary Myth? The Global Transformations Reader. Ed. Held, D and McGrew, A. Cambridge, Polity Press: 68–75.
- Hobbes, T. (1949). Di Cive. New York, Appleton-Century-Crofts.
- Hoffman, C. (1999). Immigration and Nationhood in the FRG. The Postwar Transformation of Germany: Democracy, Prosperity, and Nationhood. Ed. Brady, J., Crawford, B. and Wiliarty, S. Ann Harbor, University of Michigan Press: 357–377.
- Hogwood, P. (2000). "Citizenship Controversies in Germany: The twin Legacy of *Völkisch* Nationalism and the *Alleinvertretungsanspruch*." German Politics 9 (3): 125–144.
- Hogwood, P. (2004). "German Immigration Policy after 9/11: Militant Democracy in the Twenty-first Century." Unpublished, presented at ECPR Workshop in Uppsala: 1–18.
- Hollifield, J. (1992). Immigrants Markets and States: The Political Economy of Postwar Europe. Cambridge, Harvard University Press.
- Hucko, E. (1987). The Democratic Tradition: Four German Constitutions. Oxford, Berg.
- Hull, E. (1983a). The Rights of Aliens: National and International Issues. The Unavoidable Issue: U.S. Immigration Policy in the 1980s. Ed. Demetrios, P and Miller, M. Philadelphia, Institute for the Study of Human issues: 215–249.
- Hull, E. (1983b). "Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe." University of Pittsburgh Law Review 44: 409–432.

Hull, E. (1985). Without Justice for All – The Constitutional Rights of Aliens. Wesport, Greenwood Press.

Ignatieff, M. (1984). The Needs of Strangers. London, Hogarth Press.

Independent Commission on Migration to Germany – Summary. (2001). Structuring Immigration Fostering Integration. Berlin, Independent Commission on Migration to Germany: 1–16. <www.bmi.bund.de> [Accessed 4 July 2006]

Institute. (1987). Restatement of the Foreign Relations Law of the United States. St. Paul, American Law Institute Publishers.

Interior. (2004). Details of the Immigration Act. Berlin, Federal Ministry of the Interior: 1–7. <www.bmi.bund.de> [Accessed 17 Januari 2005]

Interior. (2005a). Schily: Compromise on Immigration Act Possible. Berlin, Federal Ministry of the Interior: 1. <www.bmi.bund.de> [Accessed 17 Januari 2005]

Interior. (2005b). The New Immigration Act Provides the First Legal Framework for Controlling and Effectively Limiting Immigration to Germany. Berlin, Federal Ministry of the Interior: 1–3. <www.bmi.bund.de> [Accessed 17 Januari 2005]

Interior. (2005c). Immigration – the Problem and the Solution. Berlin, Federal Ministry of the Interior: 1–2. <www.bmi.bund.de> [Accessed 17 Januari 2005]

Interior. (2005d). Basis. Berlin, Federal Ministry of the Interior: 1. <www.bmi.bund.de> [Accessed 17 Januari 2005]

Interior. (2005e). Legal Basis for Asylum. Berlin, Federal Ministry of the Interior: 1–4. <www.bmi.bund.de> [Accessed 17 Januari 2005]

Interior. (2005f). Immigration Law and Policy. Berlin, Federal Ministry of Interior: 1–100.

Interior. (2005g). Foreigners as a Proportion of Total Population by State, 2003. Berlin, Federal Ministry of the Interior: 1. <www.bmi.bund.de> [Accessed 4 November 2005]

Interior. (2006a). Asylum and Refugees. Berlin, Federal Ministry of the Interior: 1–4. <www.bmi.bund.de> [Accessed 24 April 2006]

Interior. (2006b). Answers to your Questions about the New Immigration Act. Berlin, Federal Ministry of the Interior. <www.bmi.bund.de> [Accessed 10 July 2006]

Interior. (2006c). Glossary Immigration A-Z – Subsidiary Protection. Berlin, Federal Ministry of the Interior: 1. <www.bmi.bund.de> [Accessed 11 July 2006]

Ipsen, J. (1983). Constitutional Review of Laws. Main Principles of the German Basic Law. Ed. Starck, C. Baden-Baden, Nomos Verlagsgesellschaft: 107–137.

Jacobson, D. (1996). Rights Across Borders: underline? Immigration and the Decline of Citizenship. Baltimore, John Hopkins University Press.

Johnson, N. (1995). The Federal Constitutional Court: Facing up to the Strains of Law and Politics in the New Germany. Constitutional Policy in Unified Germany. Ed. Goetz, C and Cullen, P. London, Frank Cass: 131–148.

Joppke, C. (1997). "Asylum and State Sovereignty: A Comparison of the United States, Germany and Britain." Comparative Political Studies 30 (3): 259–298.

Joppke, C (1998a) Asylum and State Sovereignty: A Comparison of the United States, Germany and Britain. Challenge to the Nation-State: Immigration in Western Europe and the United States . Ed. Joppke, C. Oxford, Oxford University Press: 109–152

Joppke, C. (1998b). "Why Liberal States Accept Unwanted Immigration." World Politics 50: 266–293.

Joppke, C. (1999). The Domestic Legal Sources of Immigration Rights: The United States, Germany and the European Union. Florence, European University Institute (EUI): 1–55.

Joppke, C. (2000). Mobilization of Culture and the Reform of Citizenship Law: Germany and the United States. Challenging Immigration and Ethnic Relations Politics. Ed. Koopmans, R and Statham, P. Oxford, Oxford University Press: 145–161.

Joppke, C. (2001a). The Evolution of Alien Rights in the United States, Germany and the European Union. Citizenship Today: Global Perspectives and Practices. Ed. Aleinikoff, A and Klusmeyer, D. Washington, Carnegie Endowment for International Peace: 36–62.

Joppke, C. (2001b). "The Legal-Domestic Sources of Immigration Rights: The United States, Germany and the European Union." Comparative Political Studies 34 (4): 339–366.

Joppke, C. and Rosenhek, Z (2001c). Ethnic-Priority Immigration in Israel and Germany: Resilience versus Demise. Florence, European University Institute: 1–48.

Kant, I. (1991a). On the Common Saying: 'This May be True in Theory, but it Does Not Apply in Practice'. Kant Political Writings. Ed. Reiss, H. Cambridge, Cambridge University Press: 61–92.

Kant, I. (1991b). Perpetual Peace a Philosophical Sketch. Kant Political Writings. Ed. Reiss, H. Cambridge, Cambridge University Press: 93–130.

Kant, I. (1991c). The Metaphysics of Morals. Kant Political Writings. Ed. Reiss, H. Cambridge, Cambridge University Press: 131–175.

Kant, I. (1993). Grounding for the Metaphysics of Morals – On a Supposed Right to Lie because of Philanthropic Concerns. Indianapolis, Hackett Publishing Company, INC.

Kantstroom, D. (1993). "*Wer Sind Wir Wieder?* Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany." Yale Journal of International Law 18: 155–211.

- Karpen, U. (1983). Application of the Basic Law. Main Principles of the German Basic Law. Ed. Starck, C. Baden-Baden, Nomos Verlagsgesellschaft: 55–88.
- Karpen, U. (1988). Freedom of Expression. The Constitution of the Federal Republic of Germany. Ed. Karpen, U. Baden-Baden, Nomos Verlagsgesellschaft: 91–106.
- Kay, R. (1998). American Constitutionalism. Constitutionalism Philosophical Foundations. Ed. Alexander, L. Cambridge, Cambridge University Press: 16–63.
- Kelly, L. (2001). Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power versus Alien's Rights. Immigration and the Constitution: Discrimination and Equality in Contemporary Immigration Law. Ed. Chin, G et al. London, Garland Publishing, Inc. 2: 1–59.
- Kieser, A. et al. (2000). Easy Scapegoats: Sans Papier in Europe. Country Report Germany. Cologne/Potsdam/Berlin, Report prepared for the European Workshop Promoted by the Freudenberg Stiftung: 1–64.
- King, T. (1983). "Immigration from Developing Countries." Ethics 93: 525–536.
- Klein, E. (1983). The Concept of the Basic Law. Main Principles of the German Basic Law. Ed. Starck, C. Baden-Baden, Nomos Verlagsgesellschaft: 15–35.
- Klein, E. (2002). Human Dignity in German Law. The Concept of Human Dignity in Human Rights Discourse. Ed. Kretzner, D and Klein, E. The Hague, Kluwer Law International: 145–159.
- Knipping, H. and Saumweber-Meyer, U (1995). Basic Principles of Asylum Law and Asylum Proceedings in the Federal Republic Of Germany. Migration Policies: a Comparative Perspective. Ed. Bosswick, W and Heckman, F. Bamberg, Enke: 267–302.
- Koh, H. (1985). "Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens." Hamline Law Review 8: 51–104.
- Kommers, D. (1980). "The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany." Southern California Law Review 53: 657–695.
- Kommers, D. (1989). The Constitutional Jurisprudence of the Federal Republic of Germany. London, Duke University Press.
- Kommers, D. (1995). Basic Rights and Constitutional Review. Politics and Government in Germany, 1944–1994. Ed. Schweitzer, C-C. et al. Oxford, Berghahn Books: 297–324.
- Kommers, D. (1997). The Constitutional Jurisprudence of the Federal Republic of Germany. Durham, Duke University Press.
- Kommers, D. (1999a). The Basic Law: A Fifty Year Assessment. Conference Report: Fifty Years of German Basic Law. Washington, American Institute for Contemporary German Studies, The John Hopkins University: 1–17.

Kommers, D. (1999b). Building Democracy: Judicial Review and the German *Rechtsstaat*. The Postwar Transformation of Germany: Democracy, Prosperity, and Nationhood. Ed. Brady, J., Crawford, B. and Wiliarty, S. Ann Arbor, University of Michigan Press: 94–121.

Kommers, D. (1999b). Building Democracy: Judicial Review and the German *Rechtsstaat*. The Postwar Transformation of Germany. Ed. Brady, J., Crawford, B. and Wiliarty, S. Michigan, University of Michigan Press: 94–121.

Konvitz, M. (2001). Fundamental Rights: History of a Constitutional Doctrine. New Brunswick, Transaction Publishers/Rutgers University.

Koopmans, R. (1999). "Germany and its Immigrants: an Ambivalent Relationship." Journal of Ethnic and Migration Studies 25 (4): 627–647.

Koopmans, R. and Statham, P (2000). Challenge the Liberal Nation-State? Postnationalism, Multiculturalism, and the Collective Claims-making of Migrants and Ethnic Minorities in Britain and Germany. Challenge Immigration and Ethnic Relations Politics. Ed. Koopmans, R and Statham, P. Oxford, Oxford University Press: 189–232.

Krajewski, M. and Helmut, R (1996). German Nationality Law. Nationality Laws in the European Union. Ed. Nascimbene, B. London, Butterworths: 357–385.

Krüger, P. (1999). The Federal Republic as a Nation-State. The Postwar Transformation of Germany: Democracy, Prosperity and Nationhood. Ed. Brady, J., Crawford, B. and Wiliarty, S. Ann Arbor, University of Michigan Press: 339–355.

Kunig, P. (1988). The Principles of Social Justice. The Constitution of the Federal Republic of Germany. Ed. Karpen, U. Baden-Baden, Nomos Verlagsgesellschaft: 187–204.

Kurthen, H. (1995). "Germany at the Crossroads: National Identity and the Challenges of Immigration." International Migration Review 29 (4): 914–938.

Kymlicka, W. (2002). Contemporary Political Philosophy – An Introduction. Oxford, Oxford University Press.

Lambert, H. (1995). Seeking Asylum. Dordrecht, Martinus Nijhoff Publishers.

Layton-Henry, Z. (1990). The Challenge of Political Rights. The Political Rights of Migrant Workers in Western Europe. Ed. Layton-Henry, Z. London, SAGE Publications: 1–26.

Legomsky, S. (1984). "Immigration Law and the Principle of Plenary Congressional Power." The Supreme Court Review 6: 255–307.

Legomsky, S. (1987). Immigration and the Judiciary. Oxford, Clarendon Press.

Legomsky, S. (1997). Immigration and Refugee Law and Policy. Westbury, Foundation Press, Inc.

- Legomsky, S. (1998). The New Techniques for Managing High-Volume Asylum Systems. Immigration Controls. Ed. Hailbronner, K., Martin, D. and Motomura, H. Oxford, Berghahn Books. 1117–1157.
- Legomsky, S. (2001). Ten More Years of Plenary Power: Immigration, Congress and the Courts. Immigration and the Constitution: The Origins of Constitutional Immigration Law. Ed. Chin, G et al. New York, Gerland Publishing. 1: 365–377.
- Linklater, A. (1998). The Transformation of Political Community – Ethical Foundations of the Post-Westphalia Era. Cambridge, Polity Press.
- Linklater, A. (2002). Cosmopolitan Harm Conventions. Conceiving Cosmopolitanism. Ed. Vertovec, S and Cohen, R. Oxford, Oxford University Press: 254–267.
- Mach-Hour, E. (1999). Binational Families between Family Law and Immigration Law. Munich, Center for International and European Law on Immigration and Asylum: 1–5.
- MacIntyre, A. (1981). After Virtue. London, Duckworth.
- MacIntyre, A. (1998). A Short History of Ethics. London, Routledge.
- Madison, J. (1799). James Madison's Report to the General Assembly of Virginia.
- Madison, J., Hamilton, A and Jay, J (1999). The Federalist Papers. New York, Signet Classic.
- Maltz, E. (1996). "Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence." Arizona State Law Journal 28: 1135–1191.
- Margalit, A. and Raz, J (1990). "National Self-Determination." The Journal of Philosophy 87 (9): 439–461.
- Marshall, B. (1996). German Migration Policies. Developments in German Politics. Ed. Smith, G et al. Durham, Basingstoke, Duke University Press: 247–263.
- Marshall, T. (1992). Citizenship and Social Class. Citizenship and Social Class. Ed. Marshall, T and Bottomore, T. London, Pluto Press.
- Martin, D. (1983). "Due Process and the Treatment of Aliens: Due Process and Membership in the National Community – Political Asylum and Beyond." University of Pittsburgh Law Review 44: 165–235.
- Martin, P. (1994). Germany: Reluctant Land of Immigration. Controlling Immigration: A Global Perspective. Ed. Cornelius, W., Martin, P. and Hollifield, J. Stanford, Stanford University Press: 189–225.
- Martin, S. (2002). The Attack on Social Rights: U.S. Citizenship Devalued. Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe. Ed. Hansen, R and Weil, P. New York, Berghahn Books: 215–232.

- Martiniello, M. (1994). Citizenship of the European Union: A Critical View. From Aliens to Citizens: Redefining the Status of Immigrants in Europe. Ed. Bauböck, R. Aldershot, Avebury: 29–47.
- Martiniello, M. (2000). Citizenship in the European Union. From Migrants to Citizens: Membership in a Changing World. Ed. Aleinikoff, A and Klusmeyer, D. Washington, Carnegie Endowment for International Peace: 342–380.
- Massey, D. and Taylor, E (2004). Introduction. International Migration: Prospects and Policies in the Global Market. Ed. Massey, D and Taylor, E. Oxford, Oxford University Press: 1–12.
- McCarthy, T. (1999). "On Reconciling Cosmopolitan Unity and National Diversity." Public Culture 11 (1): 175–208.
- Meehan, E. (1993). Citizenship and the European Community. London, Sage Publications.
- Meilaender, P. (2001). Towards a Theory of Immigration. New York.
- Mill, J. S. (1975). Three Essays – On Liberty Representative Government the Subjection of Women. Oxford, Oxford University Press.
- Miller, D. (1988). "The Ethical Significance of Nationality." Ethics 98 (4): 647–662.
- Miller, D. (1995). On Nationality. Oxford, Clarendon Press.
- Miller, D. (1998). The Limits of Cosmopolitan Justice. International Society: Diverse Ethical Perspective. Ed. Mapel, D and Nardin, T. Princeton, Princeton University Press: 164–181.
- Miller, D. (1999). Principles of Social Justice. Cambridge, Massachusetts, Harvard University Press.
- Miller, D. (2000). Citizenship and National Identity. Cambridge, Polity Press.
- Morris, L. (2002). Managing Migration: Civic Stratification and Migrants' Rights. London, Routledge.
- Morse, A. (2003). Tuition and Unauthorized Immigrant Students. Washington, National Conference of State Legislatures: 1–5.
- Motomura, H. (1992). "The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights." Columbia Law Review 92 (7): 1625–1704.
- Motomura, H. (1994). "Immigration and Alienage, Federalism and Proposition 187." Virginia Journal of International Law 35: 201–216.
- Mouffe, C. (2005). On the Political. London, Routledge.
- Mulhall, S. and Swift, A (1992). Liberals & Communitarians. Oxford, Blackwell Publishers.

- Muller, J. (2002). The Mind and the Market. New York, Alfred A. Knopf.
- Münz, R. and Ohliger, R (1998). Long-Distance Citizens: Ethnic Germans and Their Immigration to Germany. Paths to Inclusion: The Integration of Migrants in the United States and Germany. Ed. Münz, R and Schuck, P. Oxford, Berghahn Books: 155–201.
- Nafziger, J. (1983). "The General Admission of Aliens under International Law." American Journal of International Law 77 (4): 804–847.
- Nafziger, J. (1991). "Review of Visa Denials by Consular Officers." Washington Law Review 66: 1–105.
- Nagel, T. (1991). Equality and Partiality. Oxford, Oxford University Press.
- Nascimbene, B. (1996). Introduction. Nationality Laws in the European Union. Ed. Nascimbene, B. London, Butterworths: 1–19.
- Nedzel, N. (1997). Immigration Law: A Bird's-Eye View. Immigration: Debating the Issues. Ed. Capaldi, N. Amherst, Prometheus: 129–154.
- Needelman, J. (1997). "Attacking Federal Restrictions on Noncitizens' Access to Public Benefits on Constitutional Grounds: A Survey of Relevant Doctrines." Georgetown Immigration Law Journal 11: 349–387.
- Nett, R. (1971). "The Civil Right We Are Not Ready For: The Right of Free Movement on the Face of the Earth." Ethics 81: 212–227.
- Neuman, G. (1990). "Immigration and Judicial Review in the Federal Republic of Germany." N.Y.U Journal of International Law and Politics 23: 35–85.
- Neuman, G. (1991). "Whose Constitution?" Yale Law Journal 100: 909–991.
- Neuman, G. (1992). "We are the People: Alien Suffrage in German and American Perspective." Michigan Journal of International Law 13: 259–335.
- Neuman, G. (1993a). "The Lost Century of American Immigration." Columbia Law Review 93 (8): 1833–1901.
- Neuman, G. (1993b). "Buffer Zones against Refugees: Dublin, Schengen, and the German Asylum Amendment." Virginia Journal of International Law 33: 503–526.
- Neuman, G. (1994). "Justifying U.S. Naturalization Policies." Virginia Journal of International Law 35: 237–278.
- Neuman, G. (1995). "Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine." UCLA Law Review 42 (6): 1425–1452.
- Neuman, G. (1996). Strangers to the Constitution. New Jersey, Princeton University Press.

Neuman, G. (1998). Nationality Law in the United States and the Federal Republic of Germany: Structure and Current Problems. Paths to Inclusion. Ed. Münz, R and Schuck, P. New York, Berghahn Books: 247–297.

Niessen, J. (1996). Introduction. The Developing Immigration and Asylum Policies of the European Union. Ed. Guild, E. The Hague, Kluwer Law International.

Noll, G. (1997). "The Non-Admission and Returns of Protection Seekers in Germany." International Journal of Refugee Law 9 (3): 415–452.

Noll, G. (2000). Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection. The Hague, Martinus Nijhoff Publishers.

Notes (1986). "The Legal Rights of Guestworkers: the Case of Germany." Columbia Journal of Transnational Law 24: 311–338.

Nussbaum, M. (1997). Kant and Cosmopolitanism. Perpetual Peace – Essays on Kant's Cosmopolitan Ideal. Ed. Bohman, J and Lutz-Bachman, M. Cambridge, Massachusetts, MIT Press: 25–57.

Office, The Federal Foreign Office (2005). The New Immigration Act. Berlin, Federal Foreign Office: 1–4. <www.diplo.de/www/en/willkommen/auslaenderrecht/zuwanderung_html> [Accessed 25 February 2005]

Ogus, A. (1990). Property Rights and Freedom of Economic Activity. Constitutionalism and Rights: The Influence of the United States Constitution Abroad. Ed. Henkin, L and Rosenthal, A. New York, Columbia University Press: 123–150.

O'Neill, O. (1994). Justice and Boundaries. Political Restructuring in Europe: Ethical Perspectives. Ed. Brown, C. London, Routledge: 69–88.

Ossenbühl, F. (1993). Economic and Occupational Rights. Germany and Its Basic Law. Ed. Kirchof, P and Kommers, D. Baden-Baden, Nomos Verlagsgesellschaft: 251–282.

Oxford Dictionary (1997). The Oxford Dictionary and Thesaurus. Oxford, Oxford University Press.

Palmer, G. (1997). "Guarding the Coast: Alien Migrant Interdiction Operations at Sea." Connecticut Law Review 29: 1565–1585.

Passel, J. (2006). The Size and Characteristics of the Unauthorized Migrant Population in the U.S. Washington, Pew Hispanic Center: 1–18.

Passel, J. and Suro, R (2005). Rise Peak and Decline: Trends in U.S. Immigration 1992–2004. Washington, Pew Hispanic Center: 1–56.

Peers, S. (1996). "Towards Equality: Actual and Potential Rights of Third-country Nationals in the European Union." Common Market Law Review 33: 7–50.

- Pergler, C. (1928). Judicial Interpretation of International Law in the United States. New York, Macmillan Company.
- Perry, S. (1995). Immigration, Justice and Culture. Justice in Immigration. Ed. Schwartz, W. Cambridge, Cambridge University Press: 94–135.
- Phuong, C. (2003). Controlling Asylum Migration to the Enlarged EU. Helsinki, United Nations University: World Institute for Development Economics Research (WIDER): 1–22.
- PICUM. (2005). Germany. Brussels, Platform for International Cooperation on Undocumented Migrants: 1–6. <www.picum.org> [Accessed 4 June 2005].
- Plamenatz, J. (1960). "The Use of Political Theory." Political Studies 8 (1): 37–47.
- Pogge, T. (1989). Realizing Rawls. Ithaca, Cornell University Press.
- Pogge, T. (1994). Cosmopolitanism and Sovereignty. Political Restructuring in Europe: Ethical Perspectives. Ed. Brown, C. London, Routledge: 89–122.
- Pogge, T. (1997). Migration and Poverty. Citizenship and Exclusion. Ed. Bader, V. London, Macmillan Press: 12–27.
- Raskin, J. (1993). "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage." University of Pennsylvania Law Review 141: 1391–1470.
- Rawls, J. (1999). The Law of Peoples. Cambridge, Harvard University Press.
- Reform, U.S. Commission on Immigration Reform (1997). Becoming an American: Immigration and Immigrant Policy. Washington, U.S. Commission on Immigration Reform: I–LIX.
- Refugees, Federal Office for Migration and Refugees (2005). Legislative Changes in the Asylum Procedure – by the Immigration Act. Nuremberg, Federal Office for Migration and Refugees: 1–20.
- Reich, P. L. (1991). "Public Benefits for Undocumented Aliens: State Law into the Breach Once More." New Mexico Law Review 21: 219–249.
- Representatives, House of Representatives. (1995). Proceedings and Debates of the 104th Congress. Washington, Congress.
- Representatives, House of Representatives. (1996). Immigration in the National Interest Act of 1995. Washington, House of Representatives.
- Ress, G. (1995). The Constitution and the Maastricht Treaty: Between Co-operation and Conflict. Constitutional Policy in Unified Germany. Ed. Goetz, C and Cullen, P. London, Frank Cass: 47–74.
- Rittstieg, H. (1993). Deutsches Ausländerrecht. München, Beck.

Rittstieg, H. (1994). Dual Citizenship: Legal and Political Aspects in the German Context. From Aliens to Citizens: Redefining the Status of Immigrants in Europe. Ed. Bauböck, R. Aldershot, Avebury: 111–120.

Romero, V. (2001). Expanding the Circle of Membership by Reconstructing the "Alien": Lessons from Social Psychology and the "Promise Enforcement" Cases. Immigration and the Constitution: Discrimination and Equality in Contemporary Immigration Law. Ed. Chin, G et al. London, Garland Publishing, Inc. 2: 169–213.

Rosberg, G. (1977a). "Aliens and Equal Protection: Why not the Right to Vote?" Michigan Law Review 75: 1092–1136.

Rosberg, G. (1977b). "The Protection of Aliens from Discriminatory Treatment by the National Government." The Supreme Court Review: 275–339.

Rubio-Marin, R. (2000). Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the U.S. Cambridge, Cambridge University Press.

Rumble, W. (1979). James Madison on the Value of Bills of Rights. Constitutionalism. Ed. Chapman, J and Pennock, J. New York, New York University Press. (20): 122–162.

Sandel, M. (1982). Liberalism and the Limits of Justice. Cambridge, Cambridge University Press.

Sandel, M. (1992). The Procedural Republic and the Unencumbered Self. Communitarianism and the Individual. Ed. Avineri, S and De-Shalit, A. Oxford, Oxford University Press: 12–28.

Scanlan, J. and Kent, O (1988). The Force of Moral Arguments for a Just Immigration Policy in a Hobbesian Universe: The Contemporary American Example. Open Borders? Closed Societies?: The Ethical and Political Issues. Ed. Gibney, M. New York, Greenwood Press: 61–107.

Scaperlanda, M. (1993). "Polishing the Tarnished Golden Door." Wisconsin Law Review: 965–1032.

Scaperlanda, M. (1997). "Who is My Neighbor: An Essay on Immigrants, Welfare Reform and the Constitution." Connecticut Law Review 29 (4): 1587–1625.

Scaperlanda, M. (2001). Partial Membership: Aliens and the Constitutional Community. Immigration and the Constitution. Ed. Chin, G et al. London, Garland Publishing: 101–167.

Schatter, O. (1983). Editorial Comment – Human Dignity as a Normative Concept. The American Journal of International Law. 77: 848–854.

Schäuble, Wolfgang. (1993). Der Spiegel 47 no. 11, 15 March 1993, p. 53. Translation from Hoffman 1999: 373.

Schauer, F. (1986). "Community, Citizenship, and the Search for National Identity." Michigan Law Review 84: 1504–1517.

Schlereth, T. (1977). The Cosmopolitan Ideal in Enlightenment Thought – Its Form and Function in the Ideas of Franklin, Hume, and Voltaire, 1694–1790. Notre Dame, University of Notre Dame Press.

Schlosberg, C. (2000). Immigrants Access to Health Benefits. Boston, National Health Law Program.

Schmitt, A. (2000). "The Basic Law and the Limits of Toleration." German Politics 9 (3): 145–160.

Schuck, P. (1984). "The Transformation of Immigration Law." Columbia Law Review 84 (1): 1–90.

Schuck, P. (1998a). The Legal Rights of Citizens and Aliens in the United States. Temporary Workers or Future Citizens: Japanese and U.S. Migration Policies. Ed. Weiner, M. London, Macmillan: 238–290.

Schuck, P. (1998b). Citizens, Strangers and In-Betweens: Essays on Immigration and Citizenship. Boulder, Westview Press.

Schuck, P. (1998c). Re-Evaluation of American Citizenship. Challenge to the Nation-State: Immigration in Western Europe and the United States. Ed. Joppke, C. Oxford, Oxford University Press: 191–230.

Schuppert, G. (1988). The Right to Property. The Constitution of the Federal Republic of Germany. Ed. Karpen, U. Baden-Baden, Nomos Verlagsgesellschaft: 107–119.

Schuster, L. (2003). The Use and Abuse of Political Asylum in Britain and Germany. London, Frank Cass.

Senate. (1996). Report on Immigration Control and Financial Responsibility Act of 1996. Washington, U.S. Senate.

Seneca. (1995). Moral and Political Essays. Cambridge, Cambridge University Press.

Shacknove, A. (1988). American Duties to Refugees: Their Scope and Limit. Open Borders? Closed Societies: The Ethical and Political Issues. Ed. Gibney, M. New York, Greenwood Press: 131–149.

Shue, H. (1980). Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy. New Jersey, Princeton University Press.

Shusterman, C. (2004) How to Avoid Deportation. Available at <www.shusterman.com/deport.html> [Accessed 02 March 2007].

Sidgwick, H. (1897). The Elements of Politics. New York, Macmillan and Co.

Siebert, H. (1993). Principles of the Economic System of the Federal Republic – an Economist's View. Germany and Its Basic Law. Ed. Kirchof, P and Kommers, D. Baden-Baden, Nomos Verlagsgesellschaft: 291–310.

Singer, P. and Singer, R (1988). The Ethics of Refugee Policy. Open Borders? Closed Societies? Ed. Gibney, M. New York, Greenwood Press: 111–130.

Sinn, A. et al. (2005). Illegal Resident Third-country Nationals: Policy Approaches, Profile and Social Situation. Nürnberg, Federal Office for Migration and Refugees: Migration and Integration Research Department: 1–112.

Smith, S. (1991). Hegel's Critique of Liberalism. Chicago, Chicago University Press.

Smith, J. (2001). A Nation that Welcomes Immigrants: A Historical Examination of the United States Immigration Policy. Immigration and the Constitution: The Origins of Constitutional Immigration Law. Ed. Chin, G et al. New York, Garland Publishing. 1: 1–21.

Smith, R. (1985). Liberalism and American Constitutional Law. Cambridge, Harvard University Press.

Sontheimer, K. (1993). Principles of Human Dignity in the Federal Republic. Germany and Its Basic Law. Ed. Kirchof, P and Kommers, D. Baden-Baden, Nomos Verlagsgesellschaft: 213–220.

Sorensen, J. (1996). The Exclusive European Citizenship. Aldershot, Avebury.

Soysal, Y. (1994). Limits of Citizenship: Migrants and Postnational Membership in Europe. Chicago, Chicago University Press.

Starck, C. (2002). The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions. The Concept of Human Dignity in Human Rights Discourse. Ed. Kretzner, D and Klein, E. The Hague, Kluwer Law International: 179–193.

State Department. (2004). Proposed Refugee Admissions for Fiscal Year 2005. Washington, Department of State: 1–49.

Steinberger, H. (1990). American Constitutionalism and German Constitutional Development. Constitutionalism and Rights: The Influence of the United States Constitution Abroad. Ed. Henkin, L and Rosenthal, A. Albert. New York, Columbia University Press: 199–224.

Stimson, B. (1953). "Deportation as a Denial of Substantive Due Process." Washington Law Review 28: 205–222.

Studies, Center for Immigration Studies. (2002). Legal Immigration, Center for Immigration Studies: 1–2. <www.cis.org/topics/legalimmigration.html> [Accessed 2 November 2002].

Tamir, Y. (1993). Liberal Nationalism. Princeton, New Jersey, Princeton University Press.

Tan, K-C. (2004). Justice Without Borders. Cambridge, Cambridge University Press.

Taylor, C. (1985). Philosophy and the Human Sciences – Philosophical Papers 2. Cambridge, Cambridge University Press.

Taylor, M. (2001). Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine. Immigration and the Constitution: Shark Infested Waters – Procedural Due Process in Constitutional Immigration Law. Ed. Chin, G et al. London, Garland Publishing. 3: 129–200.

Thielemann, E.R. (2003). "Between Interests and Norms: Explaining Patterns of Burden Sharing in Europe." Journal of Refugee Studies 16 (3): 253–273.

Thränhardt, D. (1999). Germany's Immigration Policies and Politics. Mechanisms of Immigration Control: A Comparative Analysis of European Regulation Policies. Ed. Brochmann, G and Hammar, T. Oxford, Berg: 29–57.

van Caenegem, R. C. (1991). Legal History: A European Perspective. London, Hambledon Press.

Väyrynen, R. (2003). Illegal Immigration, Human Trafficking, and Organized Crime. Helsinki, United Nations University, World Institute for Development Economics Research (WIDER): 1–27.

Verdeja, E. (2002). "Law, Terrorism, and Plenary Power Doctrine: Limiting Alien Rights." Constellations 9 (1): 89–97.

Vialet, J. (2002). A Brief History of U.S. Immigration Policy. Immigration Policy in Turmoil. Ed. Gunderson, T. New York, Nova Science Publisher: 9–30.

Waldron, J. (1995). Minority Cultures and the Cosmopolitan Alternative. The Rights of Minority Cultures. Ed. Kymlicka, W. Oxford, Oxford University Press: 93–119.

Waldron, J. (1999). Law and Disagreement. Oxford, Clarendon Press.

Walzer, M. (1980). "The Moral Standing of States: A Response to Four Critics." Philosophy & Public Affairs 9 (3): 209–229.

Walzer, M. (1981). The Distribution of Membership. Boundaries: National Autonomy and its Limits. Ed. Brown, P G and Shue, H. Totowa, Rowman and Littlefield: 1–33.

Walzer, M. (1983). Spheres of Justice – A Defence of Pluralism and Equality. Oxford, Blackwell Publishers.

Walzer, M. (1997). On Toleration. New Haven, Yale University Press.

Weil, P. (2001). Access to Citizenship: A Comparison of Twenty-five Nationality Laws. Citizenship Today: Global perspectives. Ed. Aleinikoff, A and Klusmeyer, D. Washington, Carnegie Endowment for International Peace: 17–35.

Weiler, J. Haltern, U and Mayer, F (1995). "European Democracy and Its Critique." West European Politics 18 (3): 4–39.

- Weissbrodt, D. (1992). Immigration Law and Procedure in a Nutshell. St. Paul, West Information Publishing Group.
- Weisselberg, C. (1995). "The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei." University of Pennsylvania Law Review 143 (4): 933–1034.
- Wells, H. G. (1940). The Rights of Man: or What are we Fighting For? Harmondsworth, Penguin Books Limited.
- Wenzel, U. and Bös, M (1997). "Immigration and the Modern Welfare State: the Case of USA and Germany." New Community 23 (4): 537–548.
- Whelan, F. (1983). "Principles of U.S. Immigration Policy." University of Pittsburgh Law Review 44: 447–484.
- Whelan, F. (1988). Citizenship and Freedom of Movement: An Open Admission Policy? Open Borders? Closed Societies?: The Ethical and Political Issues. Ed. Gibney, M. New York, Greenwood Press: 3–39.
- Williams, H. (2003). Kant's Critique of Hobbes. Cardiff, University of Wales Press.
- Winter, M. (2004). "Becoming a German National." Unpublished Paper Presented at the Conference on Civic Education and Politics in Democracies at the Friedrich-Alexander University: 1–16.
- Wood, A. (1999). Kant's Ethical Thought. Cambridge, Cambridge University Press.
- Wright, G. (1994). "Federal Immigration Law and the Case for Open Entry." Loyola of Los Angeles Law Review 27: 1265–1298.
- Wu, F. (2001). The Limits of Borders: A Moderate Proposal for Immigration Reform. Immigration and the Constitution: Discrimination and Equality in Contemporary Immigration Law. Ed. Chin, G et al. London, Garland Publishing. 2: 61–100.
- Würtenberg, T. (1988). Equality. The Constitution of the Federal Republic of Germany. Ed. Karpen, U. Baden-Baden, Nomos Verlagsgesellschaft: 67–90.
- Zlotnik, H. (2004). Population Growth and International Migration. International Migration. Ed. Massey, D and Taylor, E. Oxford, Oxford University Press: 15–34.
- Zöllner, V. (2004). "Liberty Dies by Inches: German Counter-terrorism Measures and Human rights." German Law Journal 5 (5): 469–494.

Index of Laws

Asylum Procedure Act. As Amended until 29 October 1997. (engl. translation) by Federal Ministry of the Interior.

Basic Law for the Federal Republic of Germany 23 May 1949. As Amended to 1 December 1993. (engl. translation) in Currie 1994.

Burlingame Treaty 1868. (16 Stat. 739, 740, T.S. No. 48.)

Council Directive 2003/9/EC. Council Directive Laying down Minimum Standards for the Reception of Asylum seekers. 27 January 2003.

Council Directive 2003/86/EC. Council Directive on the Right to Family Reunification. 22 September 2003.

Council Directive 2003/109/EC. Council Directive Concerning the Status of Third-country Nationals who are Long-term Residents. 25 November 2003.

Executive Order 12807. Interdiction of Illegal Aliens. 24 May 1992.

Expatriation Act. 15 Stat. 223. 1868.

Freedom of Movement Act/EU. Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners. Article 2: Act on the General Freedom of EU Citizens. 30 July 2004. (engl. translation) by Federal Ministry of the Interior.

Immigration Act. Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners. Article 1: Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory. 30 July 2004. (engl. translation) by Federal Ministry of the Interior.

Immigration and Nationality Act (INA). Immigration and Nationality Act. As amended to 19 July 2005.

Nationality Act. Nationality Act 22 July 1913. As amended to 14 of March 2005. (engl. translation) by Perrin, G in Legal Texts In-Press.

Military Commissions Act of 2006.

Treaty Establishing the European Union. Consolidated Version of the Treaty Establishing the European Community. As amended to 24 December 2002.

U.S. Constitution June 21 1788. As amended to 1992.

Index of U.S. Cases

Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535. (1973).

Ambach v. Norwick et al., 441 U.S. 68, 99 S.Ct. 1589. (1979).

Barbier v. Conally, 113 U.S. 27, 5 S.Ct. 357. (1884).

Bernal v. Fainter et al., 467 U.S. 216, 104 S.Ct. 2312. (1984).

Boyd v. State of Nebraska, 143 U.S. 135, 12 S.Ct. 375. (1892).

Bridges v. California, 314 U.S. 252, 62 S.Ct. 190. (1941).

Bridges v. Wixon, 326 U.S. 135, 65 S.Ct. 1443. (1945).

Bugajewitz v. Adams, 228 U.S. 585, 33 S.Ct. 607. (1913).

Cabell et al. v. Chavez-Salido, 454 U.S. 432, 102 S.Ct. 735. (1982).

Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525. (1952).

Chae Chan Ping v. U.S., 130 U.S. 581, 9 S.Ct. 623. (1889).

Edye v. Robertson, 112 U.S. 580, 5 S.Ct. 247. (1884).

Ex parte Kumezo Kawato, 317 U.S. 69, 63 S.Ct. 115. (1942).

Fiallo v. Bell, 430 U.S. 787, 97 S.Ct. 1473. (1977).

First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407. (1978).

Fiske v. State of Kansas, 274 U.S. 380. (1927).

Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1376. (1960).

Foley v. Connelie, 435 U.S. 291, 98 S.Ct. 1067. (1978.)

Fong Yue Ting v. United States et al., 149 U.S. 698 13 S.Ct. 1016. (1893).

Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737. (1954).

Graham v. Richardson et al., 403 U.S. 365, 91 S.Ct. 1848. (1971).

Hamdan v. Rumsfeld, 126 S.Ct. 2749. (2006).

Hampton v. Mow Sun Wong et al., 426 U.S. 88, 96 S.Ct. 1895. (1976).

Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512. (1952).

Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 107 S.Ct. 1207. (1987).

In re Chung Toy Ho and Wong Choy Sin, 42 F. 398. Circuit, Court, D. Oregon. (1890).

In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851. (1973).

Kleindienst v. Mandel. 408 U.S. 753, 92 S.Ct. 2576. (1972).

Kwong Hai Chew v. Colding et al., 344 U.S. 590, 73 S.Ct. 472. (1953).

Landon v. Plasencia, 459 U.S. 21, 103 S.Ct. 321. (1982).

Mahler et al. v. Eby, 264 U.S. 32, 44 S.Ct. 283. (1924).

Mathew v. Diaz et al., 426 U.S. 67, 96 S.Ct. 1883. (1976).

Minor v. Happersett, 88 U.S. 162. S.Ct. (1874).

Moore v. City of East Cleveland, 431 U.S. 494 97 S.Ct. 1932. (1977).

Nishimura Ekiu v. United States et al., 142 U.S. 651, 12 S.Ct. 336. (1892).

Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382. (1982).

Rasul et al. v. Bush et al., 124 S.Ct. 2686. (2004).

Reid v. Covert, 354 U.S. 1. (1957).

Ross v. McIntyre, 140 U.S. 453. (1891).

Russian Volunteer Fleet v. United States, 282 U.S. 481, 51 S.Ct. 229. (1931).

Sale v. Haitian Centers Council, 509 U.S. 155, 113 S.Ct. 2549. (1993).

Schneider v. State of New Jersey, 308 U.S. 147. (1939).

Schneiderman v. United States, 320 U.S. 118, 63 S.Ct. 1333. (1943).

Smith v. Turner & Norris v. The City of Boston, 48 U.S. 283. S.Ct. (1849).

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243. (1969).

Sugerman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842. (1973).

Torao Takahashi v. Fish and Game Commission et al., 334 U.S. 410, 68 S.Ct. 1138. (1948).

Traux v. Raich, 239 U.S. 33, 36 S.Ct. 7. (1915).

United States v. Cruikshank et al., 92 U.S. 542. S.Ct. (1875).

United States v. Gue Lim, 176 U.S. 459, 20 S.Ct. 415. (1900).

United States v. Macintosh, 283 U.S. 605, 51 S.Ct. 570. (1931).

United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S.Ct. 1056. (1990).

United States v. Wong Kim Ark, 169 U.S. 649, 18 S.Ct. 456. (1898).

Wong Wing et al.v. United States, 163 U.S. 228, 16 S.Ct. 977. (1896).

Yee Won v. White, 256 U.S. 399, 41 S.Ct. 504. (1921).

Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064. (1886).

Zadvydas v. Davis, 533 U.S. 678, 121 S.Ct. 2491. (2001).

Index of German Cases

- BVerfGE 2, 1. First Senate. (1952). (engl. translation) by Schmitt, Schmitt 2000.
- BVerfGE 4, 7a. First Senate. (1954). (engl. translation) by Sontheimer, Sontheimer 1993.
- BVerfGE 4, 7b. First Senate. (1954). (engl. translation) by Kommers, Kommers 1989.
- BVerfGE 6, 32. First Senate. (1957). (engl. translation) by Kommers, Kommers 1989.
- BVerfGE 6, 55. First Senate. (1957). (engl. translation) by Kommers, Kommers 1997.
- BVerfGE 7, 198a. First Senate. (1958). (engl. translation) by Kommers, Kommers 1997.
- BVerfGE 7, 198b. First Senate. (1958). (engl. translation) by Weir,
www.ucl.ac.uk/laws/global_law.
- BVerfGE 7, 377. First Senate. (1958).
- BVerfGE 24, 367. First Senate. (1968). (engl. translation) by Currie, Currie 1989.
- BVerfGE 27, 1. First Senate. (1969). (engl. translation) by Kommers, Kommers 1989.
- BVerfGE 30, 173. First Senate. (1971). (engl. translation) by Kommers, Kommers 1989.
- BVerfGE 32, 98. First Senate. (1971). (engl. translation) by Kommers, Kommers 1997.
- BVerfGE 33, 23. Second Senate. (1972). (engl. translation) by Kommers, Kommers 1997.
- BVerfGE 35, 202. First Senate. (1973). (engl. translation) by Lawson and Markesinis,
www.ucl.ac.uk/laws/global_law.
- BVerfGE 35, 382. First Senate. (1973). (engl. translation) by Neuman, Neuman 1990.
- BVerfGE 39, 334. Second Senate. (1975). (engl. translation) by Kommers, Kommers 1989.
- BVerfGE 45, 187a. First Senate. (1977). (engl. translation) by Currie, Currie 1994.
- BVerfGE 45, 187b. First Senate. (1977). (engl. translation) by Kommers, Kommers 1989.
- BVerfGE 53, 257. First Senate. (1980). (engl. translation) by Schuppert, Schuppert 1988.
- BVerfGE 65, 1. First Senate. (1983). (engl. translation) by Kommers, Kommers 1989.
- BVerfGE 74, 358. First Senate (1987). (engl. translation) by Frowein, Frowein 1992.
- BVerfGE 76, 1. Second Senate. (1987).
- BVerfGE 83, 37a. Second Senate. (1990). (engl. translation) by Rubio-Marín, Rubio-Marín 2000.

BVerfGE 83, 37b. Second Senate. (1990). (engl. translation) by Kommers, Kommers 1997.

BVerfGE 83, 37c. Second Senate. (1990). (engl. translation) by Neuman, Neuman 1992.

BVerfGE 89, 155a. Second Senate. (1993). (engl. translation) by Kommers, Kommers 1997.

BVerfGE 89, 155b. Second Senate. (1993.) (engl. translation) by Ress, Ress 1995.

BVerfGE 1423/92. First Senate. (1994). (engl. translation) by Kommers, Kommers 1997

BVerfGE 1481/04. Second Senate. (2004). (engl. translation) by

Bundesverfassungsgericht, http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104.html.