A THEORY OF FAMILY-CLASS IMMIGRATION AND ITS POLICY IMPLICATIONS

by

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In this thesis, I argue for a right to family reunification: a right against one’s state to bring in one’s foreign family members to reside in the state permanently. Though this conclusion runs against current legal norms, I argue that it flows directly from liberal values and ought to persuade liberal states to recognize this right. My argument is consistent with states’ general (though limited) right to exercise their discretion in controlling their borders, foregoing cosmopolitanism.

Chapter 2 articulates a functional definition of the family as a group of individuals who share in a relationship of mutual care, responsibility, and sharing of resources and experiences, and defends a right (against one’s own state) to family life based on our interests in care and sharing our lives. It also discusses two specific applications of the right to family life: the right to form a family of one’s choice and the right to uninterrupted family life.

Chapter 3 argues that the right to family life also entails that we have a civil right (against our state) to be reunited with our foreign family members within our state. It also considers and refutes the objection that such a right would be uniquely and unacceptably burdensome.

Chapter 4 contextualizes this theoretical defence of the right to family reunification within the broader immigration ethics literature. It examines the debate between open-border and closed-border positions, and reviews immigration theories grounded in communitarianism, individualism, and cosmopolitanism. Most theories do not attend, or attend with limited sensitivity, to the unique considerations at play in family-class immigration.

Chapter 5 examines and critiques a number of typical limitations imposed on family reunification: restrictive definitions of family, quotas, the ‘elsewhere approach.’ It also considers a group of limitations that could be permissible so long as they are proportionate.

This thesis offers an exhaustive account of the considerations at play in a right to family reunification, building it from its theoretical foundations in the right to family life, assessing its power in the cross-border context, contextualizing it within the broader immigration ethics literature, and discussing its practical implications.
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I dedicate this thesis to cross-border families everywhere, to my birth-family back home, and to my family of choice and making in my new home in Canada.
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Chapter 1

Introduction: On the Problem with Family-Class Immigration

How should a state respond to a plea by a family composed of a citizen or permanent resident and a foreigner to allow the foreigner to settle within the state’s territory so that the family can exercise family life? In this thesis, I argue that the answer to this question turns on the obligations of the state towards the family member who is a citizen or a permanent resident of that state. The right of citizens and permanent residents to bring in their foreign family members, I argue, forms part of their right to family life, which serves their basic human interests in care and in sharing their lives with others. A liberal state is committed to respecting its members’ right to family life, including the aspect of the right to family life that limits the state’s discretion with regards to its immigration policy. Thus, even if states enjoy a general prerogative to control immigration, their commitment to their members constrains this prerogative and results in a general obligation to admit foreign family members as immigrants.¹

A member’s² right to family-class immigration limits the state’s ability to manage its own membership significantly, but not entirely. The right and the correlative duty to admit a foreign family member are not unqualified. Other societal interests may override them, and a state may be justified in limiting family reunification for certain reasons. In this thesis, I will consider a number of unjustified limitations on the right, as well as a number of justified ones. Doing so, I will complete an account of the right’s scope and its appropriate extent of protection.

Arguing for the right to bring in our foreign family members “from the ground up”—from the underlying human interest to permitted and prohibited policy tools concerning the right—I attempt in this thesis to draw a connection between two conversations about family-class immigration. The law and policy conversation is concerned with particular rules and policies and their effect on family members and society at large. The political theory conversation is concerned with the ethical principles underlying citizenship and immigration systems. Usually, these conversations are held independently from one another. I believe that the two conversations must be held in concert, and that each can contribute to the other’s flourishing. By painting the normative picture from its theoretical foundations to its policy

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¹ I speak of states as if they are moral agents in the world, but this is just a metaphor. The state stands for its people. When I speak of states’ rights, I speak of individual rights and freedoms that are promoted via political cooperation, giving rise to group-rights.

² I use the term “member” to refer to both citizens and permanent residents. In the literature, citizenship is spoken of as “full membership” in a polity. “Membership,” then, is a larger category of persons with bonds to the state, that includes both full and less-than-full members.
implications in one piece, I hope to offer a reader a deeper understanding of the different ethical and legal considerations pertaining to family-class immigration than is available in current literature.

The thesis aims to provide a solution to two sets of problems affecting family-class immigration worldwide: practical and conceptual problems. The reality is that some cross-border families suffer long periods of separation, some without hope of ever being lawfully reunited in one country. And all cross-border families go through demanding, expensive and prolonged processes to achieve the goal of reunification. With family life being so precious to many of us, and so delicate and sensitive to interruption, this reality is causing immense human suffering. And it is unclear that the prevalent political conception of family-class immigration can inspire policies that will bring about a better future. Our current understanding of family-class immigration is murky and incomplete, and the policies it inspires are inconsistent.\(^3\) And indeed I believe that this conceptual deficit works to the detriment of cross-border families. Trying to arrive at a solution to this conceptual problem, in this thesis I evaluate the theoretical foundations of family-class immigration to suggest some policies that will put us on the right path to treating this subject as it is ought to be treated.

The argument I advance here contributes both to theoretical debates over immigration and citizenship and to the design of immigration law and policy. The argument challenges both the prevalent conception in academia that states are morally obliged to keep their borders open,\(^4\) and the prevalent conception amongst the public, politicians, jurists and immigration policymakers worldwide, according to which states rightfully enjoy full discretion to control family-class immigration.\(^5\) And it concludes with a consideration of practical questions of immigration policy design. I hope that by presenting my argument I create an opportunity for thoughtful evaluation of the basic human interests and normative principles that are concerned in the kind of questions that cross-border families impose to us.

\(^{3}\) Cynthia S. Anderfuhren-Wayne has expressed similar thoughts regarding the state of affairs in 1996 when she said: “For one thing, there is no unified approach regarding a right to family unity or what family protection encompasses. Furthermore, despite recognition of the family unit, its significance and its need for protection, obstacles to family reunification are deep-rooted and manifold.” (Cynthia S. Anderfuhren-Wayne, “Family Unity in Immigration and Refugee Matters: United States and European Approaches,” *International Journal of Refugee Law* 8, no. 3 (1996): 348).


\(^{5}\) See, e.g. Betty de Hart, “Love Thy Neighbour: Family Reunification and the Rights of Insiders,” *European Journal of Migration and Law* 11 (2009): 235–252. de Hart says that the European Court of Human Rights gives the interests of insider spouses (citizens or permanent residents) in Article 8 ECHR cases (right to family life) only a marginal role in determining the appropriate treatment of a state a specific case. Although the Court has acknowledged that family reunification is about insiders, it does not look at the ties of the insider spouse to his or her country of citizenship or residence. Furthermore, the Court’s pattern of decisions reveals they have a discriminatory effect: It sees the relationships of insider women with migrant partners as a more serious threat to restrictive immigration policies than relationships of insider men with migrant women. This is despite the fact that in *Abdulaziz* the court recognised that the rights of insiders are at issue in family-class immigration cases:

The applicants are not the husbands but the wives, and they are complaining not of being refused leave to enter or remain in the United Kingdom but, as persons lawfully settled in that country, of being deprived (...) or threatened with deprivation (...) of the society of their spouses there.

1.1 Family-Class Immigration Worldwide

The primary problem with family-class immigration is that the leading legal doctrine adopted by liberal states stands in stark opposition to widely shared moral sentiments as they are reflected in major public policies in place in the same states. According to the prevailing legal approach, save for in exceptional circumstances, there exists no individual right to immigrate to a country by virtue of family ties with a national of that country. But in terms of policy, the family class is an established category of immigration worldwide. As Carens said, “liberal democratic states act as though they have a moral obligation to permit family reunification, even when they do not think it is in their interest to do so.” Indeed, liberal-democratic countries’ immigration laws internalize the norm of family reunification and dedicate a portion of their immigration intakes to family-class immigration: foreign family members of citizens and permanent residents.

Some scholars have gone as far as to argue that family-class immigration has become, through the practices of states, a norm of international law, no longer self-imposed. But states resist this, of course. Domestic legislatures and courts reject the idea that the state is obliged to take in family members. Time and time again they assert that immigration of foreign family members—as all immigration—is in the full discretion of the state. And the states’ perspective dominates international law as well. Even international human rights law, the most attentive to individuals’ fundamental rights, where we find some of the most expansive statements of the value and right to family life, states that “no international instrument universally establishes family reunification as a fundamental right”. Instead, “the authority of the nation-state in migration has been consistently reinforced at the international level” even with respect to the issue of family unity. This leading legal doctrine of state sovereignty prevents longstanding entitlements under major public policies from evolving into individual rights. In all jurisdictions, then, access to immigration under the category’s auspices is limited by definition.

This thesis will consider three policy measures that reflect the leading legal assumption of state discretion in immigration matters and that interfere severely with individuals’ liberty to pursue family life. The first is the restrictive definition of the family for the purposes of family life. The second longstanding limitation is numerical caps on admissions, which are rooted in the category in the U.S., for example, and occur also in Canada and Australia. The third, and most serious, limitation is the elsewhere approach, a doctrine applied in many jurisdictions—but mainly by the European Court of

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6. I use different words to mean similar things: state, country, nation, polity. I use “family-class immigration” and “family reunification” interchangeably in my argument whenever I speak of family reunification as the primary reason for migration. The literature sometimes distinguishes “family reunification” from “family unification,” where the former pertains to families once living together, later separated by either choice or coercion, and now looking to reestablish shared family life in one state and the latter pertains to individuals who are looking to begin family life together in one state.


Human Rights—according to which the refusal of a state to allow reunification within its borders is not considered a violation of the right to family life if the family has a presumed alternative: the—merely presumed—possibility to reunite in another country.  

A second problem with family-class immigration has to do with the latest policy trends. It seems that in the last couple of decades, and contrary to the period immediately preceding it, states have come to understand their interest to be against general openness to family-class immigration and they are using their perceived discretion to limit some aspects of it. The global policy trend, which diminishes further the variations and highlights the shared aspects of family-based policies worldwide, is limiting access to family-class immigration.  

This convergence justifies speaking of family-class immigration as one unified phenomenon. In global terms, then, for advocates of cross-border families, the leading proposition that states have full discretion over their immigration policies presents a timely concern.

The latest revisions of family reunification policies are, states claim, attempts to answer concerns that family-class immigration burdens the economy more than it contributes to it, facilitates social clustering and hinders integration and public trust, enables harmful familial practices, or is a category of immigration too easily abused. Recent policies elevate the financial conditions and obligations involved

11. See Chapter 5. It may be helpful to consider the specific concerns with family immigration that lead to the adoption of different conditions and rules for the category. First, the trend can be part of an effort to curb overall immigration numbers. Since in all immigration countries family class immigration composes a major part of intakes, policy measures aimed at family class immigration are likely to have a noteworthy effect on immigration at large. Second, the trend can be a reaction to dissatisfaction with “unchosen” immigration in particular. Humanitarian immigration—the admission of asylum seekers and the resettlement of refugees—and family immigration are “unchosen” in the sense that by adopting routes for these kinds of migration states restrict in important ways their own discretion to choose amongst applicants. Presumably, with other categories of immigration states retain greater discretion. Programs that choose amongst nominees, or programs selecting by skills, economic potential, or cultural criteria supposedly give states more room to choose particular immigrants. If states perceive this dichotomy to be true (whether or not in reality discretion to choose individual immigrants differs greatly between categories), and if they see their interest as demanding greater discretion to select individual immigrants, they will prefer to curtail “unchosen” immigration. Last, the trend can be responding to specific worries about family class immigration. For example, it is often assumed that family class immigration is less economically viable than other categories, despite evidence to the contrary. For example, Naomi Alboim found that family-class immigrants tended to do better than other immigrants in their first year in Canada due to their social relations. (Naomi Alboim, “Adjusting the Balance: Fixing Canada’s Economic Immigration Policies,” Maytree, 2009, 47, https://maytree.com/wp-content/uploads/adjustingthebalance-final.pdf.) It is also often claimed that many of the individuals coming in under family class immigration hold political and cultural views that hinder their integration into receiving society, make integration impossible, or reject core values of the receiving society and thus threaten its identity. It can also be the case that the idea of a right to family reunification, or of the benefit in allowing families to reunite, is losing public support, or that the ideology of state control is gaining public support for a variety of reasons. There could arise the concern that family class immigration policies are used fraudulently to achieve access to immigration. And, finally, there could arise the concern that an entrenched norm and policy path of openness to family class immigration creates a “multiplier effect”: a potentially endless stream of unchosen immigration, which could potentially possess any of the disadvantages mentioned above. Heightening the conditions for family reunification can reduce numbers of immigration at large, can restores some sense of control over the character of family immigration—making it less “unchosen,” and can answer some particular concerns with the integration potential of family immigrants.

12. As one scholar put it:

[T]here is convergence among immigrant-receiving democracies in the policy instruments used to control and manage international migration, as well as convergence in the efficacy and the effects of these policies; and...the gap between immigration policy and outcomes has widened over time. (Tom K. Wong, “Commentary: Conceptual Challenges and Contemporary Trends in Immigration Control,” in Controlling Immigration: A Global Perspective, 3rd Edition, ed. James F. Hollifield, Philip L. Martin, and Pia M. Orrenius (Stanford: Stanford University Press, 2014), 40.)


13. Kofman et al suggest that changes in family-class immigration patterns, as well as changes in state policies with regards
in family-class immigration.\textsuperscript{14} “Cultural integration” policies impose “integration contracts,” language requirements and civic tests, some of which the incoming family member must comply with before entry into the country.\textsuperscript{15} A policy spreading worldwide lately raises the minimum age for spouses eligible for reunification.\textsuperscript{16} And relatively new policies present new requirements couples need to meet before, and sometimes after, reunification.\textsuperscript{17} In all these senses, we see a global trend of limiting access to family reunification. In this thesis, I will consider to what extent these limitations are legitimate through an analysis of what the principle of proportionality means in the context of family-class immigration.\textsuperscript{18}

1.2 \textbf{Family-Class Immigration Theory}

Family-class immigration remains undertheorized. Despite the considerable share of family-class immigration in overall immigration,\textsuperscript{19} and while in recent years the interest in this category is growing,\textsuperscript{20} still very little academic attention is dedicated to family-class immigration as a unique phenomenon.\textsuperscript{21}

to other forms of immigration, add to the debate as well (Eleonore Kofman et al., “Introduction: Issues and Debates on Family-Related Migration and the Migrant Family: A European Perspective,” in Kraler et al., \textit{Gender, Generations and the Family in International Migration}, 13, n.5). Perhaps most importantly, “[t]he nature of family migration has shifted from the earlier family reunification type to family formation in older immigration states. Restrictions on labour migration have left marriage as almost the sole means of entry to, and continuing residence in, the EU for third-country nationals, especially those who do not have the recognised skills” (ibid., 18). While these arguments pertain to the European reality, they apply to other major immigration countries as well [For example, The United States’ immigration system is commonly accused of being particularly sub-optimal in that political roadblocks prevent the development of a sophisticated, modern system of selective economic migration. Part of the result, critiques claim, is the overuse and abuse of family class immigration].

14. For example, as of January 2\textsuperscript{nd} 2014, Canada’s sponsorship program for parents and grandparents saw a 30% increase in the minimum necessary income (MNI) of the sponsors, and a lengthened period of demonstrating such MNI from 1 to 3 years (Immigration and Refugee Protection Regulations, Reg 133(1)(j)(B), SOR/2014-140, s 10(E)). Denmark, France, the Netherlands, Germany, Austria and the UK similarly heightened financial thresholds (Ruffer, “Pushed Beyond Recognition? The Liberality of Family Reunification Policies in the EU,” 937.).


16. For example, for Canada see change pertaining to the age of children (Canada. Citizenship and Immigration Canada, “Notice—Changes to the Definition of a Dependent Child,” Government of Canada, 2014, \url{http://www.cic.gc.ca/english/department/media/notices/2014-08-01.asp}), and change to the minimum age of partners from 16 to 18. source. In Europe, changes pertain both to children, such as in Denmark, France, the Netherlands, Germany, Austria, and the UK (Ruffer, “Pushed Beyond Recognition? The Liberality of Family Reunification Policies in the EU,” 936), and to spouses, such as in the case of Germany, Denmark, and the Netherlands (ibid., 947–948.).

17. For example, Australia, USA, UK, and Canada have all adopted a new category of “conditional permanent residence” status, which applies to sponsored partners. Under this category partners are admitted under the condition that they cohabitate in a conjugal relationship with their sponsor for a probationary period. Failure to meet the condition will result, under some exceptions, in loss of permanent residence status and in possible removal. Canada adopted such policy in 2012, following the trend (Canada. Citizenship and Immigration Canada, “Operational Bulletin 280: Conditional Permanent Residence Measure for Spouses and Partners in Relationships of Two Years or Less Who Have No Children in Common,” Government of Canada, 2014, \url{http://www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob480.asp}), but recently abolished the condition (Canada. Immigration, Refugees & Citizenship Canada, “Notice—Government of Canada Eliminates Conditional Permanent Residence,” April 28, 2017, \url{http://www.cic.gc.ca/english/department/media/notices/2017-01-03.asp}).

18. See Chapter 5.


Even less academic attention is given to the theoretical foundations of the category. More often, we find assessment of the category in empirical or policy terms. My aim is to offer a thesis dedicated to the unique theoretical questions involved in family-class immigration and to offer a comprehensive justificatory foundation to family reunification that provides also clear policy guidance.

The history of family immigration policies reflects a variety of ideas about the relationship between family ties and a political status. Once upon a time, in the countries I am currently interested in, women lost their citizenship if they married a non-national, and foreign women gained citizenship upon marrying a national. Manhood was the leading status. Family ties then were the leading relationship, and citizenship status followed. More recently, in a context of mass work immigration of men, family reunification policies were thought of both as promoting the integration of migrants in society and as a matter of former migrants' rights—their right to family life. A policy of openess to family reunification had been thought of as achieving two liberal goals: the promotion of a cohesive society (that is a condition to a thriving democracy), and of respect for individual rights (a condition of liberalism). Supported by these all-benefiting liberal notions, family reunification policies spread and struck roots worldwide, and for a period in the 20th century enjoyed wide support and received very little academic or public attention.

The limiting trend of the current period reveals that the two justifications—integration and rights—are no longer able to inspire public support for family reunification policies. Under this period's circumstances, the merits of family reunification are no longer uncontested, and recent policy debates and developments reveal that the assumptions supporting family reunification policies are eroding worldwide. Notions of individual rights retreat in the face of growing sentiments of protectionism and statism in a world fearful of growing flows of asylum seekers and undocumented economic migrants. And the once-stable belief that family reunification supports integration is now being replaced by suspicion towards the very possibility of economic or social integration of, at least some, immigrants.

It is not only that family reunification seems to facilitate the creation of migrant enclaves, raising obstacles to integration in the receiving society, rather than facilitate integration as expected. It is also the fear that family reunification policies allow into the country individuals whose practices and beliefs are incompatible with the receiving society's civic culture, or with its conception of morality or of good family. In economic terms, family-class immigrants are suspected of being unproductive members of the receiving society, dependent on others or on welfare systems. It seems to be almost inevitable that this would be the case, as the category's criteria does not include skill-related requirements such as those still lacks overarching theoretical writing.

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22. See, e.g., Ruffer, “Pushed Beyond Recognition? The Liberality of Family Reunification Policies in the EU.”
24. Ruffer, “Pushed Beyond Recognition? The Liberality of Family Reunification Policies in the EU,” 935–936
25. For example: “While the debate of family migration was largely absent during the periods of post-colonial and classic guest worker migration, a number of related issues were raised...” (Kofman et al., “Introduction: Issues and Debates on Family-Related Migration and the Migrant Family: A European Perspective,” 15.).
26. By “good” I mean beneficial rather than harmful to individual family members. Abusive relationships, coerced marriages, and severely unequal partnerships are all examples of bad families.
27. Caleb Yong, “Caring Relationships and Family Migration Schemes,” in The Ethics and Politics of Immigration: Core Issues and Emerging Trends, ed. Alex Sager (London: Rowman & Littlefield, 2016), 62 (characterizing the critique of family immigration preference as concentrated on the assumption that such immigration is not only economically dependent, but also comes at the expense of high-skilled immigration that would be more productive). See also George Borjas, Heaven’s Door: Immigration Policy and the American Economy (Princeton, N.J.: Princeton University Press, 2001); Stephen Macedo, “The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice?,” in Debating Immigration, ed. C.M. Swain (Cambridge: Cambridge University Press, 2007) (arguing that reducing family immigration and increasing skilled-based immigration is not only good policy, but also may be required in order to address the state’s obligation towards its least well-off citizens).
applying to economic migrants.\textsuperscript{28} And in a world of economic, political and security uncertainty, right norms have fallen out of vogue.

The tension between the perspective of receiving society and that of the individual who is a member of a cross-border family is being revealed in the current economic and security environment. Arguments in favour of openness to family-class immigration from the perspective of the individual members of cross-border families tend to stress the idea that family members have a right to be together, and tend to prioritize the interests of specific individuals over the collective decision-making aggregated interests) of the political group. The status as a right gives the interest of individuals in family life special weight (the exact weight—between being a trump card and weighing just slightly more than any other interest-based vote in the general aggregation of votes towards or against a policy—is another matter of debate to which I will attend later) and thus may constrain society’s ability to act according to its collective will in this area of policy. On the other hand, arguments in favour of openness to family-class immigration from the perspective of the receiving society often portray such immigration as a means to promote social cohesiveness and thereby to promote the well-being of society at large. The integration of former immigrants is perceived as in the interest of the community as a whole, and it is only if and because this interest is fulfilled by family reunification that the policy choice is made to open the borders to this kind of immigration. While previously overlooked, this tension is now fully exposed and sits at the heart of this thesis: When states see general openness to family-class immigration as contrary to their interests, can individuals’ interests in family life override society’s perceived interests so as to oblige states to adopt a policy of openness?

While lately certain family-class policy trends have caught the attention of immigration scholars, and some have offered different accounts of the underlying justifications for family reunification policies, the normative picture is still porous, and no author provides a full account of the ethics of family-class immigration.\textsuperscript{29}

One group of authors care a great deal about policy details, whether they are advocates for openness to family-class immigration or its critics. The advocates focus on inequalities created by family-class policies or by their discriminatory application by state agencies.\textsuperscript{30} These writers often rely on the implied assumption that family reunification is a right, at least of the citizen family member, or a good the special value of which is agreed upon.\textsuperscript{31} Whether they advocate for the expansion of the legal


\textsuperscript{31} Two separate arguments could be made in favour of family reunification: one from the perspective of the insider, and one from the perspective of the outsider (or from a global perspective). While I will defend in this thesis the right of the citizen or permanent resident, others advance a non-partial understanding of the right to family reunification, according to which the interest of the insider family member deserves equal moral consideration as that of the outsider family member and both have a (for some writers equal) claim against the state. The two competing arguments—the universal and the particularist—will be debated at length in chapters 2 and 3. For a summary discussion of both approaches to the right to family reunification see Honohan, “Reconsidering the Claim to Family Reunification in Migration.”
definition of family entitled to reunification so as to meet diverse social realities, or whether they detail
the discriminatory application of procedures and requirements, their scholarship highlights the fact that
some groups do not enjoy full access to family reunification and their (explicit or implicit) normative
claims appeal to the norm of equality rather than to justifications for family reunification themselves,
which they simply assume to stand critique. The critics, on the other hand, tend to measure family-
class policies exclusively in terms of its costs and benefits (economic as well as social) to the receiving
society. They work with one of two hidden assumptions: either family reunification is subject only to
considerations of interests of the receiving society at large, and not at all to any considerations of justice,
or both sets of considerations apply to the question, but the interests of society categorically outweigh
those of individual family members. Ultimately, these writers extend to the realm of family reunification
the conception prevailing in economic migration, according to which considerations of justice and rights
do not apply (or, in a weaker version: do not strongly apply) to a country’s immigration policy. They
advocate for the unmitigated discretion of the state to select its immigrants. So, whereas one group of
writers assumes without debate that family reunification is a matter of justice, the other assumes without
debate that it is an unconstrained policy choice subject only to the receiving society’s discretion.

Another group of writers is engaged with political philosophy and writes either about immigration
ethics at large, or about family reunification in particular. The arguments concentrating on family-
class immigration are particularly thoughtful. Unfortunately, I believe they are all vulnerable to serious
objections. I offer a new theory of family-class immigration, one that I believe is more persuasive.

The more general accounts of immigration ethics tend to give less attention to the question of
family reunification, leaving their theories unfinished, in my view. Carens gives the matter the greatest
consideration, and even he fails to explain key aspects. Miller is particularly dismissive, stating in the
few lines he dedicates to the matter that “[t]here are questions to be asked about how far the right to
family reunification should extend beyond a person’s partner and their children, but these are matters
of policy that cannot be resolved by appeal to general principle.” As I said, I believe that authors
harm their own theories when they neglect the problem posed to immigration ethics by cross-border
families. I am hoping to present the fullest normative account of family-class immigration to date. I
am hoping both to offer a full justification for protecting family-class immigration, and to derive from
this justification a clear account of the legal entitlements and protections owed to potential family-class
migrants.

I believe that the shortcomings of our current understanding of family-class immigration have proven
consequential of late. Many liberal-democratic countries are presented with popular demands to limit
access to family reunification, and some answer it not by reiterating any principle underlying the policies,
or by opening a debate about policy goals and the appropriate measures to achieve them, but by supplying

32. For the purpose of the remarks here I exclude humanitarian immigration from the debate over immigration policies.
But it should be noted that even those claiming that, generally, considerations of justice do not apply to questions of
migration can, and most often do, relax this claim when humanitarian migration is debated.

33. See Patrick Grady, “The Parent and Grandparent Immigration Program in Canada: Costs and Proposed Changes,”
abstract_id=2003488; Martin Collacott, “Canadian Family Class Immigration: The Parent and Grandparent Component
Under Review,” Fraser Institute, 2013, https://www.fraiserinstitute.org/sites/default/files/canadian-family-
class-immigration.pdf; and Herbert Grubel, “Canada’s Immigrant Selection Policies: Recent Record, Marginal Changes
and Needed Reforms,” Fraser Institute, 2013, https://www.fraiserinstitute.org/sites/default/files/canadas-
immigrant-selection-policies.pdf.

34. For details on his account as well as on others’, see Chapter 4.

35. David Miller, Strangers in Our Midst: The Political Philosophy of Immigration (Cambridge, MA: Harvard University
Press, 2016), 113.
policy change inspired by popular conceptions and sentiments. A misinformed public debate may enable a policy trend that, properly considered, would be found harmful, unjust and unadvised.

Two responses to the trend of limiting access to family reunification come to mind. First, as mentioned above, the trend seems to suggest that states reject the possibility that family reunification may be a right. But family reunification policies fulfill the interests of individuals in family life, a basic and widely shared interest of humans. The suffering caused by the denial of this interest is arguably unbearable. It should thus at least be seriously considered whether the interest in family life constitutes a moral right that should be respected by law. Furthermore, it should be easier to construct a right to immigrate in the context of family life since the case always involves a local.\(^\text{36}\) So even if we agree that in matters of immigration it is appropriate for a society to prefer the perspective of locals to that of foreigners, the perspective of local family members offers at least a prima facie reason to consider openness to family reunification. And if family reunification is in fact a right, compromising it to satisfy the will of the majority is subject to considerable limitations. If family reunification is an individual right, considerations of benefit to the receiving society at large may not be weighty enough to justify limiting family-class immigration.

Second, even if it is appropriate to analyze the policy of family reunification by cost-benefit measurements, it is nevertheless unclear whether the cost-benefit analysis, on which the latest policy changes are based, is accurate. The access-limiting trend reflects the assumption that (at least some) family-class immigration is “unproductive” and generates a net loss for the receiving society at large, in either economic or cultural terms. The trend further reflects the assumption that by limiting access to family reunification we can avoid some of the costs without sacrificing many benefits. These assumptions may be misguided. The recent policy trend of limiting the access of families to reunification is usually motivated by the assumptions that immigrants fail to integrate. Critics of family reunification have claimed that reunification facilitates cultural enclaves rather than interaction with general society,\(^\text{37}\) destabilizing the previously held assumptions that, when unified with their families, immigrant integrate in the receiving culture. Critics have raised further concerns regarding the probability that incoming family members themselves integrate into the receiving society in economic, social, cultural, and political respects. The claims that family reunification policies result in net losses to receiving societies are used to erode public support of openness to family-class immigration.

Arguing that family-class immigration benefits society at large, as others have done,\(^\text{38}\) would serve as a strong objection to the access-limiting trend, but this thesis will not take this route. This is because benefit-to-society arguments have limited persuasive power, especially considering my goals here. My intent is to offer a universal and principled argument that will be able to transcend my present time and location. Benefit-to-society arguments cannot achieve this goal as they always pertain to certain contingent facts. Not only is it hard to provide uncontested evidence of societal benefits of a specific program of immigration in a specific context, but even if such evidence was produced it would only be able to support limited arguments. Any analysis of a perceived benefit has to be cognizant of the particular circumstances in which the benefit materializes. The power of the argument will be limited to the circumstances in which the benefit is likely to occur, and the power to infer a more general argument from these findings is quite limited. I believe that something of universal and perpetual value can be

\(^{36}\) Locals are citizens and permanent residents. I argue for this in Chapter 3.

\(^{37}\) See, e.g., Honohan, “Reconsidering the Claim to Family Reunification in Migration,” 772. In parentheses, Honohan responds to the concern: “...but this is a risk that is not specific to family reunification, but to any kind of chain migration, in which large numbers of a particular nationality or religion immigrate and settle in with people from the same background.”

\(^{38}\) Reference the people who made empirical observations about the contribution of family-class immigrants.
said about the claim to family reunification. For this reason, I opt for normative arguments rather than descriptive or predictive ones, offering a thesis on the right to family-class immigration.

1.3 A Theory of the Right to Family Life

The premise of the thesis is that the familial element is normatively consequential and makes the case of foreign family members different from that of unattached individuals looking to get into the country to improve their lives. The familial element imposes an obligation on the state to be open to some family-class immigration. So while this is a thesis in immigration, I start by examining the right to family life in general, and use this as the foundation of my theory of a right to family-class immigration.

Authors who write about family-class immigration often refer to the intuition that “there is nothing more important” than being with one’s family, but no account to date has offered a fully developed argument as to why we should treat families differently, or shown precisely how we ought to treat them. It is of the utmost importance that this thesis not simply reiterate the intuition that the general interest in family life deserves protection, but that it carefully analyze the normative source of the right to family life. I argue that the justification for the right to family life lies in the basic and universal interest in care and in sharing our lives, and advocate for a functional understanding of the family. I then discuss two concrete instances of the right to family life: the right to form a family of our choosing and the right to uninterrupted family life. Chapter 2 is dedicated to this part of my thesis.

1.4 A Theory of the Right to Family-Class Immigration

If we accept that we have a right to family life, I argue that it extends to the case of cross-border families, thereby obliging states to be open to some family-class immigration. I argue that an individual’s right to family life extends to the context of immigration and creates a right to family-class immigration, which is the right of a citizen or a permanent resident to bring a foreign family member into the individual’s country of citizenship or residence.

Three main challenges meet a theory of the right to family-class immigration. The first challenge is to explain who holds the right, and who holds the correlative duty. I will evaluate two forms of the right, one held by all humans against every state, and one held by citizens and permanent residents against their state of residence, and will argue for the latter. The second is the sovereignty challenge: Does sovereignty not entail full discretion over immigration? The third challenge alleges that the right I am advocating for is of a “positive” nature and that “positive rights” are misguided notions. I consider objections to the right I advocate for along all these lines. Chapter 3 is dedicated to developing the argument for the right to bring in our foreign family members, which I claim forms an aspect of our right to family life.

39. This includes refugees. I am not claiming that one is more deserving than the other, at least not yet, just noting the contrast between family immigrants and others.
41. Such an intuition is expressed in international law, as well as in the laws of nations such as Ireland, in statements such as “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State” (U.N. General Assembly, “Universal Declaration of Human Rights. Resolution 217A (III),” 1948, Art 16(3), http://www.refworld.org/docid/3ae6b3712c.html) and “The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law” (*The Constitutions of Ireland*, Art 41.1c).
1.5 Immigration Ethics and the Borders Debate

The overall claim motivating this thesis, is that an answer to the question of families divided by political borders, such as the argument presented in this thesis, provides a so far missing and essential component in central citizenship and immigration theories.

The central disagreement in immigration ethics regards the question of whether states have the right to exclude non-members, or whether there exists an individual right to immigrate that corresponds with an obligation of states to open their borders and accept new members without discretion. A related, secondary, question is whether states ought to take into account the different reasons for immigration—specifically asylum-seeking, subsistence-seeking and family reunification—and reflect them when they design their immigration policies. More specifically, do different circumstances pushing an individual to seek immigration license from a country give rise to different normative claims against that country? Should a person escaping imminent threat to her life be treated similarly to the one escaping extreme poverty, or to the person asking to better their life, or to the person asking to reunite with a local family member?

I am using the borders debate as an organizing tool to survey the immigration ethics literature and see what it has to say about family-class immigration. There are two sides to the debate. One side argues that compatriots owe one another special treatment, compared with the treatment all humans owe one another. The special treatment accorded to compatriots creates a normative border between the polity and the rest of humanity. On this view, immigration is rightfully a question left to the discretion of the citizenry, to be determined according to the rights and interests of citizens. The other side argues that all humans should be considered equally and, as consequence, at least some outsiders have, in at least some circumstances, the right to immigrate into a political society even if the majority of citizens object. When family reunification is considered, the right to immigrate may be the product of the strong interest of a foreigner in family life with a citizen.

Surprisingly, given their different views at large, most authors agree that family-class immigration is about the “vital interests of [states’] own members”. And they do not say much more. It is fair to say, I think, that particularly the cosmopolitan side stays silent on the question of family-class immigration. There is room in the literature, then, for a more detailed discussion of the political theory of family-class immigration.

The argumentative strategy I am taking in this thesis is to demonstrate that, by their own terms, liberal arguments according to which states have a right to control immigration must accept that the prerogative of the state to control immigration is curbed by the right to family life of the state’s own members. I am employing this strategy because close-borders views pose the most serious objections to the position for which I advocate. For open-borders arguments according to which global freedom of movement is a basic human right, the discussion of the particular normative power of the familial claim is inconsequential. Open-borders arguments are impartial to the underlying motivation moving

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42. Citizenship is commonly known as “full-membership” in a political community and I borrow this use. The terms “members,” “insiders,” and “locals” refer, in this thesis, to citizens and permanent residents (those who are legally allowed to permanently reside, and enjoy the domestic legal right, at the country of residence, to apply for family reunification with foreigners). The terms “non-members,” “outsiders,” and “foreigners” apply to all others. Unspecified “membership” would mean the membership of permanent residents and citizens. When I want to focus on the specific rights of citizens I will do so explicitly.

43. See Chapter 3 for participants in the debate and main arguments.

44. Carens, “Who Should Get in? The Ethics of Immigration Admissions,” 97

45. Carens, The Ethics of Immigration, 293 (“Normally, in a world of open borders, there would be no need to grant priority based on family reunification.”).
an individual to exercise her right. It would thus achieve less to show that if we accept the premise of these arguments, family-class immigrants should enjoy greater access to immigration. In chapter 4, I explain where the argument for the right to bring in our foreign family members sits within immigration ethics, and what it contributes to this literature.

1.6 Policy Implications

The last part of the thesis is dedicated to drawing some of the policy implications of our right to bring in our foreign family members, should we agree that we hold such right. I do so by critically evaluating some current limitations on family reunification that I find illustrative of the boundaries of state discretion as they ought to be understood. I draw conclusions regarding some unjustifiable and justifiable limits on the right to family reunification.

As all rights, the right to bring in our foreign family members is not unqualified. For example, states can exclude individual foreign family members if they pose a clear and substantial risk to society. Some limitations on the right are thus justified, but not all. Starting with unjustified limitations, I will argue that states ought not to use the definition of “family members” eligible for immigration as a means to limit family-class immigration for any cause. I will also argue that states should not set quotas for family-class immigrants. Finally, I will argue that states cannot free themselves of the obligation to admit foreigners by the claim that the family can reunite elsewhere. Here, the case is not that the strategy is viable but prohibited but that it is conceptually invalid. The legal arguments made by states in support of the elsewhere approach are unsuccessful. All three of these policies are disqualified by the right. This is a retraction from states’ discretion that is the direct consequences of the status of family life as a right.

Looking at justified limitations, I start with the notion that states are entitled to limit family-class immigration when that is necessary to pursue a weightier worthy cause as long as the limitation is proportionate. A host of general conditions on reunification may thus be permitted, as long as they are proportionate. And they are proportionate only if they stop shy of causing family separation. I will explain exactly what the requirement of proportionality means in the context of family-class immigration, using examples from current jurisprudence. Chapter 5 is dedicated to the discussion of policy implications of our right to bring in our foreign family members.

1.7 Method

This is a thesis about how laws should be designed from a normative perspective, rather than how laws are designed as a matter of fact. Accordingly, the method of the thesis is analytical, with illustrative use of empirical examples, aiming to arrive at normative conclusions. The thesis will discuss three different questions: a question of moral theory pertaining to the right to family life, a question of political theory pertaining to the application of the right to family life in the immigration context, a one question of legal policy pertaining to the extent of protection the right to family reunification deserves. To answer these questions, the thesis engages with literature from all three areas.

The thesis will suggest a connection between the three areas of normative theory. I will claim that the right to family life of citizens and permanent residents shapes the right of their state to control its borders in principle, as well as its discretion with respect to the specific conditions and limitation it
imposes on the realization of the right as a matter of law and policy. By the end of this thesis, I hope to have presented a fuller normative theory of family-class immigration than currently available to the interested reader.
Chapter 2

On the Right to Family Life

2.1 Introduction

In this thesis I am interested in only one aspect of the right to family life: Do cross-border families have a right to be reunited in one state and, if so, what does this mean for family reunification policies? Traditionally, this question interests mainly scholars of immigration, who apply to it their political theories of rights and obligations in the cross-border context. Since I am unsatisfied with the results of available accounts of family-class immigration, I am trying an alternative route. In approaching my thesis question, I begin with the familial aspect of the problem of cross-border families. I start with discussing philosophical arguments about the rights and obligations of liberal states with respect to families (and vice versa). I explore the idea of a right to family life, which I will later consider in terms of its possible implications in the context of immigration.

My approach assumes that the problem of cross-border families shares important normative aspects with other questions regarding the family, questions arising in any field of law and policy. In all ethical questions concerning the family, one normatively important aspect is the positive value of the family, or the possible positive contribution of a family to the lives of its members. For this reason, I dedicate this chapter to investigating the value of family life, and the justifications for protecting this value in the form of an individual right to family life. After developing an argument for the general right to family life, I will focus on a concrete instance of this right that operates in the context of immigration: the right to family-class immigration.

The first task in building a theory of a right to family-class immigration, as I see it, is to build an account of the right to family life, which is the broader category to which the right to family reunification belongs. The reasons why we should guard family life as a matter of individual right in the domestic realm serve also as the foundation for the more specific right to family reunification. The latter is an instance of the former.

The theory I am looking to advance should be able to define the criteria according to which a specific state can come under an obligation to admit an individual as an immigrant because of the familial relationship with a member of that state. To do so, first, the theory of the right to family life must answer the following questions:

1. What is the function of the right to family life? What is this good—“family life”—that we aim to achieve?
2. What is the argument for the existence of a right to family life?

3. Who are the rights holders? Who are “family members”?

4. Who is the duty-holder?

The answers to these four questions will form the rest of this chapter. I will first argue that the right to family life is justified by our interests in care and in sharing our lives. A careful examination of these interests, particularly their universality and their vulnerability, will answer the first and second questions. I will then define the terms “family relationship,” “family member,” “family,” and “family life” by alluding to the function familial relationships play in people’s lives, which is to satisfy the interests in caring and sharing. In this way, I will be answering the third question in functional terms. Arguing for the existence of the right to family life, I will also answer the fourth question and identify the appropriate duty-holders as everybody, including the state.

I will give concrete content to the right by considering in detail two instances of the abstract right to family life: the right to form a family of one’s choice and the right to uninterrupted family life. Arguing for these two instances will build the foundations of the normative argument to be applied in the immigration context. Once the general right to family life has been defended, the next chapter will evaluate the specific questions that arise in claims for family reunification.

A note about the approach taken in the theoretical part of this thesis—specifically this and the next chapter—may be in order. The account I build here is theoretical in nature: it provides philosophical arguments in favour of the right I defend rather than authoritarian arguments based on the recognition of the right in the laws and jurisprudence of different jurisdictions. I choose this route of argumentation for two specific reasons. First, what I am trying to achieve is a principled analysis of the problem of cross-border families that transcends the current legal reality and persists regardless of the specifics of the laws in any jurisdiction at any given moment. This is a thesis about what the law should be like in principle, rather than a reaction to what the law is like in a particular context. For this reason, the arguments defending or rejecting the right to family life and the right to family reunification in actual laws and jurisprudence are not taken for granted, but are being assessed. The philosophical arguments presented here are meant to serve as a critical analysis of current legal argumentation.

Second, the legal treatment of rights is always lacking in philosophical dimensions. Whether a right is stated in law or whether it is introduced into jurisprudence through precedent, the right is usually merely posited but not defended. Legislation on all levels is particularly inclined to declare rights, and—aside from an occasional superficial argument in the preamble—offer no justification for the adoption of a specific right aside from the procedural justification that the content was democratically approved.\(^1\) Even when notions of rights are introduced in common law by judges, the rights are largely asserted and it is the authority of the majority and of precedent that gives them power, rather than the persuasiveness of the argument supporting them. Later on, when rights are applied to specific cases, they are limited or employed based on the facts of each case. The result is a casuistic normative picture which tells us less about the foundations of the right—the legal principle it supports—and more about the specific history of the cases in which it was invoked.

\(^1\) By “all levels” I mean both from international to domestic, and from covenants and constitutions to legislation. In some cases, arguments in favour of the right can be found in background material such as parliamentary discussions. But the discussion there does not form part of the legal norm, and may also in itself be lacking in philosophical dimensions as well.
The right to family life is no different. Some legal documents adopt it as a matter of assertion, particularly international law instruments. In the laws of most jurisdictions the right is not mentioned specifically, but some jurisprudence has developed acknowledging its weight in a number of different jurisdictions. While we can find scattered reference to the origins of the right and the reasons for its adoption, these are sporadic and inconsistent and thus do not amount to a full-fledged theory of a right. In this chapter I attempt to offer my reader an account of the right to family life that begins at the human interests supporting it and culminates in a number of specific instances, or implications, of that right.

That is not to say that it is not important, when debating the law, to find a legal argument for the existence of a right. When moving from the level of moral arguments to the level of legal debate, we must show not only that an argument is persuasive, but also that it has room in a specific legal system, in that it was recognized as belonging in the past, or there exists a yet-unexplored legal path towards its recognition. At least, we must show that a moral argument does not stand in stark opposition to the basic principles and doctrines of a legal system.

By exploring the normative theoretical considerations implicated in family reunification, I hope to present a compelling argument that liberal democracies ought to recognize a right to family reunification. Starting with the latter, and as noted above, arguments about the right to family life can be found in a number of major jurisdictions. While they do not form a full account of the right to family life, they provide an avenue for such an account to be recognized within the legal system. For example, the right to family life has been recognized in Canada as a defence against deportation. Similarly, the jurisprudence in the United States recognized the interest in family life as one of the interests that can only be denied by due process. I will attend to the question of how my policy reforms are possible within the current legal context.


3. For example, the Canadian Charter does not mention the right, but the right was invoked and debated, mainly in the context of immigration admissions and removal, in Canadian courts under the auspices of Article 7: Habib v Canada (Citizenship and Immigration) 2008 FC 924 Reporter; McBean v Canada (Citizenship and Immigration) 2009 FC 1149 Reporter; Wilson v Canada (Citizenship and Immigration) 2007 FC 48 Reporter; Caruth v Canada (Citizenship and Immigration) 2009 FC 891 Reporter; MAO v Canada (Minister of Citizenship and Immigration) 2003 FC 1406 Reporter; MAO v Canada (Citizenship and Immigration) 2002 CanLI 47118 (CA IRB); Alexander v Canada (Solicitor General) 2005 FC 1147, [2006] 2 FCR 681; Haj Khalil v Canada 2007 FC 923, [2008] 4 FCR 53; Canada. Supreme Court of Canada, de Guzman v Canada (Minister of Citizenship and Immigration), (IAD TB4–00857). In the United States, jurisprudence have developed myriad instances of the right to family integrity based on the due process clause (Kevin B. Frankel, “The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members,” Columbian Journal of Law & Social Problems 40, no. 3 (2007)). As an example of how undertheorized rights are when recognized in jurisprudence, consider this:

   In 1977, in Moore v. City of East Cleveland... the Court noted that it ‘ha[d] long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.’ Justices Brennan and Marshall emphasized in their concurrence that ‘[i]f any freedom not specifically mentioned in the Bill of Rights enjoys a ‘preferred position’ in the law it is most certainly the family.’ (ibid., 312–313)

4. See, e.g., Canada. Supreme Court of Canada, de Guzman v Canada (Minister of Citizenship and Immigration), which denied the claim in the case at hand but reaffirmed the idea that the family-life claim has room in deportation cases.

legal system last, after having discussed the theory of the right as well as policy implications of the theory. But the heart of this thesis is the principled argument about the need for recognition of a right to family life along the lines I present in this chapter and the next. The argument in this chapter will develop as follows. In section 2.2, I will describe the basic interests that I believe are the source of the right to family life: the interest in reciprocal care and the interest in sharing our lives with others. I will do so by exploring both the abstract notion and two instances of the right to family life: the right to form a family of one’s choice, and the right to uninterrupted family life, and will explain how the basic interests play out to form rights and obligations to perform or avoid certain actions. In section 2.3, I will provide definitions for “family,” “family members,” and “family life.” In this context, I will argue in favour of the functional approach to family life.

2.2 Arguing for the Right to Family Life

The argument in this section is focused on giving meaning to an abstract notion of a right to family life by providing a detailed and shared justification to two concrete rights that are derived from the abstract notion. The abstract notion of a right to family life is fairly commonly accepted in law, politics and ethics, but its practical implications are rarely debated though they are often much more contested than the abstract idea. For example, wherever it is stipulated as a human right in international documents, the right to family life is presented in the abstract, “with no suggestion that [this right is] absolute, but with no attempt to suggest [its] impact on particular complex social situations.” What the literature is lacking mostly, then, is concrete rights, which “express more definitely the weight they have against other political aims on particular occasions.” Here I intend to describe the right to family life in detail. I begin with the argument for the existence of the right to family life in abstract. I then examine the exact persons enjoying entitlements, particularly those that entail state obligations, in two different cases: creating families and maintaining uninterrupted family life. I will later use the conclusions of the discussion here to develop another instance of the right: the right of families to be reunited across borders.

2.2.1 The Underlying Interests

In my view, the basic justification for the right to family life, in all its derivative forms, is the strong human interest in receiving and giving care, and in sharing one’s life with others. Family life is particularly good at fulfilling these interests. We thus have a reason to structure our sociopolitical life in a way that allows families to form freely, and that supports the continued existence of families when they already exist, even after a family has found itself divided by international borders.

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6. See Chapter 4.
8. Ibid.
9. See Chapter 3.
10. Of course, only “good” family life fulfills these interests. There are people who are either harmed or not benefited by their relationships with their relatives. But as my definition of family life revolves around the fulfillment of the interests I identify as basic, such harmful or non-beneficial relationships will not be considered by me to be familial relationships.
Chapter 2. On the Right to Family Life

Being Cared For

This is maybe the most widely shared and most basic interest of the three human interests I identify in my argument. First, there are the moments and periods in life where we are less than fully capable of taking care of ourselves. In times of infancy, illness, weakness, and incapacity, we rest on the care of others to support us. It could be physical help: to feed, keep warm, alleviate pain, fight illness, or maintain personal hygiene. It can be emotional support: to guide, advise, gain perspective, solve problems, improve mood, gain skills, or gain confidence. It could be economic or material care: a place to live, food and drink, money—to purchase necessities or to pursue opportunities—or in kind support. The care of others, when we cannot care for ourselves, can be necessary for our survival and is crucial for our flourishing.

Then there are the times in life when we are completely independent in physical, emotional and material respects. We continue to desire the care of others, and it contributes to our wellbeing and happiness. First, even when we are perfectly capable of taking care of ourselves, we do not always believe that we can, or we still think that we can get along better with the support of care from others. For example, we can be looking for a new job. We might be capable individuals, aware of the requirements of the industry, good researchers and communicators, but we may still seek the advice, knowledge, or referral of others with whose help we believe we will achieve better results. Second, and most important, being cared for feels nice. It alleviates some of the burden of caring for ourselves, it reduces loneliness and provides connection, and it gives us a feeling of worth in the eyes of others. Being taken care of and cared for by others can thus fulfill the primary interests in survival, flourishing, and happiness.

Caring for Others

Taking care of others is also a widely shared interest. It may seem that an interest in caring for others can only be instrumental, that caring for others could be valuable to us only as a strategy to secure care for ourselves, and never valuable in and of itself. While it is true that caring for others serves this instrumental interest, there is also an independent interest in caring for others, I believe.

Caring for others can be a source of pride and joy, connection, and empowerment in two main ways. First, since we recognise our own need for care, we understand that giving care to others increases their wellbeing. The enjoyment of others can then be a source of happiness for us. We see ourselves in the eyes of others as valuable and this contributes to our perception of ourselves.

Second, the giving of care itself, with no relation to the feedback from others, can be a source of happiness. To commit ourselves to a project that requires our attention and effort can give us a sense of purpose and a way to evaluate our own worth. Through such a project we develop new skills and learn more about ourselves, our strongest qualities and our weaknesses, our preferences and our values.

So like being cared for, caring for others fulfills primary interests in flourishing and happiness. Giving care also fulfills the interest in survival, only it does so only in the instrumental sense, in which caring for others is a tool to secure care for oneself. Caring for others is a natural strategy for securing cooperation. Our personal desire to receive care makes us value it as an exchangeable asset. We comprehend that others may desire and value care given to them in the same way that we do, so we recognise the power of giving care to foster cooperation. Offering our care to others can thus create a reciprocal relationship of care that suffices our interest in survival.
Sharing Our Life

The interest in receiving care stands on its own, but the interest in providing care hits at another basic human interest: we have a basic interest in connecting with others, in not being alone. We are social beings who derive great pleasure from interacting with others, sharing experiences and thoughts, and exchanging ideas. We understand ourselves with relation to how we interact with others and we derive some of our appreciation of ourselves from the way others perceive and value us. We value our relationship with others not just for strategic, cooperation-related reasons, and not just because we comprehend that it is easier to achieve some material goals together with others rather than alone.  

2.2.2 From Interests to a Right

My claims that reciprocal care and sharing our lives are basic interests are based on intuitive observation, an abstraction from the psychological reality of humans as I perceive it. I have not provided any evidence that people have an interest in reciprocal care or in sharing their lives with others. No statistical findings were presented, no qualitative support, not even anecdotal reference. The claims I am making here are analytical and conceptual, rather than descriptive or authoritative. I observe the reality around me and extract from it what I think are the principal components of people’s behaviour. I observe that these interests are shared by most of us, and that they are represented in the way people around me lead their lives, and the proclamations they make (as individuals and as representatives of the public). What I hope to achieve is that the reader relates to what I have defined as basic interests and is persuaded that the account of basic interests I have offered is worthy. The authority of my claims rests solely in their ability to persuade others.

To argue that the two interests I have described—in reciprocal care, and in sharing our lives—deserve the status of a right, a couple of steps are still necessary, even if we agree on the basic interests. Firstly, rights typically protect universal interests. Indeed, I believe that the interests in family life are widely shared. Not every human being shares them, maybe, but a broad majority does. Secondly, rights typically protect basic interests, interests that are closely connected with the value of human life itself. I have explained that at some times the interest in care is in fact an interest in survival, and a more basic interest humans do not know. Even when the interests in reciprocal care and sharing do not equate to an interest in survival, they still reflect aspects of our happiness and what we think gives life its meaning. They give us purpose and connections with others, thus contributing to our personal identity and our confidence in the future. If they are not fulfilled, the quality of our lives, our sense of happiness, and the purpose of living are severely diminished. If we agree that these are basic, widely shared, interests, we should agree that we all have a good reason to protect these interests wherever they are vulnerable. I now move to consider in what sense these interests, as embodied in family life, are vulnerable, and in what way we can protect them. I claim that there are two ways in which the interest in family life is vulnerable.

If we do not think of family life as vulnerable, as requiring specific protection, it is because our family life is, for the most part, not threatened and is thus taken for granted. Because it is so common, and has been so common for most of human history, for families to be formed and structured in familiar ways,

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11. I cannot provide evidence for this observation, I can only show that a few other scholars supported similar ideas. For example, Grotius said that “among the traits characteristic of the human being is an impelling desire for fellowship, that is for common life...” (Hugo Grotius, De Iure Belli ac Pacis Libri Tres / On the Law of War and Peace. 2 vols., trans. Francis W. Kelsey (Oxford, U.K.: Oxford: Clarendon Press, 1925), reprinted in Martha Nussbaum, Frontiers of Justice: Disability, Nationality, Species (Cambridge, Mass.: Harvard University Press, 2009), 273).
it may never occur to us that family life could be threatened. But this simply reflects the pervasiveness of the family norm in our society, and our lack of imagination.

Those who do see that their family life interest is threatened are usually members of the minority, such as same-sex families who are interested in forming a family for similar reasons to those of the majority, but whose interests are threatened by the majority’s conception of “the good family.” For this reason, it is typically members of minorities, those who are excluded from the form of family dominant in our society, who think to invoke their right to family life against the rules backed by the assumptions of the majority.

There are many ways in which family life could be vulnerable to changing social norms, and to appreciate that, we need to consider marginal and hypothetical cases. Despite being marginal or hypothetical examples, they may be motivated by reasonable rationales, and they could possibly become actual policy proposals. For this reason it is valuable to review them, and to appreciate their possible threat to family life.

Family life, though practiced throughout human history in one form or another and dominating the social order, is not an immutable or inescapable fact of life. Humans can choose to lead their lives in a number of different ways, of which family life is just one. And at times other forms have been adopted; for instance, some communes have at times raised children communally, outside of their familial relationships.12 Even procreation and child rearing, which is maybe the function most closely associated with family life, can be performed outside the structure of the family. The life of individuals in the form of families is a social construct which reflects not biological needs or natural facts but human values and preferences.

A society may choose to form social structures that promote preferences other than family life. If, for example, a society were to value equality as its main goal, it could choose to shape social structures, including the family, so as to achieve this goal. If equality were the main social goal, coupling and parenting could take completely different forms from the ones we now know in a number of ways. For example, under a specific understanding of equality, it may seem justified to require the physically stronger individuals to couple and mate with weaker individuals, the most intelligent with the least, the most attractive with the least, and so forth if we have reasons to believe that the children that would be the product of these relationships may be more equal in their personal characteristics and in their abilities than they would have been had individuals been left to choose whether or not to create families and with whom.13

The parenting of children can also take a number of different forms. If we consider the example of the societal goal of equality, society could have demanded that all children enjoy equal conditions during their upbringing.14 This may require a centralised form of raising children, such as in educational institutions in which all children reside, are cared for, and are educated in one way. Human history has provided examples of policies to this effect.15

In another vein of thought, if equality in parenting is a leading value and goal, parental responsibilities

14. In fact, Matthew Clayton—self-identifying as a liberal!—claims that parenting should be heavily limited so that parents are not allowed to indoctrinate their children in any conception of the good that is not “liberal” (Matthew Clayton, Justice and Legitimacy in Upbringing (Oxford: Oxford University Press, 2006)).
15. Again, communes, Kibutznim, communism in the state level.
could be demanded to be shared equally. If society saw it as in its interest to maintain its existence over time by procreation, then every capable adult individual could be required to contribute to the project of creating and caring for children in the same way, irrespective of the individual’s interest or disinterest in being a parent. If the reproduction of society was a goal but equality of parenting seemed undesirable, the polity could still incentivise child rearing, for example with tax incentives. And indeed, many states do offer parents tax benefits. So family life could be under threat from competing social ideas.

Furthermore, family life is under threat from society at large even if we maintain an understanding of the value in family life in the form of independent families formed by choice. As I have noted above, family relationships are characterised by the caring and responsibility that family members feel toward one another. Once a family is formed, the attachment family members have toward one another can be used against each one of them by private, as well as public, agents. Protecting the interest in family life would thus be a measure by which to protect individuals from extortion, a tool to guard liberty at large.

Family life could be threatened by society at large if it advanced other interests over those in caring and sharing, or it could be threatened by individuals if they used the threat to one’s family life as a mean to achieve their goals. So if we were to protect the universal and basic interests underlying family life from threat we would identify everyone as the duty holder: everyone is obliged to not violate one’s right to family life. Society at large, or the state—its executive arm—would be under the same obligation, having to justify any intervention in the right to family life.

Having argued for the basic interests, and for the justification for protecting them in the form of a right, I will now move to consider the proper content of the right to family life, if the interests in care and sharing are to be protected. For this purpose, I will cash out the abstract notion of the right to family life in two concrete instances: the right to form a family of one’s choice, and the right to uninterrupted family life.

2.2.3 The Right to Form a Family of One’s Choice

One aspect of the right to family life is the freedom of adults to form families as they choose. Of course, adults are not completely free in choosing their families. They are limited by the pool of potential partners. They do not fully control processes of natural procreation and their results. Even when they resort to artificial procreation, the law limits the choices of freely-acting adults. And of course, adults are not free from an array of influences on their free will by others or by the particular circumstances in which they find themselves. When I speak of forming families of choice, then, I mean that individuals have the right to considerable discretion with respect to the families they form, and that the state does no use its coercive power to restrict this wide discretion except for the most exceptional cases and for the sake of protecting vulnerable individuals.

The justifications for the right to form a family of one’s choice are the basic interests in care and sharing. The caring and sharing that I identified as basic interests can be best fulfilled when one chooses the relationship. An individual knows best what kinds of caring and sharing she desires, and what kinds she can provide. When she has the freedom to choose familial relationships, she is more likely to create

17. I am not questioning artificial procreation policies in this thesis. Evaluating these policies is beyond the scope of the argument.
relationships that will fulfill her interests in caring and sharing than if the relationship was imposed on her. Furthermore, she is more likely to form a sense of responsibility towards chosen relationships than towards coerced ones.\textsuperscript{18} So although other social constructs could have sufficed the needs of children and other dependent persons in care that is akin to survival, the advantage of a family of choice is the added value of care and sharing that goes beyond assuring basic needs. Such enriching behaviour is dependent on the interest of individuals in the relationship.

The philosopher David Archard objects to the idea that adults have a right to form families of their choice for two reasons.\textsuperscript{19} His main concern is with the notion of a right to become a parent. Archard is concerned that acknowledging adults’ right to parent means giving them control over children. This might put children at risk. More generally, Archard objects to the idea that adults have a right to form a family of their choice because not every adult has an interest in forming a family of her choice. Archard believes that rights must be supported by universal interests or needs, and on his account universality must mean absolutely all humans. I will attend to the two objections in order.\textsuperscript{20}

Explaining why he thinks that adults do not have a right to form a family, Archard says that “if individuals have a right to form families then they may form the kinds of families that are not considered ideal or even particularly good ones.”\textsuperscript{21} Also, “the right in question is a right of control over other human beings.”\textsuperscript{22} Focusing on the relationship between parents and children, Archard’s main concern, as it is reflected in these words, is with granting power over children to adults. Archard believes that there exists some trade-off between the rights granted to parents and those of children, and he rejects the right to form a family of one’s choice because he prefers the rights of children, who are more vulnerable and needy.

I disagree with this assessment of the trade-offs between rights and interests. It is true that every right, if recognized, contains an element of control over others, but not in the sense that Archard is conceiving. For example, the right to property is the right to control other’s behaviour with respect to a certain objectthe right to exclude them from using it without permission, for instance. But the right of one individual is never absolute and is always shaped by the rights of others around her. For example, the property right of a real-estate owner, whose ownership extends to the aerial space above the plot, does not negate the right of passage of air vessels in that aerial space. The freedom of movement of others qualifies the property right of the land-owner in this particular way.

We can think of the right to form a family of one’s choice in a similar way, granting the right does not

\textsuperscript{18} Some may object by noting that many marriages around the world are formed not by the choice of the married but by the decisions of relatives or community leaders. What do I make of these? I believe that arranged marriages actually exemplify the interest in chosen family life. Arranged marriages are typically chosen by parents, relatives or community leaders. I believe that these individuals can be seen as proxies, fiduciaries, of the couple. If the couple agrees to the method, it is because the couple believes that it will serve their interests. We can appoint delegates to act on our behalf when we believe that our own judgement on a specific question would not serve our interest best, and that our delegate has the particular knowledge or judgement that would be required for us to make an informed decision. By delegating our judgement to others we do not forfeit our freedom of choice. This is how I would view arranged marriages. My assumption is that the married couple gives their consent to the results of the efforts of their proxies. I would not consider coerced marriage a family tie for my purposes, on the other hand, specifically because lack of consent. To be clear, I claim that there is no normative reason to extend coerced marriages a legal right to family life. While assessing whether or not a marriage is coerced is a significant obstacle to enforcing this legal distinction, this is not a unique or insurmountable challenge, as consent and coercion are frequently matters of legal consideration.

\textsuperscript{19} David Archard, \textit{The Family: A Liberal Defence} (London: Palgrave Macmillan, 2010), Chapter 2.

\textsuperscript{20} Archard advances a third objection that I will not address here: “The third reason to be sceptical about the idea of a direct non-derivative right to a family is the fact that many people have the wrong kind of interest in creating families. Even if there are good reasons to be a parent—ones that do in fact motivate very many people—there is ample evidence that a very large number of people who become parents do so for bad reasons.” (ibid., 39.).

\textsuperscript{21} ibid., 27.

\textsuperscript{22} ibid., 37.
exclude us from recognizing expansive rights for children, or for other family members for that matter. These rights will create duties that an adult creating a family by parenting would have to fulfill in the exercise of her right to family life. Her right to create a family will thus not grant her full control over others in the sense that Archard is thinking of. It would, however, grant the adult a right to control some actions of others. For example, the adult’s right to form a family of her choice prevents the state from passing a law that criminalizes interracial marriages.

“The second reason to be sceptical about the idea of a right to have a family,” says Archard, “is that it is not clear that the interest appealed to is genuinely a universal one. Not everyone wants to have a family.”23 I disagree with Archard’s interpretation of the universality requirement. Earlier I claimed that the interest in family life is universal. I maintain this claim despite agreeing with Archard that not everyone has an interest in family life. But universality cannot mean totality simply because the requirement that an interest will be shared by absolutely all humans is too demanding. With respect to any human interest, the requirement of totality is unattainable. The requirement of universality must be interpreted to mean that an interest is shared by an overwhelming majority of humans, so that we could say that the interest is “virtually universal.”

The most basic and universally accepted right of all—the right to life—may serve as a good example for the need to reject the interpretation according to which the requirement of universality means totality. Not every person shows interest in her own life. The suffering person asking to be helped to die, the person taking her own life, and the suicide bomber more interested in taking the lives of others than in her own survival are three examples of individuals who do not share the interest in life. But these counterexamples do not provide a good argument against the right to life. Others, the overwhelming majority, do have an interest in life. Their interest is the most basic, and extremely strong. Virtually all of us hold this interest as first in order, and without the assurance from others that they will not violate it we can have no good reason to cooperate with them. Since virtually all of us share this interest, a social agreement to generally protect it is most easy to arrive at. It seems to me that a widely shared basic interest is a good basis for a right.

2.2.4 The Right to Uninterrupted Family Life

The right to uninterrupted family life is based on the same interests that I have identified as basic: interests in reciprocal care and in sharing our lives. We have a right to uninterrupted family life because such family life is an especially good way to secure these interests. On this point I agree with Archard, who argues that “the claim that the family is or ought to be private... invokes the positive defence that the family works best, and flourishes, if it is left to its own devices.”24

The right to uninterrupted family life is, by definition, conditional. The right is justified by the basic interests of individuals in forming relationships of caring and sharing. This means that only where these interests are met by family life does the argument for the right stand. Thus, whenever the uninterrupted family life results in harm to an individual family member, the justification for the right ceases to exist.

The interests of individual family members are prior to any interests that the family unit might form once it exists. The right to uninterrupted family life is held by individual family members as long as the specific family fulfills its members’ interests. In cases of harm or neglect within a family, the argument for the right ceases to exist and the interests of individual family members in life, health and security

24. ibid., 22.
override the consideration in favour of non-intervention.

As I will immediately move to argue, the definitions of “family”, “family member” and “family life” that I offer in this thesis are most suitable to deal with the conditional nature of the right to uninterrupted family life. As will immediately be revealed, an abusive or neglecting family will not enjoy protection under the right for which I advocate as it is not “a relationship of mutual care, responsibility, and sharing of resources and experiences.” By definition, the right not to be interrupted is only accorded to families that satisfy the interests of their members.

2.3 Definitions

2.3.1 Definitions: Family Relationship, Family Member, Family, Family Life

To achieve the fulfillment of the basic interests I define, a right to family life should be understood according to the following definitions:

D1 Family relationship is a relationship of mutual care, responsibility, and sharing of resources and experiences. It contains a promise, or a mutual understanding, of eternal connection.

D2 Family member is an individual who maintains, with one or more other individuals, a family relationship—a relationship of mutual care, responsibility, and sharing of resources and experiences which contains a promise or a shared understanding of eternal connection.

D3 Family is a group of family members—individuals who share a family relationship with one another.

D4 Family life is the day-to-day exercise of the duties family members have towards one another and the day-to-day enjoyment of their privileges stemming from their relationship with one another.

2.3.2 Explaining Components of the Definitions

Care

By care I mean both that one attends to the needs and wants of another, and that one internalises the concern for another’s wellbeing such that the other’s wellbeing forms part of one’s own. Family members take care of one another and care for one another.

Sharing Experiences

Family members both engage in shared activities, and share with one another their thoughts and reflections on experiences gathered separately. Family members spend time together, engaged in shared activities from daily meals and leisure time to the more distinct experiences such as holidays, rites, and celebrations. In doing so, family members gather shared memories, and the conversation and reflection that accompanies their time together becomes their shared experience. Family members also share with one another some of their individual experiences. They listen to one another, help solve problems, provide unsolicited advice, discuss the meaning of experiences, and so forth. Of course, different families share different kinds of activities and experiences and do so to a greater or lesser extent. The nature of their sharing—which experiences they share and which they do not, whether their shared time is joyful or stressful, whether they agree with one another or not, and so forth—shapes the perception of what is “family” in the eyes of each of them.
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Sharing Resources

Families can share dwellings and their contents, income, services, food and other items. Not all families share resources to the same extent, but all share some. In the exercise of their care for one another they share their time as well as their emotional and material resources. And, of course, as part of the sharing of experiences as described above, families also share the resources required for these experiences.

Responsibility

In some respects, this component may best identify whether a relationship is a familial one, or one of close friendship, for example. Whereas all friends care for one another and many take care of one another in many respects, family members also see it as their responsibility to care for one another. Responsibility here means both that one sees another’s wellbeing as one’s own concern, and also that one’s providing care to one’s family member is not open to one’s choice in every particular instance. I do not mean to suggest that the family relationship is one of coercion. Rather, I suggest that family members choose the overall relationship, including the idea that on a daily basis they would not choose whether or not to care for and take care of one another. The long-term commitment to care for another is a unique feature of family relationships.

This may be a good point to discuss the relationship between care, sharing and responsibility in defining a familial relationship that deserves protection under the right to family life. We can think of cases in which the interest in care, for example, can be best satisfied by someone who is not my family member. The medical care one receives in a hospital by professionals satisfies one’s interests in survival, and in being cared for. In the same way, one can hire a professional caregiver for daily needs such as feeding and grooming. From the standpoint of that professional caregiver, the job satisfies the need to care for others. It then seems that satisfying the need for care is not a sufficient justification for the protection of the familial relationship. Similarly, there are numerous forms of sharing that people practice and care for that occur outside the family. With their club members, for example, people share assets, past time, interests, and celebrations. Thus, some aspects of our interests in care and sharing can be satisfied outside the family. What distinguishes the familial experience, I believe, is the combination of care, sharing and responsibility that satisfies at the same time the two basic needs I described—in mutual care and in sharing—and that included a special commitment to continue satisfying them.

Mutuality

I claim that the responsibilities and privileges of family members are always mutual. This component of the definition of family has been rejected by some, specifically David Archard, and may seem surprising to others, so I will try to defend the claim in short. We often think of some family members as the

25. I am grateful to Sophia Moreau for suggesting this component of the definition.
26. I disregard here any responsibilities of family members towards one another that are laid in law. We are here concerned with what would be the social unit to fall under the legal definition of the family, to which, later on, legal rights and duties could be attached.
27. Cf Caleb Yong, claiming that “although material caregiving could be performed outside of an intimate caring relationship for example by a social worker or medical worker, even material caregiving is much better done within the context of an intimate caring relationship: the intimate knowledge which caregivers have when hey share an intimate caring relationship with dependents furnishes them with the level of understanding of the dependent’s specific needs, interests, and preferences that will allow them to provide a higher quality of material care. Moreover, dependent adults have fundamental interests in their psychological well-being which would be undermined absent the attitudinal care found in intimate caring relationships.” (Yong, “Caring Relationships and Family Migration Schemes,” 75.).
primary caregivers and of others as primarily being cared for. The prominent example is of parents and children, the two groups of family members that every scholar and jurisdiction agree belong in the definition of a family.\textsuperscript{29} With respect to children, particularly very young children, it is common to find accounts according to which they hold a right to family life that does not entail any obligation on their side, while their parents hold obligations towards the children, and only enjoy freedoms that are necessary for the parents to execute their obligations towards their children.\textsuperscript{30}

The view that some members of the family, particularly children, enjoy rights and privileges but are subject to no duty, can rest on either of two assumptions, or on a combination of them. The first assumption is that children lack the \textit{ability} to provide care.\textsuperscript{31} The second assumption is that children do not \textit{choose} to take part in a family. I consider each assumption in turn, starting with the latter, and argue that neither supports a decisive reason to attribute to children rights and privileges and no duties with respect to their family members.

Children come into the world bounded by family ties they did not choose. But I argue that this lack of explicit choice is immaterial, and other normative considerations justify children’s obligation towards their family members. Children have an interest in the reciprocal relationship with their parents (or other family members) and are direct beneficiaries of the care and obligation of their family members towards them. As infants, the care children enjoy from their guardians is no less than crucial to their survival. As children grow older and more independent, they maintain an interest in care and in intimate relationships. Their intellectual, emotional and material wellbeing are deeply affected by the actions of their family members and their relationship with them. The duty of children towards their family members stems from the care they receive, the fulfillment of their interest, rather than their direct consent.\textsuperscript{32}

We can also phrase the argument from interest in terms of \textit{tacit consent}. Children have an interest in the care of their family members. Family members have an interest in caring for children only on a reciprocal basis, assuming that care will also be given back. Given these two assumptions, it is fair to conclude that if they could have chosen it, children \textit{would have} chosen a relationship of reciprocal care—of mutual rights and obligations—with their family members.

One qualification may be in place. My claim for reciprocal obligation does not extend to children who are harmed or neglected by family members. In the cases of abuse or neglect the components of my definition of the familial relationship simply are not satisfied. So, by definition, no family ties exist in abusive relationships or in cases of neglect. When I describe below the justification that gives rise to the right to family life I will stress further that the right to family life is conditioned on family life being beneficial for the individual family member. The right stems form a basic individual interest and only comes to light if this interest exists. Abused or neglected family members do not have an interest in the family life that causes them harm, and so no right to family life is accorded to members of these relationships.

\textsuperscript{29} Virtually all laws concerning the family in all jurisdictions attend to the “nuclear” family, composed of parents and their children. For scholarly debate of the definition see, e g, Lahav, “International Versus National Constraints in Family-Reunification Migration Policy”; Honohan, “Reconsidering the Claim to Family Reunification in Migration”; Archard, \textit{The Family: A Liberal Defence}; and Carens, “Who Should Get in? The Ethics of Immigration Admissions.”

\textsuperscript{30} Archard, \textit{The Family: A Liberal Defence}.

\textsuperscript{31} For an argument in support for such a position, see Yong, “Caring Relationships and Family Migration Schemes” [presenting the position that children are dependents and have, as all dependents, a claim for care that is distinct from the claim of independent adults.]

\textsuperscript{32} My position posits wellbeing rather than liberty as the main political ideal and goal of politics. It is a liberal position in the sense that it holds that defining wide areas of personal autonomy and prohibiting interference in these is a good means to bring about individual wellbeing on a large scale.
We now come to the possible problem of children’s *inability* to perform their obligations towards family members. Inability to perform obligations, and specifically a temporary inability to do so (as opposed to impossibility by nature or definition), does not harm the argument in favour of the existence of the obligations in principle. As with any case of an agent under a duty that the agent legitimately cannot fulfill at a specific moment, I see the inability of children to fulfill their obligations as an *excuse*, an ex-post defense against culpability in a case of a violation, but not as a justification. One cannot be held responsible for consequences out of one’s control, and an inability to fulfill obligations means that their violation would be a consequence out of a child’s control. But children’s inability to perform some of their obligations is temporary and it is not a principled refutation of the claim that such duties exist. As children grow, they gain more and more ability to fulfill their obligations. Throughout their lives, their performance of these obligations is measured according to their ability to perform them at any given moment, but the obligations themselves are universal and enduring, deriving—as claimed above—from the interest of children themselves in a reciprocal relationship of care.

The debate over children’s obligations toward their parents also demonstrates what happens in the life of a family. At the beginning, the children are unable to fulfill almost any of their obligations. The parent fulfills her obligations towards her child, and the child enjoys the fulfillment of his interests. As times passes, the child gains more and more abilities and with them he takes more and more responsibility with respect to his obligation towards his parent. Adult children and their parents share equally the responsibility to fulfill their mutual obligations and enjoy equally the fulfillment of their interests through family life. As time continues to pass, aging parents may lose some of their abilities to fulfill their obligations. When they do, they gain a defense against condemnation if they fail to fulfill their duties. At this time, their children will perform their duties and the parents will enjoy their rights. The reciprocal relationship comes full circle, fulfilling the interests of the individuals involved throughout their lives according to their abilities and needs at each point in time. An account of inability as an excuse rather than as a refutation provides a clear, consistent, and enduring explanation of the rights and obligations that the reciprocal familial relationship yields.

**A Promise of Eternity**

Familial relationships are characterized by an air of eternity. The object of the relationship gives rise to this characteristic. The end of a familial relationship is the provision of ongoing support and care, sharing of life, and mutual responsibility. Unlike other aim-specific relationships, there is no concrete goal that family members look to achieve, no definite point at which the relationship has satisfied its purpose. In this sense, the relationship is defined by its promise of eternity.

This is not to say that familial relationships do not end, or that members of the family must be oblivious to the possibility that a relationship may end. But during the life of the relationship, it is typically experienced by members of the family as open-ended and enduring, as creating an eternal connection between them. Family members enter the relationship with a view that it will last, and they live it day-to-day as everlasting.

A marginal point, but maybe also not a completely unimportant one, reflects on what happens when a familial relationship ends, which speaks to the eternity of the relationship as well. The untying of family ties is typically, though not always, less clear-cut than other relationships, particularly because of the depth of shared experiences, and the tendency to hold assets together, or to be tied by relationships with other family members such as shared children. It is true that other relationships also have accessory assets
or ties. Such, for example, is the relationship between partners in a business: when their partnership ends, business partners may still not be able separate their lives fully because of the shared assets or interests that are left between them. But whereas those shared assets or interests can ultimately be dissolved, familial sharing is typically less easily dissolvable. When parents dissolve the relationship between them, their enduring responsibility for their shared children makes it impossible for them to fully separate their lives even when they choose to separate as a couple. The same is the case with remaining relationships with other shared family members, or with the attachment to experiences and memories made together. Familial relationships typically involve shared assets or connections that make the relationship harder to dissolve completely.

Daily Exercise

Finally, for the purposes of the argument I offer here, it is important to distinguish family life from the mere membership in a family. For this purpose, I introduce the component of day-to-day exercise of the relationship. In social terms and in day-to-day life we speak of “family” even when we refer to persons with whom we do not share experiences, care or resources on a daily basis. For example, we see our grandparents and grandchildren, aunts and uncles, cousins, nephews and nieces, and in-laws of all kinds, as part of our family. We may share many experiences together, and the kind of experiences we share can be ones that we exclusively save for the family: we can celebrate personal events or holidays, perform rites, share meals and vacations. We can spend more time with relatives than we do with friends or simply share a distinct kind of activities with relatives. Nevertheless, for the purposes of the theory advanced here, intended to distribute rights and obligations, relatives who do not exercise mutual care, commitment, and sharing on a daily basis are excluded from the definition of family life.

To clarify, I exclude certain people from the definition of family I propose here not because they fall outside any formal description of the familial group: it is not that parents are categorically part of the family while aunts are categorically not part of it. For both parents and aunts, the test is one: the functional test of daily care, responsibility and sharing. For example, if you are raised by your aunt, and rarely see your mother, then you and your aunt share family life for the purposes of the theory proposed here while you and your mother do not.

2.3.3 Components Missing from the Definition

My definition of the family disregards three functions or components that others have found to be important in defining the family: raising children, multigenerational relationships, and cohabitation. For example, Archard says that “[i]n light of [its] essential functional role the family can be minimally defined as a multigenerational group, normally stably co-habiting, whose adults take primary custodial responsibility for the dependent children.” Honohan defines the family relationships as “relatively permanent or durable relations of shared affection and support, of joint projects over time, characteristically relations of intergenerational care and concern across a lifetime.” As others find them central to the definition, I will explain here why I do not include these components in my definition.

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34. Honohan, “Reconsidering the Claim to Family Reunification in Migration,” 775
Raising Children

I do not include the rearing of children in my definition for three reasons. First, my interest is in the basic functions of care, responsibility and sharing. As I will soon explicate, it is the basic interests of humans in care and sharing that give rise to the right to family life. These interests can be fulfilled by the creation of family life between adults even without raising children. According to the justification for the right to family life that I offer, families that fulfill these interests are worthy of protection whether or not the relationship also involves the upbringing of children.

Second, my interest is in proposing a theory of the right to family life that answers social realities today and in the future. Particularly in recent times, more adults are choosing to maintain family lives, to form families, but not to raise children. I suspect that this trend may grow. And, as just said, these families still fulfill the basic interests that I claim yield a right to family life.

Third, all families stop raising children when the children become independent adults. Building a definition of the family around raising children would mean that the same familial relationship will lose its protection once minor children are grown. But family life amongst family members continues after children grow up and become independent, and it continues to fulfill the basic interests of individuals involved in the familial relationship. Persons are interested in care and sharing throughout their lives, and the family continues to fulfill these interests as individuals move through different phases of life. For this reason, the definition of the family should not centre on the function of raising children, which is, by its nature, temporary.

Inter-Generational Relations

The interests that I will immediately claim are protected by the right to family life can be addressed by families whether they are composed of different generations or of just one. While it is true that many families are composed of more than one generation, the relationship with other generations in itself is not the component of the familial relationship that fulfills these interests. People may have an interest in a connection with others from another generation or they may not. This interest is independent from the interests I define as giving rise to the right to family life. Any account of why intergenerational relationships form an integral part of the definition of the family must explain what basic interest intergenerational relationships fulfill for individuals. Honohan does not provide any such explanation, other than the notion that intergenerational relationships are typical of families. For Archard, intergenerational relationships are definitive of the family because of his focus on the function of raising children. I argued that this function is not a necessary condition for the existence of a family, and for the same reason I do not see the intergenerational relationship as necessary: the basic interests that I identify as giving rise to the right to family life do not require intergenerational relationships.

Cohabitation

I chose not to include this particular form of sharing in my definition because I find it quite restrictive. By focusing on cohabitation, a definition not only excludes non-cohabitating families from its scope, and risks mistaking some non-familial cohabitating groups for families, but also undervalues other forms of sharing of resources. I aim for a flexible and inclusive definition that captures the essence of the relationship. I would not want any specific practice to determine the nature of the relationship, or to divert the focus of the definition away from the overall function of the relationship and toward a
particular social custom. I am willing to accept that cohabitation and sharing a household are good indications of a familial relationship, but I wouldn’t require them, nor would I take their value to be self-evident.

**Love**

Many would consider love to be a central component of familial relationships. I do not speak of love in this context because (a) love is a deeply contested concept which I cannot propose to resolve, (b) love is not something that governments can or should evaluate, and (c) love is neither necessary nor sufficient for the family relationship which I have identified and which I have argued is socially valuable even in love’s absence.

Firstly, love is a deeply contested concept, and has been at least since Plato. Helm’s SEP entry identifies four main families of theories of love: love as valuing, as union, as emotion, and as robust concern. Love as the appraisal of value—recognizing valuable traits in one’s beloved—faces the trouble of fungibility and trading-up, while love as the bestowal of value—conferring value on one’s beloved—faces the trouble of arbitrariness: how can I justify conferring value on my husband rather than someone else? Love as union views claim that two lovers form a union—a literal third entity—to explain how love is not selfish; yet, aside from being metaphysically odd and sounding like a category mistake, such views undermine the possibility of love being selfless, and make it difficult to explain how or when love can or should end. Love as emotion or emotion complex views lack critical details needed to distinguish romantic love from other attitudes or emotions and, as I will argue next, make love something that governments cannot and should not be expected to assess. And love as robust concern views would consider the responsibility and mutuality conditions of my definition of the family relationship to be sufficient to make it a loving relationship, in which case there would be no need to add “love” as another element in the definition.

I cannot consider the philosophical complications of love in anywhere near sufficient detail in this thesis to make love a useful element in the definition of the family relationship. And I think consideration of the deeply contested nature of love offers us a very strong reason to exclude it from definitions of the family in legal theory and in law. It is far better to stick with simpler and less contested elements that are more amenable to governmental assessment, as my definition does.

Secondly, I do not believe that love is something that governments can or should assess, and thus it would be impractical and unwise to add love to a definition of the family intended for legal theory and law. It is a common feature of all of the theories of love that love is deeply tied up with internal states—values, attitudes, desires, emotions, volitions, etc.—which are, by their nature, very difficult for governmental organisations to evaluate. In order to even attempt to assess such states, a great deal of sensitive personal information would be needed—information that I would be uncomfortable sharing with a government. And even such information could, at best, prove the kinds of external criteria I have used in my definition, while counting as indirect and insufficient evidence of love understood as an internal state. While I can observe care and sharing, and even responsibility, by certain behaviours, I cannot do the same for love.

36. ibid., Section 4.
37. ibid., Section 2.
38. ibid., Section 5.
39. ibid., Section 3.
Finally, love is neither necessary nor sufficient for the family relationship that I have identified, and that relationship is socially valuable and thus worthy of protection even if it lacks love. There are cases of great love between people who cannot care for one another or share anything. Think of an incapable parent: when the Ministry of Children and Youth Services removes children from their parents’ homes, they do not question whether the parents love their children—that is beside the point—they question the parents’ ability to care for their children. And, on the other hand, there are cases of devoted family life in families that do not speak of love.

I do not mean to claim that love is unrelated to family relationships; I expect that there will be considerable overlap between families that meet my definition and loving families. But since love is neither necessary nor sufficient for a family relationship worth governmental recognition and protection, and since love is contested and immensely difficult for governments to evaluate, I do not believe that it belongs in a legal definition of the family.

2.3.4 A Constitutive, Functional, Flexible, Neutral Definition

I have offered a specific set of definitions for the family and for family life, and have provided a detailed account of the different components of the definitions. In this section I turn to defending the approach I am taking in offering these definitions. My definition of the family focuses not on the identity of the family members, the family’s structure, or its formal status, but rather on the nature of the relationship between family members. By defining family in this way I am taking the functional approach to the normative evaluation of the family. Responding to the formalistic approach, which ruled most of law’s history and can still be found in the language of many legal documents pertaining to the family, the functionalist approach represents a critical turn in legal thought motivated by ideas of liberty and equality.

The formalistic approach to the legal treatment of the family has dominated most of legal history. It is characterized by a preferential treatment given to certain forms of families, based on a favourable normative evaluation of the forms of families privileged. Traditionally, laws extended protective or favourable treatment to families created by the marriage of one man to one woman and their procreative efforts under official gaze. The legal protection of this form of the family originated in religious domination over private life and was inherited by the modern state. Despite changes in the definition of the family over the years, the formalistic approach continues to perceive families through the identities of their members and the forms and official status of the relationship between them.

With the development of liberal politics and the rise of the ideals of equality and autonomy in politics, support for the functional approach grew. Advocates noted that the protection and preferential treatment of the family may only survive if the original religious justification for the exceptionalism of the family is fully translated into one that all citizens, regardless of their conception of the good, can reasonably endorse. Once ideas such as the sanctity of marriage were translated into neutral notions
such as caring, codependency and commitment, it became clear that the protection cannot be awarded to one specific form of family, but must be extended to all relationships which exhibit these characteristics. Typically, proponents of the functional approach identify the interests in autonomy, care, commitment, and economic and emotional security as basic interests that are both neutral and widely shared (this list is illustrative rather than exhaustive). Having defined the interest meriting a special legal arrangement, relationships should then be measured according to their “qualitative attributes,” that is, according to whether or not individuals fulfill this interest by maintaining the relationship. Relationships that fulfill the defined interest are then awarded special legal treatment that is meant to support the relationship and allow it to flourish.

The functional approach motivated the struggle to expand the definition of the family in law and policy to include various forms of family, among them same-sex couples, families created outside marriage ties, single-parent families, and more. But in its essence, the functional approach does not call for the expansion of the definition of the family but rather for a complete change of the legal standard. It is ultimately not interested in adding more forms of families to the traditional definition of the nuclear family, but in abandoning the reliance on a formal definition altogether, refocusing policies’ attention on the qualitative attributes of relationships.

The functional approach must be committed to abolish form for a simple reason: defining the family by its form—expansive and permissive as the definition may be—is destined to result in a policy that applies to cases in such a way as to defy the justification underlying the policy. The form’s rigidity assures that the policy will be both over-inclusive and under-inclusive: there will be “recognized” families whose actual experience does not merit that recognition in light of the policy’s aims, and there will be “unrecognized” families who meet the justification for the policy but who will not enjoy its protections or benefits. Thus any attempt to define the family by its form is destined to result in an undesired reality in which the basic interests of some individuals are not protected, and in which society may even provide the conditions for harming some individuals.

Despite the rise of the liberal critique, the formalistic approach still rules many laws in which the family is closely defined by the identity of family members and the nature of the relationships between them. Where laws still adopt this approach, jurists are likely to adhere to the formalistic definition, and only a formal petition to review the laws may bring change to the definition. But where laws loosely refer to a familial relationship without attending to the exact definition, jurists are more likely to take the functional approach, internalizing the functionalist critique.43

Thus, it is fair to say, that while it is still not the legal standard, the functional approach is taking hold of the normative evaluation of the family within the liberal tradition and in critical legal thought.44 For example, Honohan claims that when the claim for family life centres on the concept of care, its appeal is clearer and it is less contested:

 minimalist perspective, no matter how narrowly one draws the category of family for admissions purposes, it clearly must include a spouse and minor children. (Carens, “Who Should Get in? The Ethics of Immigration Admissions,” 98).


The idea that family migration should be restricted gains its greatest force from the systems in which family is defined in terms of legal and genetic relationships rather than those of continuing care. If we understand the family as a relationship of care, we might recommend a different reach for family migration, one that calls for an adjustment to most states’ provisions in this area.\textsuperscript{45}

The functional approach is not devoid of difficulties itself, and its adoption may not remedy all of the adverse effects of the formalistic definition of the family. In particular, if the definition of the family would now come to revolve around a set of functions common in families, there still exists the risk that lawmakers might specify the list of functions based on those commonly fulfilled by a specific form of family, presumably the nuclear Western family. If this or any form of family captivates our imagination when we come to define the functions of a family, we may end up with a definition of the family that is still tilted in favour of the normative formal assumptions of the majority, to the detriment of non-normative families.\textsuperscript{46} To avoid this problem of recreating inequalities in the definition of the family, I choose to adopt a definition of the family that is not focused on a list of particular activities characteristic of families, but on the core function of different activities taken by different families, which I identify as the function of providing reciprocal care and sharing.

Critics may note that my approach presents another difficulty. By stripping down the function of the family to the notions of care and sharing, I might create too vague a definition that may be unable to distinguish families from other relationships. I will answer this concern by highlighting two features that I believe are unique to families: taking responsibility for one another, and eternal connection. In the next section I will scrutinize the components of my definition in hope of persuading my reader that the account I suggest can effectively, even if not hermetically, identify familial relationships.

The benefits of the account I offer here in comparison with other definitions of the family, including functional definitions that are focused on a set of activities, are its enduring quality and its constitutive quality. First, I am interested in creating a theory of the right to family reunification that attends to the needs of families today and well in to the future. Over time, as social conditions change, families change the kinds of activities they perform. For example, more adults in recent generations are deciding not to rear children, but they remain interested in forming enduring relationships of mutual care and responsibility. With depreciating wages and increasing labour insecurities, more adult children stay dependent on their parents well into their adulthood and remain part of their parents’ familial unit. And for similar reasons, more elderly parents are invited into the familial units formed by their children, either because the elderly parent provides important care within this unit, or because the adult child is providing important care to the parent. These are some examples of modern families that are left unaccounted for by traditional definitions—even functional definitions—of the family.

We should also consider changes in normative views that will shape the families of the future. A prominent example is that of polygamous relationships. Polygamous relationships are today outlawed in most liberal democracies, usually based on claims that these relationships are harmful, coercive, exploitative or cannot be consented to by women or children who form part of these relationships.\textsuperscript{47} But these criticisms may be motivated largely by the background social realities in which polygamous

\textsuperscript{45} Honohan, “Reconsidering the Claim to Family Reunification in Migration,” 783.

\textsuperscript{46} See Note, “Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family.”

relationships are typically practiced today, namely in patriarchal societies where women and children enjoy few economic opportunities and limited independent legal recognition. Meanwhile, in the Western world, an interest in group relationships is growing. Many, both men and women, feel limited in monogamous relationships, whether sexually, emotionally or intellectually. And they insist that they are able to provide care and responsibility to more than one partner, or to parent children in complex groups, on a consensual basis that is beneficial to all. The more this trend grows, the more the normative claims supporting the prohibition may be found wanting. With a definition of the family like the one I propose, no change in policy would be needed to accommodate the rise of polygamous families in the Western world, should that trend emerge. By focusing on the core functions of the family, the definition I propose can adapt to changing social conditions and norms.

The other benefit of the functional approach, and in particular a functionalist definition of the kind I offer here, is its constitutive quality. That which is valuable about the family relationship is also what constitutes or determines the family relationship itself. The relationship between the definition of the family relation and the argument for its value is direct, and there is no further need to adjust the definition to certain realities to exclude “bad” families or to include “good” families that fall outside of the definition. A case in point is a polygamous relationship that answers to the definition I propose. I would claim that a relationship that manifests reciprocal care, responsibility and sharing is by its nature not exploitative, harmful or coercive. The definition itself weeds out relationships that harm some of their members. In a similar way, we no longer need to wonder if a certain distant aunt or a grandfather are family members. Their relationship with others defines their familial status. The definition I propose is constitutive, flexible and enduring, always identifying its subject with direct relation to its value.

Two notes may still be required. First, naturally, not all family ties are the same. Some families maintain some aspects of the definition I offer, but lack others. For example, some individuals may not understand family ties with their partners as potentially eternal, but as chosen on a daily basis and open to be ended completely upon decision. The fact that a specific tie does not meet all of the components of the definition I offer is not supposed to disqualify the relationship from the definition. The definition does not provide necessary and sufficient conditions, but rather characteristics grounding a “family resemblance.”


49 In this context, Laura Ferracioli actually argues that liberal neutrality demands that reunification rights will be extended not only to families, but also to friendships. (Ferracioli, “Family Migration Schemes and Liberal Neutrality: A Dilemma.”).
relationship as chosen anew every day and open to be ended by decision.\footnote{See also Honohan, “Reconsidering the Claim to Family Reunification in Migration,” 775: “the fundamental significance of the family, more than friends, remains as a locus of relatively permanent or durable relations of shared affection and support, of joint projects over time, characteristically relations of intergenerational care and concern across a lifetime.”} Finally, I would accept that a relationship between friends’ that contains the care, the sharing, the responsibility and the eternal connection I include in the definition of the family should be awarded the same treatment even if in other respects it is seen as more of a friendship. Marginal cases of friendships that seem to be fulfilling the criteria of responsibility and promise can be evaluated on an individual basis. If they are found to meet the criteria, I will claim that we are in fact dealing with a familial relationship, and I will apply to the relationship the theory of family reunification. To deny such relationships family status would be to cling to the form of family most typical in our society, disregarding its function and value. I assume that the majority of the cases fall clearly within or outside the definition of the family I offer.

\section*{2.4 Conclusion}

In this chapter I argued that the right to family life stems from our basic and widely shared interests in reciprocal care and in sharing our lives, and that thus the right should be understood in functional terms and protect the relationships that satisfy these interests rather than a preconceived vision of the deserving family. I then explored two concrete aspects of the right to family life: the right to uninterrupted family life and the right to form a family of one’s choice. Finally, I presented definitions for “family relationship”, “family member”, “family”, and “family life” that are constituted by the value of family life.

The theory of the right to family life presented here will be used in the next chapter to build a right-based solution to the problems of cross-border families. In the following chapters I will put the account of the right to family-class immigration in context within citizenship and immigration literature (chapter 4), and will explore some of the major policy implications of the theory of a right to family-class immigration, the foundations of which are offered here (chapter 5).
Chapter 3

On the Right to Bring in Our Foreign Family Members

3.1 Introduction

This chapter concerns the instance of the right to family life that is this thesis’ subject: the right of families to be reunited\(^1\) in one country. Based on the discussion in the last chapter, I will argue for a right to family-class immigration, or more specifically for the right to bring in our foreign family members. The right, I will claim, is justified by the same interests underlying other instances of the right to family life: the interests in reciprocal care and sharing. Furthermore, I will argue, the international aspect in cross-border families’ cases does not present a unique challenge to the application of the right to family life. There are thus no good reasons to deny the existence of a right to family-class immigration.

The idea of a right to family-class immigration faces fierce objections, both in real terms—as states and courts regularly refuse to recognise it—and in the field of legal and political theory. The common objection does not reject the idea of a right to family life, not even the idea that the right may extend beyond the borders of a political community. Instead, the objection portrays the right to family-class immigration as uniquely demanding. Whereas the right to uninterrupted family life poses minimal obligations on all to not interfere, and thus is not more demanding when it moves from the domestic to the global sphere, the right to family-class immigration—so the objection goes—entails a positive obligation to admit foreigners. This obligation is demanding as it contravenes a right of the body-politic to determine its membership by choice. I will dedicate a major part of this chapter, section 3.2, to considering the objection that the right to family-class immigration is more demanding than other instances of the right to family life. In doing so, I will take issue with the dichotomy between positive rights and negative rights, and will question it as it is applies to the subject of family life. I will argue that the burden created by the claim to family reunification, and borne by the receiving state, is in fact not relevantly different from the burden created by the claims to non-intervention in the choice of individuals to create family life, and by their demand that others will not intervene in their family life, in the domestic context.

\(^1\) I do not pay attention to the distinction between “family reunification” and “family unification” or “family creation.” Conceptually, they are equal, in my view. Accordingly, I use terms such as “reunification” and “family-class immigration” interchangeably.
The cross-border context in which the right to family-class immigration operates raises a number of key questions concerning the identity of the right-holders, the identity of the duty-holders, and the relationship between them that gives rise to those rights and duties (i.e. the justifications). Two competing views dominate the debate. According to the human right account of the right to family-class immigration, all humans hold the right to family reunification, at least in states to which they have specific linkage. According to the civil right account of the right to family reunification, a state’s members hold the right to family reunification in that state. For proponents of the human right account, the duty to respect the right to family-class immigration falls in principle on all states, and in practice on any state which exercises control over any family member, or even on states able to help the family. Proponents of the civil right account see the right to family reunification as applying exclusively between states and their own members. And while the human right camp emphasizes that the basic human interest in family life is universal and gives rise to obligations that apply to all, the civil right camp considers the right to family reunification to arise from a specific political relationship between compatriots, and thus thinks that the duty arises only between a state and its own members, not the foreign family members. The civil right view must then explain the nature of the political relationship that gives rise to the right and the duty, and why it applies to members of the state but not to others who reside in the state, or find themselves under its control.

After examining the human right and the civil right views, I will argue for the benefits of the civil right understanding of the right to family-class immigration, according to which the right is held by citizens and permanent residents against their state of citizenship or residence. I will argue that this is the best way to understand the right to family class-immigration from a security perspective: it provides family members with clear, enforceable rights, and it provides states with a clear and manageable duty that stems from the original justification for the existence of a state. As such, a legal arrangement along these lines will enjoy support and be stable. In section 3.3 I will evaluate the two ways to construct the right and will argue for the benefits of the civil right argument according to which states of membership owe their members the opportunity to be exercising family life with their international family members in the states’ territory.

3.2 The Right to Family Reunification is Not Uniquely Burdensome

Although the right to family life is actually regularly appealed to in the immigration context, the idea of a right to family-class immigration has been repeatedly rejected by courts and legislatures. Despite states being active both in imposing immigration controls against families and in enforcing such controls by deporting violator foreign family members, the law in most jurisdictions traditionally views only the act of deportation as a case of state intervention in family life against which a right-claim is effective. The result is arguably paradoxical. Unauthorised migrants, or people who defaulted on the conditions

\[ \text{2. Recall the list of questions a theory of a right must answer, presented above in Chapter 2.} \]
\[ \text{3. See, e.g., Canada. Supreme Court of Canada, de Guzman v Canada (Minister of Citizenship and Immigration),} \]
\[ \text{at para 96:} \]
\[ \text{Deportation of a person from the country in which he or she has been residing with other family members is a direct attack by the state on family life, which, on the facts of this case, paragraph 117(9)(d) is not. The separation of Ms. de Guzman from her children has been in large part attributable to her leaving her sons in the Philippines with their father when she came to Canada and failing to disclose their existence.} \]
on their permanent residency, have access to a claim based on family life that immigration applicants, following the law and its procedures to the letter, do not.

This stark difference in legal treatment to the family-life claim between cases of admission and cases of removal is the consequence of a longstanding political-legal tradition of preferring negative rights-claims to positive ones. For some ethicists the distinction is normatively consequential, whether for them the adjectives “negative” and “positive” describe a right’s form or its substance. But, as I will attempt to show in this chapter, in the case of a right to family life applied to a cross-border scenario, the distinction has no normative consequence. The function of the right to family life remains the same even if we only accept its negative form: a state may be required to admit a specific individual. I begin by articulating the concepts of negative and positive rights, and proceed to question the application of these concepts in the context of family-class immigration.

Negative rights are rights to be free from hindrance by other people in executing one’s will. Negative rights provide their holders with a guarantee of non-intervention by anybody else, and, correlative, negative duties are duties to not interfere with others in the execution of their will. Positive rights are rights to a good or a service. Positive rights provide their holders with an entitlement to assistance from others, and, correlative, positive duties are duties to assist others to achieve a certain goal or good. As some have put it, negative rights are about processes and positive rights are about results.

Proponents of liberty note that negative duties are less restrictive than positive duties. A duty to not interfere with others’ actions leaves an agent with the freedom to perform any action other than the one prohibited. A duty to assist commands an agent to perform a specific action, thus depriving the agent of all other options. In this sense, negative rights are thought of as more compatible with a notion of individual liberty. Others are concerned that positive rights invoke broad assertions of entitlements. But probably the reason for which negative rights traditionally enjoy greater support has to do with a concern with enforceability. For those who value rights with direct relation to their enforceability, positive duties present difficulty in that they may be unachievable, or in that they may...
require unattainable or otherwise undesirable institutional arrangements. Proponents of positive rights usually argue back by way of destabilizing the dichotomous assumption. Some interpret the concept of liberty itself as a positive concept rather than a negative one. Seen as a goal to be promoted, and one dependent on background conditions (such as life, minimal health, subsistence, or education), liberty itself may require others’ assistance. This view of liberty as a goal stands in contradiction to the libertarian view of liberty as a pre-existing feature of humans, and as a side constraint on the behaviour of others, not a goal to be promoted.

Others note that when it comes to enforcement, the differences between the two kinds of right disappear and it is not less burdensome to enforce negative rights than positive rights. That is not to deny that some liberties require more intervention than others. In terms of efforts of enforcement, rights form a spectrum, but the division between positive and negative rights does not correlate with the place on the spectrum. For example, to enforce our right to life—even in its negative form—society must provide structures to prevent the violation of one’s right by others. It can do so by establishing a police force patrolling the streets, or by imposing deterring penalties and punitive damages for violations, for example.

Most fundamentally, others question the assumption that what matters to people most, or that what is most morally relevant, is non-interference in individual freedoms. They point out that the moral importance of being provided with some goods and services cannot, at least not without debate, be considered inferior to the moral importance of being free of interference. Relatedly, Mill has rejected the dichotomy altogether, saying that “[t]o have a right, then, is, I conceive, to have something which society ought to defend me in possession of.” This statement is insensitive to whether the “defence” is provided by non-interference or by the delivery of goods and services, and suggests to me that Mill is thinking of results rather than processes.

I will add one last concern I have with rejections of positive rights based on liberty. The idea that somehow a negative obligation leaves an agent with infinite potential courses of action but a positive obligation leaves the same agent with only one permitted course of action is, in practical terms, mistaken. Agents are constricted in their behaviour by many constraints, even if we consider only the moral constraints. So it is not the case that by introducing to an agent a new negative duty their path of action stays relatively unchanged. A heavily limited scope of authority has gained yet another constraint.

And it is not the case that fulfilling any positive duty requires following one, pre-determined, policy path. With many positive rights, significant discretion is left with the agent. Consider the obligation of a state to provide adequate housing to all residents. The state can tax housing to finance public housing, condition development permits on the provision of public housing, legislate a personal responsibility for

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11. I understand Lippke’s attack on libertarian objections to positive rights as rooted in a positive understanding of liberty. (ibid.) See also Nelson, “Positive Rights, Negative Rights and Property Rights.”
12. Holmes and Sunstein, The Cost of Rights: Why Liberty Depends on Taxes, 15 (arguing that from the perspective of rights enforcement, the difference between positive and negative rights disappears, as even the protection of negative rights requires redistribution in the form of taxation: “to the obvious truth that rights depend on government must be added a logical corollary, one rich with implications: rights cost money. Rights cannot be protected or enforced without public funding and support. This is just as true of old rights as of new rights...”).
13. ibid., 43.
housing over one’s relatives for three generations in any direction, and more. The possible courses of action are endless. This point is a general comment on the dichotomous view of negative and positive rights. But when it comes to the right to family-class immigration it is true that a positive obligation to admit foreign family members would dictate a result and would mean a duty to admit a specific person. Nevertheless, I argue that in the context of immigration the positive aspect of the right to family life is not more burdensome than the negative aspect of the right to family life.

My effort in this chapter is to show that the right to family-class immigration, rejected by courts on the ground that it would constitute a positive obligation on the state to admit particular individuals, should nevertheless be recognized. I will first use an analogy with the case of deportation to illustrate why the act-omission or process-result distinctions do not apply to the case of the negative and positive aspects of the right to family life in the context of immigration. In practical terms, in the context of immigration, respecting the positive and the negative aspects of the right to family life looks the same: the result is the state accepting a specific individual against its will. Based on this demonstration, I will then argue that this setback to the promotion of the state’s choice of its own members, or the setback to members’ freedom of political association, is not unique. The effect of a right to family-class immigration is not more restrictive of others’ freedoms than the effects on the right to uninterrupted family life in the immigration context. Thus, there is no good reason to recognize the negative aspect of the right to family life but not the positive aspect in the context of immigration.

I will then use the analogy with the case of bringing children into the world as an illustration of the fact that the results of respecting the right to form a family of one’s choice domestically are similar to the results of respecting this right in the immigration context: the citizenry either loses or gains similar measures of discretion over its membership in both cases. By following this strategy, I hope to sidestep the general debate between proponents and opponents of positive rights by showing that the concerns that opponents have with positive rights do not apply to the specific right to family-class immigration, and thus the right to family-class immigration can be supported by both proponents and opponents of positive rights. All in all, I hope to demonstrate that the right I advocate for here would not be more burdensome than the negative, well established, and respected aspects of the right to family life.

3.2.1 Negative vs Positive

States object to a right to family-class immigration on the basis that such a right, if recognized, would require the state to perform a specific act: admit a specific foreign individual as an immigrant. But courts have found that in cases where a person currently residing in a state is facing deportation—because of that person’s violation of immigration and citizenship laws—and her deportation will severely interfere with her family life, the state should refrain from the act of deportation. The argument leading to this conclusion depicts deportation as a form of intervention that the state is under obligation to avoid, while maintaining that refusing admission is not intervention in family life in the same way.

Granted, in the former case the state is asked to perform a specific act—to admit—and in the latter case the state is asked to avoid a specific act—to avoid deporting. The former case looks like a positive claim whereas the latter looks like a negative claim. But is there a substantive difference between the two reactions asked of the state here? I think that the negative answer is clear if we consider what happens after a state refrains from deporting.

As a consequence of a state refraining from deporting a person because deportation would violate her family life, some sort of regularization of the foreigner’s status in the state is inevitable. It is not the
case that a vacuum of residential status is created, nor is it the case that imminent threat of deportation remains, as the claim to stay has already been accepted and is likely to persist. This means that an individual that the state’s laws strictly aim to exclude, is nevertheless being included. This outcome is akin to the desired outcome of a request that the state admit a foreign family member as an immigrant: a specific individual is admitted regardless of the state’s interest in her presence. And the right-claim is based on the same interest in family life. Thus, in terms of outcomes, admitting an immigrant family member and refraining from deporting an illegal immigrant family member are relevantly similar.

One significant detail separates the case of the immigration applicant from that of the deportation candidate, but I believe that it should actually count in favour of the immigration applicant’s plea. The difference between the two individuals comes down to the fact that the deportation candidate stands within the border, and the immigration applicant stands outside of it. The state, from its perspective, claims that as she stands within its borders, within its jurisdiction, the state is obliged to consider the interests of the deportation candidate, and even to let them override its ability to enforce its immigration system. The immigration applicant falls outside the state’s jurisdiction. State claims that for this reason a state holds no obligation to consider the immigration applicant’s family-life interests.

But this is only true if we consider only the claim to family life of the deportation candidate and of the immigration applicant themselves. But in both cases, there exists an insider family member—a citizen or resident of the state in question—who holds the same family-life claim with respect to the foreigner, and in both cases the state has an obligation to consider that family member’s claim to family life. It seems to me that, considered from this perspective, the fact that the immigration applicant is applying for entrance, rather than violating laws of the state and setting facts on the ground by entering without authorization, should be counted in the applicant’s favour. This conclusion seems also to be in the best interest of the state, as it removes an incentive to violate immigration controls. There is no good reason to see the obligation to admit in the case of the applicant as more restrictive than the obligation to avoid immigration-control enforcement in the case of the deportation candidate.

Consider de Hart’s words in describing the argumentative move made by the European Court of Human Rights in the case of Abdulaziz, in which the court found only a very narrow duty to admit foreign family members:

The Court also pointed out that, at the time of the marriage, the (applicant) women knew that the immigration status of their husbands was precarious. By now, it has become established case law that when family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would, from the outset, be precarious, only in the most exceptional circumstances will would removal of the family member constitute a violation of Article 8 (the right to respect of family life). But the Court went further. Mrs Cabales should have known, since she had never cohabited with her husband, that he required permission to remain that would not be granted under the existing rules. The Court concluded that there had been no violation of Article 8. Here, the permanent residence or citizenship of the insider women did not weigh up to the fact that their husbands had not been lawfully admitted. Even if they had broken no rule at all, as in the case of Mrs Cabales, the insider had to reckon with the fact that the state might refuse admittance. The Court denied any right to the insider to have a family life with a partner from abroad. This way of reasoning transforms the actions
of the state (refusal of admittance) into the consequence of choice by the insider spouses.\footnote{Hart, “Love Thy Neighbour: Family Reunification and the Rights of Insiders,” 238.}

3.2.2 Domestic vs International

A common objection to the right to family-class immigration is that its effect on the freedom of association of current members is overly restrictive. Here I want to suggest that the right to family-class immigration, when it is held by the insider family member against her state, is not more restrictive than the traditionally accepted right to form a family of one’s choice in the domestic context.

One aspect of the right to form a family of one’s choice is that, in liberal states, parents are allowed to bring into the world (and the society) children as they choose, without significant restrictions.\footnote{The case of biological children is importantly different than the cases of adopted children or of children the product of assistive reproduction procedures. In the latter, to bring about the child to the specific longing parent the state is required to take some specific actions: it must manage an oversight system for adoptions, domestic or international, in order to assure the best interest of children, for example. I will discuss the case of biological children as it is common enough to pose a challenge to a general policy.} In the majority of cases, these children will become birthright members of the state. Individuals, then, hold the power to introduce new members into society at their will by creating children. This power is usually qualified neither by the number, nor the identity, nor the character of the new members. In this way, liberal states privatize some of their control over shaping the political body.

I believe that bringing in foreign family members is equal, from the point of view of society, to the introduction of new children. Society loses the opportunity to manage the exact number and identity of newcomers equally in both cases, and it confers some of its powers on individuals in the name of the right to family life equally in both cases. In this way the opportunity costs that are embodied in the right to form a family of one’s choice are similar to the opportunity costs embodied in the right to family-class immigration. Indeed, given relatively small number of cross-border families compared with the number of domestic families who decide to create children, the latter poses much greater total opportunity costs than the former. States’ argument that their right to shape their own membership would be uniquely harmed by a recognized right to family-class immigration is weakened.

Three objections to the analogy between children and foreign family-members can be raised. The first objection maintains that, to the extent that parents are allowed to introduce an indefinite number of children into society, this right is not rooted in their interest in family life, but rather in the interest of mothers in bodily integrity. The second objection is more fundamental still. It maintains that the inclusion of certain children in the political membership as a matter of birthright is not justified by their parents’ right to family life, but rather by the children’s natural relationship with the state. So it is either the interest of society itself that informs the rules of belonging, or it is the rights of the children, not of their parents, to political membership. I will consider these two objections in turn.

The right of a mother to bodily integrity cannot account for a rule according to which the mother’s child will be awarded membership in the mother’s society. There are methods to preserve the mother’s right to bodily integrity and still preserve society’s monopoly over political membership. We have a concrete example of a case in which a mother’s children are not automatically awarded membership in the society in question. China’s child control policy is not executed by means that intervene with women’s bodies. Instead, children who are brought to life outside their parents’ allotted quota are refused official recognition unless a hefty fine is paid by the parents.\footnote{Nathan Vanderklippe, “The Ghost Children of China,” The Globe and Mail, March 13, 2015, https://www.theglobeandmail.com/news/world/the-ghost-children-in-the-wake-of-chinas-one-child-policy-a-generation-}
While the right of a woman over her body will not be affected by the Chinese policy, the woman’s right to family life would. The refusal to formally recognise the child will hinder the family life in that it will make it more difficult to perform the different activities through which family members take care of one another and share their lives. For example, legal custody over children, authority to make education and health decisions, legal recognition of the rights of family members over shared property, guardianship of the adult child over aging and needy parents, are all necessary for family members to exercise their family life. Insofar as we are opposed to a policy like the Chinese child control and would object to the implementation of such a policy in our own societies, our objections cannot rely on the right to bodily integrity of the parents, but must hinge instead on the parents’ and children’s interests in family life. Bodily integrity only requires that the state not intervene in mothers’ bodies either to impregnate them or to stop reproduction. But the status of the child once born and her relationship to the state of her birth are not guided by the concern for bodily integrity. It is the interest in family life that justifies our current policies, in which parents are unrestricted in introducing new political members of the quantity and identity of their control.

According to the second objection, the inclusion of children in society is not justified by the right to family life of their parents but by the interests of society. Two distinct objections can be contained in this claim. The first objection claims that it is not the interests of parents in family life that justify the inclusion of their children in society, but rather the interests of society more broadly. This objection points to the overall social utility in including the children of citizens and residents in society. The second objection is more focused. It attends to society’s specific interest in its perpetuation as a cultural unit, and claims that the inclusion of current members’ children in society’s membership is justified as a method of ensuring the society’s perpetuation.

The claim that it is social utility rather than parents’ rights that justifies children’s inclusion in society suffers from three potential flaws: it either masks the interests of parents in family life in the more general category of social utility, relies on inaccurate claims, or is disingenuous. First, the utility that parents gain from enjoying family life within their society with their children forms part of the general social utility. Those who believe that it is social utility, not the interest in family life, that justifies our present policies must show how admitting all of the children created by society’s members contributes to a narrow calculation of social utility that excludes the utility of family life, focusing instead on the pecuniary and other such advantages of such a policy. Until they do, we have reason to suspect that claims of social utility include, without admitting so, the utility gained from family life.

The claim that children offer social utility is also inaccurate in another sense. The claim is never backed with an evaluation of the utility offered by the specific children included in society, and it is never accompanied by evidence that the children currently included in society are the group offering the most utility to society. We could think of a competitive scheme for the inclusion of children in society according to which children will be selected by merit: their abilities, intelligence, prospects, health, and so forth would be assessed, and only those children with the greatest promise would be inducted into our society. It seems very likely that such a scheme would better promote narrow social utility than our present system, once we have set aside the basic interest in family life. Unless we can show that

19. There are intricacies here that have to do with the different possible birthright rules: *jus soli*, *jus sanguinis* and hybrid methods. Under each system it is different groups of children who are considered birthright citizens. Only in pure *jus sanguinis* systems there is a complete match between the citizenship status of parents and the birthrights of children. But in all systems there is a relation between the status of parents and that of children (even if as weak as physical presence). So for the purpose of the debate here it is unnecessary to go into these intricacies.
our present system better promotes social utility, without smuggling the utility derived from the basic interest in family life into our calculations of social utility, we cannot assume that the current rules of inclusion best promote social utility. And insofar as we would object to such a meritocratic scheme for determining membership in our society, our objections cannot rely exclusively on social utility, and must be based at least in part on a recognition of the interest in family life.

Relatedly, the claim for social utility is disingenuous. Given that the claim is inaccurate, in that it is not backed by evidence to show social utility, the claim likely rests on proxies and assumptions. The leading assumption is that children of certain adults—children of citizens or children of residents, or a combination of the two—offer the greatest benefits to society. But this assumption internalizes the idea that their belonging to society, their benefit to it, comes from the fact that they are “our children”, children born to current members or residents. The thought process that leads to our current membership rules is not motivated by social utility, then, but by the interests of parents.

The objection that contends that rules of inclusion are justified by society’s specific interest in its perpetuation—that is, in the perpetuation of the society’s culture, way of life, mores, and so forth—is similarly inaccurate and disingenuous. The assumption that “children born to us” or “children born here” are “like us” is only superficially true. They may carry resemblance to us, may be brought up in similar terrain, but what else do these children carry that makes them like us? Besides the idea that the blood is the same, can we offer any evidence that, generation after generation, societies stay the same? We know that different generations develop different ways of life, different values, and different interests. They change the face of their society according to the values in vogue during their lifetime. So a relation of blood or territory does not reproduce culture.

Similarly to the claim about social utility, the claim about society’s perpetuation is not supported by evidence that the current rules of inclusion best promote that perpetuation. We could think of a competitive model of inclusion that would choose new members according to their social values, culture, and so forth. Given that other societies produce some children who fit our cultural values well, and that our own society produces some children who fit our cultural values poorly, this model would better promote the perpetuation of our society in a cultural and social sense; it would simply not perpetuate the blood line of our society. So if our concern were truly to perpetuate the culture of our society, we would likely not select our current policies.

According to the third objection, the inclusion of children in society is not justified by the right to family life of their parents but by the rights of the children to citizenship. It claims that children have a right to inclusion in a society, and that the best candidate society is that of their parents. This objection is also flawed. Assuming that the premise is correct, and everyone has a right to inclusion in at least one political society on earth (a presumption that is fair, I believe, given our global legal regime in which rights and powers are attached to political membership), we should still consider how children gain a claim against a particular political society. That our rules of inclusion give the children birthright in their parents’ society must be motivated at least in part by children’s interest in, and right to, family life with their parents, if not by the interests of parents. Otherwise, we could have distributed children in accordance with other values and principles of justice; for instance, we could distribute children to different countries based on a consideration of the wealth of the different countries and the values of welfarism, egalitarianism, or prioritarianism, sending children with expensive medical conditions to wealthy countries and particularly fit children to poorer countries, for instance. Without appealing to the interest of children or parents to family life, we would lack any justification for anything resembling
the status quo, even if we believed that each child ought to have political membership somewhere.

The failure of the objections points to the conclusion that the inclusion of children in their parent’s society is motivated by the interest in family life. It thus serves as an appropriate analogy to the case of the right to family-class immigration, in which an individual holds the power to introduce a stranger into the state based on the individual’s right to family life.

3.3 Right-Holders and Duty-Holders

The kind of right to family-class immigration that I defend in this thesis, and have defended in this chapter so far, is a right held by the local, or insider, family member against her state. More specifically, citizens and permanent residents have the right, I argue, to bring into their states as immigrants their foreign family members. In this section I argue that the justification for the obligation of the state to admit foreign family members lies in the obligation of the state towards its own member, not towards the foreign family member. The foreigner enjoys a derivative privilege in the form of access to the state, but the foreigner does not hold an independent right against the state.

My conception of the right to family-class immigration is not the only conceivable form of such a right. An alternative is a right held by all humans, irrespective of their legal relationship with the state in which they are looking to reunite with family members. Such an argument can provide any number of justifications for the duty held by a specific state towards an individual who is not a citizen or a resident of that state. In this section I will evaluate these two approaches. I will consider the human right argument that sees the right as held by any family member worldwide, and the duty as “catching” a specific state by the criteria of authority or choice. I will then explain in more detail the civil right argument that catches only states of which at least one family member is a member, that is, a permanent resident or a citizen. I will conclude by arguing in favour of the civil right to family-class immigration.

3.3.1 A Human Right

Iseult Honohan takes important steps towards developing what she calls a universalist argument for a right to family reunification.20 I will refer to such an account as she is presenting as the human right account of the right to family-class immigration. First, Honohan assumes that entry and residency in a state are matters of justice. Then she notes, citing a common understanding, that “few things are more important” than family life.21 From these premises she concludes that any attempt by the state to limit family reunification must be justified. Since both immigration admissions and family life are matters of justice for her, not all reasons to limit family reunification would be justified.22

Honohan starts her normative evaluation with the fact that many jurisdictions recognise a variety of claims to family reunification.23 She says:

The importance such instruments attribute to family life may be best understood as based on a fundamental human interest in and need for what is sometimes called affiliation... in establishing and living in intimate relationships of affection and support that entail giving

\[20\] Honohan, “Reconsidering the Claim to Family Reunification in Migration,” 771–772.
\[21\] ibid., 771, quoting Gibney at 243. Gibney provides a formal definition of the family, an approach against which I have argued in Chapter 1, but for the purposes of the point regarding the importance of the family this is immaterial.
\[22\] ibid., 770.
\[23\] ibid., 771.
and receiving care in those aspects of our lives that involve necessary dependence, including childhood and old age.\textsuperscript{24}

To that she adds:

While there are other kinds of important affiliation, the family is distinguished by its intimacy and long-term personal commitment that characteristically involve its members living together.

...\textsuperscript{25}

The reason a state may be considered to have \textit{prima facie} obligation to admit family members lies in the importance of such relationships, in which members have agent-specific obligations of care to one another. The right to family life may be thought of as a universal right to discharge special obligations, which recognizes the value of particular relations.

In her words here, Honohan considers the right to family life to be based on universal human interests. She thus sees the right-holders as all family members, potentially all humans.

Considering who may be the correlative duty-holder, Honohan says:

\begin{quote}
[I]t is not clear that there are good reasons for a \textit{special} obligation among \textit{citizens} based on national or state membership' to admit their family members. Instead we may see it as an obligation on the state to those under its authority, whose family life it obstructs or facilitates through its immigration laws.\textsuperscript{26}
\end{quote}

And

Family reunification is justified not in terms of a partial preference towards fellow citizens (and residents), but as a universal obligation (to insiders and outsiders in different ways) to allow people to establish and maintain intimate relationships and practices of affection and support. It stems from a more basic obligation to those subject to the authority of the state, whose need for family life we are in a unique position to support.\textsuperscript{27}

For Honohan, the correlative duty to allow familial relationships is held by \textit{everyone}, or by any state, and more specifically by those in a position to assist family members to discharge their special obligations. The right is also pre-political; it does not require the existence of a state for the right to arise and for its correlative duties to apply to others. In fact, Honohan reverses the default assumption: individuals hold the right naturally, and states enter the field later on. When states exercise authority on immigration matters, they are in the position to interfere with family life. When they assume this power, they need to limit it according to the natural right of individuals. Every state that exercises authority over a specific individual must yield to the individual’s right to family life. By allowing family

\begin{footnotes}
\item[25] Honohan, “Reconsidering the Claim to Family Reunification in Migration,” 771–772. Honohan’s formulation shares many of the components of mine, but also differs significantly. Honohan’s more \textit{statistical}, mine more \textit{abstract}, \textit{purely functional}. In this formulation, the right to family life is instrumental, aimed to achieve the discharge of obligations towards others. This formulation fits with my idea that we have an interest in protecting our opportunities to \textit{care for others}. This formulation also echoes thoughts regarding the state, morality, reciprocity.
\item[26] ibid., 774.
\item[27] ibid., 783.
\end{footnotes}
reunification the state does not provide a certain service, but rather does not exercise its power to control immigration.

It should be noted that although in her words above Honohan promotes the idea that the state exercising authority over an individual at the time is the state that holds the specific duty to allow reunification, the human right argument can use other criteria. The duty is held by “anyone in a position to assist,” a term that can be interpreted in a number of different ways. In fact, Honohan herself suggests another possible criterion: “In this case [in which the human right argument stands] it seems reasonable to think of this [the state of reunification] as at least equally a matter for the family to determine as the state.”

Under the human right argument, states can be under the specific obligation to reunite families based on a number of different relationships with a family member: the obligation could fall on the state exercising authority over the individual, or even on the individual’s choice of state.

The human right argument may seem attractive because it protects any family member worldwide, irrespective of her political status in different states. It may also seem attractive because the argument applies the duty to respect the right to a number of states equally, thus providing the family a number of alternatives for a place of reunification.

I find the human right account unpersuasive mostly because it seems unnecessary and artificial. If no family member has an independent right to settle—or continue living—in the country in which the family is asking to be reunited, but we nevertheless think that the family has the right to be reunited there, then our understanding of the right to family life entails also a right to settle in a foreign country. This aspect of the right to family-class immigration would need to be justified. An argument like the one I presented above, which draws an analogy between the situation of a citizen establishing a family domestically and the situation of a citizen establishing family life internationally, would not suffice to justify such an all-states-catching right to family reunification. Assuming that all family members hold the right of settlement in at least one country, why would it be necessary to argue for such a complex right to family life? I understand the need for access to countries able to help in cases where none of the family members have a safe country of citizenship. But creating an exception for these cases, and reviewing them as part of the main claim to asylum sounds like the reasonable solution to me. It seems to me that families at large would be protected well enough—indeed, I will claim shortly even better protected—by a rule that allows citizens and permanent residents to bring into their country their foreign family members.

But the main difficulty with the human right argument is that I think it is likely to be politically unpopular with states and hard to enforce. As the human right effectively deepens the justified claims of foreigners against states, states are likely to try and avoid the wide responsibility to reunite families within their borders by limiting the access of foreigners to the area of their authority. In this way, the human right argument runs into the problem of enforcement.

The elsewhere approach, adopted by almost all jurisdictions, is the best illustration of the efforts states are making to resist even the right of citizens and permanent residents to family reunification within their state. While I advocate for the abolition of the elsewhere approach, I am hesitant to

29. We already see states trying to escape rights of refugees by avoiding contact with them. See Moria Paz on how states react to universalist duties to persons under their authority by adopting measures restricting the access of foreigners to their area of authority (Moria Paz, “Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls,” Berkeley Journal of International Law 34, no. 1 (2016)).
30. Especially pronounced in the European context, the elsewhere approach is actually prevalent amongst states, and many have invoked its basic argument in attempt to avoid admitting specific individuals. Essentially, states claim that when a family member is affiliated with another state, the family as a whole has an alternative option available for reunification.
expand states' duties, especially where I don’t find it useful to do so. By approaching the cross-border family through the relationship of a state with a family member who is a citizen or a permanent resident, I hope to be offering states the most persuasive argument from their perspective. And as a result, I hope to provide families with optimal protection as well. Given that I do not find the human right argument very persuasive from a theoretical perspective, I believe I provide family members with the most persuasive argument from their perspectives as well. For me, it is a most significant flaw that the human right argument is likely to be successfully resisted by states. As I believe that the civil right argument is more persuasive and effective, I present an argument for a civil right to family-class immigration.

3.3.2 A Civil Right

Many scholars of immigration agree that the right to family reunification is held against one's state of citizenship or legal permanent residence. The civil right argument is strong in that it identifies one state (or a very small set of states) that holds a unique duty towards one family member, and in that it provides the rationale of affinity for this conclusion, which is a strong one. I prefer the civil right argument because it provides strong reasons for states to respect their duty, and because it provides more security for families looking to be reunited. For states, the argument internalizes the prominent conception of the state’s realm of obligation. It simply reiterates the established notion that states are responsible for the wellbeing of their own members.

From the perspective of families, the argument is most successful for three reasons. Firstly, the argument provides a cross-border family with a clear path toward reunification in that it identifies which family member should apply for reunification in which state, and the exact laws and procedures each request will be subject to. In both political and legal terms, the identified state will find it harder to deny its unique responsibility toward the family, and the state’s own enforcement mechanisms will be open to the family member to hold it accountable to its duty, should state officials refuse to do so. Secondly, as citizens of at least one state themselves, thinking as legislators of their own communities, I believe that family members would be inclined to vote for the civil right view rather than the human right view. And indeed any citizen should, as she may find herself seeking family reunification. And lastly, because it provides better reasons for states to respect families’ rights, I believe that the civil right view ends up providing families with better protection.

My argument combines a principled critique of the human right account with a political-legal strategy. Both aspects are important, I believe. In terms of argumentation, when challenging an established political-legal reality, it is best to present a minimalist argument, one that requires the smallest adjustment to achieve its goals. It is also more productive to speak as much as possible in the language of your

31. See, e.g., Gibney, The Ethics and Politics of Asylum, 243; Carens, The Ethics of Immigration, 186 (“we must keep in mind that family reunification is primarily about the moral claims of membership. The state’s obligation to admit family members living elsewhere is derived not so much from the claims of those seeking to enter as the claims of those they seek to join: citizens or residents or others who have been admitted for an extended period.”); Lister, “Immigration, Association, and the Family,” 721 (see quote in text below); Miller, Strangers in Our Midst: The Political Philosophy of Immigration, 113 (“although there is indeed a human right to family life that everyone possesses, to turn this into a right to engage in family life in a specific place (the territory of State S), it needs to be coupled with a right on the part of at least one family member to reside there”).

32. Again, I accept the exception according to which persons who have no safe citizenship or residency states have a human right to settlement and family life the correlative duty of which is held by other countries.
strongest opponents. As it is sovereigntists who tend to object to a right to family-class immigration rather than cosmopolitans, the civil right argument is more fitting. But on a more basic level, my idea that the human right account is less persuasive rests on my own dissatisfaction with the argument. My theoretical critique thus supports my argumentative strategy.

A number of scholars have offered different accounts of civil rights to reunification in one state. In the rest of this section I want to present my specific argument for a civil right to family-class immigration and then to evaluate the best-developed competing civil-right accounts available in literature. In doing so I will explain where I disagree with them and what leads me to introduce my own account into this literature. The best developed examples of civil right arguments all highlight different considerations and promote different conclusions from the theory I offered in this chapter.

I believe that citizens and permanent residents hold the right to bring their foreigner family members to settle in the former’s state of citizenship or permanent residence. Considering first the rights of citizens, it is clear that citizens have a right to reside and freely act in their own country. As I showed, they also have a right to family life that is justified by the basic interests in reciprocal care and in sharing. This right extends also to the case where a citizen shares family life with a foreigner, as argued for in section 3.2. The commitment of the state to allow this is based on the established notion that states are responsible for the well-being of their own members—that state sovereignty is only justified to the extent that the state is promoting rather than hindering its members’ wellbeing (however such wellbeing in conceived).

I extend the right to family reunification within the state to permanent residents based on the prevalent legal understanding of the category of permanent residency itself and on the argument for the basic human need for family life presented in chapter 2. Legal permanent residents are immigrants that the state already admitted, and to whom it gave the license to live in the country indefinitely—under certain conditions—and with the view that they could one day become—having sufficed certain conditions—full political members: citizens. It is commonly agreed that some rights can be denied to permanent residents and be accorded to citizens only, such as the right to run or vote for political office, or the unconditional right to enter to and remain in the country.

But the right to family life cannot be one of these rights that are exclusive to citizens, I argue. Like the right to work, to study, to move about, and to legal protection, family life is necessary for on to establish permanently a decent life. The exclusive rights of citizenship cannot contain those rights which support basic human needs.

The position I argued for comes closest to that of Carens:

People clearly have a deep and vital interest in being able to live with their immediate family members. Peter Meilaender, who is generally a defender of the state’s discretionary control over immigration, argues that this control is rightly limited by the claims of family:

We are bound to our family members through a more richly complex web of relationships, a mixture of love and dependence, than we share with any other people. These relationships give rise to especially intense feelings of mutual affection and concern. To deprive someone of these relationships is to deprive him of his richest

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33. I discuss the map of immigration ethics theories in Chapter 4. Sovereigntists are those who argue that states’ sovereignty precludes the possibility that there exist rights to immigration except in the most outstanding circumstances, and insist that states have the right to choose their immigrants.

34. Lately we see some erosion of the rights of naturalized citizens as well, but these cases are beyond the scope of this thesis.
and most significant bonds with other human beings. That is something we should do only in rare circumstances.\(^{35}\)

Carens explains how this individual interest in family life is protected by a civil right in a system of immigration ethics:

In addition to their interest in family life, people also have a deep and vital interest in being able to continue living in a society where they have settled and sunk roots. Of course, people sometimes have good reasons of their own to leave and sometimes face circumstances that require them to make painful choices. If two people from different countries fall in love, for instance, they cannot both live in their home countries and live together. So, people must be free to leave. But no one should be forced by the state to choose between home and family. Whatever the state's general interest in controlling immigration, that interest cannot plausibly be construed to require a complete ban on the admission of noncitizens and cannot normally be sufficient to justify restrictions on family reunification. The qualifier “normally” is necessary because even basic rights are rarely absolute, and the right to family reunification cannot be conceived as absolute. States do not have an obligation to admit people whom they regard as a threat to national security, for example, even if they are family members. But the right of people to live with their family clearly sets a moral limit to the state’s right simply to set its admissions policy as it chooses. Some special justification is needed to override the claim to family reunification, not merely the usual calculation of state interests.\(^{36}\)

In my theory of the right to bring in our foreign family members, I could be said to follow Carens’ three principles governing family-class immigration:

1. Family reunification is about the moral claims of insiders, not outsiders.

2. In addition to their interest in family life, people also have a deep and vital interest in being able to continue living in a society where they have settled and sunk roots.

3. No one should be forced by the state to choose between home and family.\(^{37}\)

As compared to Carens’ account, my approach provides more details on the justifications for the right to family life (justifications for protecting the human interest in family life) and on policy implications.\(^{38}\)

Matthew Lister defends a right to family reunification within a system of closed borders using the idea of freedom of association, arguing with respect to the rights of citizens:

[T]his right to bring in non-citizen family members is based on the fundamental right to form intimate relationships of one’s choosing. This right is an essential one for personal autonomy and in the development and exercise of what Rawls calls the moral powers’, and as such cannot, at least in any serious way, be traded off for gains in utility or to satisfy the preferences of the majority. This right is, at least in part, a special sub-branch of the freedom of association.\(^{39}\)

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36. ibid.
38. See Chapter 5.
39. Lister, “Immigration, Association, and the Family,” 721. See also: “I shall argue that the way to think about family-based immigration is to look at it primarily through the perspective of the current citizen, rather than the would-be immigrant” (720).
Lister’s right protects personal associations because they contribute to autonomy and to “moral powers”. While both Lister and I identify a basic interest in personal relationships, we define these relationships differently and we disagree about what such basic interests would be. And I ultimately care about wellbeing, while Lister cares about liberty.

Lister claims that his account can answer two fundamental objections. According to the first challenge, citizens’ freedom of association is what justifies states’ discretion to choose their immigrants. The same consideration cannot, thus, support the opposite conclusion that individuals can coerce the state to accept new members. This objection claims that freedom of association, and more fundamentally personal autonomy, would actually be served if the state’s right to choose immigrants prevails. The second objection notes that if Lister’s argument (that freedom of association of individuals overcomes the state’s discretion to control its immigration) is successful, the argument might prove too strong, so as to entail that any associative desire of citizens, and not only the intimate association with family members, overcomes the state’s discretion to the effect that the state’s discretion is annulled. Lister claims that his account can show what is special about family association so that it can overcome the state’s discretion, but can also distinguish family association from other associations which cannot overcome this discretion.40

Following Rawls, Lister claims that association with others helps us to develop our moral powers because “by interacting with others we learn to temper our wants and desires, to consider the good of others, and to interact in mutually beneficial ways.”41 He agrees that this description applies to all associations, and his only defence of the claim that the familial association is special amongst associations rests on the assertion that this development of justice faculties “is perhaps especially salient in the family.”42

Having established his argument for the privileged status of the familial association, Lister argues that nationals’ freedom of association, which serves as the justification for closed borders in the first place,43 is unable to limit individuals’ freedom to form familial associations because

given what we take to be important about freedom of association, in a conflict between the largely anonymous association of the state and the highly intimate association of the family, the more intimate association deserves the greater deference here.44

Finally, Lister finds that his argument is not too wide and does not apply to a variety of other intimate associations (such as friends, for example) because such associations “do not, by their nature, require close and intimate contact in perpetuity.”45

Lister’s argument suffers, in my view, from two weaknesses: it is both too narrow and too broad for his purposes. First, the argument in favour of the privileged status of the family is instrumental: the special status is given to the family in order to achieve another goal, in this case the development of moral powers. An instrumental account only stands as long as the ultimate goal is achieved. Ultimately, the
account is too narrow for its purpose, because it will only protect the families that will bring about the development of moral powers, and—to my mind—not all good families will. The argument is contingent on the perceived ability of the family to bring about the development of moral powers. Lister is aware of the problem that will be posed by the practices of specific families, which will inevitably be shown to fail in bringing about this quality. To this problem Lister does not offer a solution but merely says.

Of course, there is no guarantee that the family, or any association, will be well-used and lead to virtue as opposed to vice.\(^{46}\) That this is so is one of the dangers people living in a free society must face, and does not change the fact that these associations are essential for moral development.\(^{47}\)

It may be that this answer is sufficient to deal with the problem of the odd family failing to meet the standard of its category. But is it accurate or proper to define, even in theory, the family as the category of associations that will bring about the development of moral powers? What we feel in intimate relationships is care, while justice is the virtue we require exactly where care is absent.\(^{48}\) It seems to me that we develop moral powers in social circumstances in which we are equals of our peers, such as in school, or as members of the public.

Furthermore, Lister’s own argument for this point needs empirical evidence. Accepting freedom of association of nationals as the initial justification for closed borders, and having just defined the right to family reunification based on the same freedom, Lister moves to argue that freedom of association cannot serve to restrict family-based immigration. He claims that “the more intimate an organization, the more important it is that the members be able to determine the content of the group if these organizations are to be able to... allow for the development of the moral powers.”\(^{49}\) The claim is still missing the evidence that families in fact contribute to the development of moral powers. And the right of any particular family will stay contingent on the family’s ability to achieve the development of moral powers.

At the same time, I can think of other associations that would do better at developing our moral powers. I think it is correct to say that, compared to other associations like schools, the familial association is not best designed for the development of our moral powers. For example, when we go to school as children, we are learning to interact in an environment in which no one considers us entitled to favourable treatment. We are all subject to an equal set of rules and expectations, and we create personal relationships within this framework. Don’t we learn “to temper our wants and desires, to consider the good of others, and to interact in mutually beneficial ways” better in such a levelled playing field? Parents as ‘judges’ are biased towards their children, while teachers and principals as ‘judges’ are neutral. Furthermore, schools rely on more formal and rigid rules, while parents can (and should) be much more flexible and responsive to particular aspects of each circumstance and child. Finally, in schools I think children learn much more about injustice, as the ratio between teachers and students is quite different from that in the family, and often misdeeds will be unobserved. For this reason I question Lister’s assertion that the family is “perhaps especially” capable of bringing about the moral development of children. Until the suspicion I raised is removed, Lister’s argument is not successful in demonstrating the exceptional value of the family.

\(^{46}\) Lister’s language here exposes his virtue-ethics position. His account of the right to family reunification will fit well within the capabilities approach.

\(^{47}\) Lister, “Immigration, Association, and the Family,” 723.


Lister’s account is also too narrow in another sense. The definition of “the family” that he is willing to settle on seems unjustifiably restrictive. As Caleb Yong notes, Lister refers to an “‘overlapping consensus’ or ‘common core’ among otherwise divergent conceptions of the family that recognizes two adult partners and their dependent children as constituting a family unit.”

Lister is happy to adopt this conventional definition. He further suggests that, beyond this core definition of a family, the right to family immigration in every state will be defined by the prevalent conception of the family in that state. But the prevalent conception of the family in a specific society at a specific time does not necessarily correspond to the kinds of relationships that contribute to the development of the moral powers of their participants. The adoption of the prevalent conception may thus unjustifiably restrict the protection afforded by the right. Further, it will restrict this protection based on the conception of the good adopted by the majority of the concerned society, contrary to liberal demands of individual freedom and neutrality towards different conceptions of the good.

The second problem with Lister’s account is that it is also too broad: the justifications it advances for the privileged status of the family apply also to other associations, and it is thus unsuccessful in distinguishing what is unique and deserving about the family, contrary to Lister’s claim. Indeed, it may support the power of all citizens’ associative desires to overcome the discretion of the state in selecting its immigrants. Lister attempts to save this argument by claiming that “[a]s a general rule, the more intimate and closely-knit an association is, the fewer restrictions the state may put on the association.”

And “the family is the most intimate of all associations.” Invoking the general rule implies that what is unique about the family is that the close associative ties that it contains are more capable of bringing about moral development, and that the power of moral development lies in the degree of intimacy of association. Again, do we have good evidence that families help us develop our moral powers? And that they do so better than other types of associations?

Contributing to my concern that his account is too broad is the fact that Lister does not discuss in depth the quality of intimacy, which is so central to his account. Even if we accept the idea that intimacy is a good qualifier for associations meriting protection in the form of rights, Lister’s mere proclamation that “the family is the most intimate of all associations” is unsatisfactory as an answer to the question why, amongst many different types of associations, only family deserves the protection Lister grants it. Caleb Yong shares my concern. He finds it a significant lacuna that Lister’s argument does not provide criteria to determine which associations are intimate to a degree that merits protection. Is it the size of the association, its function (care and companionship versus economic interests, for example), the frequency of contact between participants, personal familiarity, or a combination of any of these criteria that does the conceptual work in his account? In the absence of criteria for intimacy it is impossible to determine which family ties, and which other associations, are covered by Lister’s right.

One claim of Lister’s that I do find persuasive is that “the right to free association, perhaps especially intimate association, is a pre-condition of good lives.” Lister relates this claim to his main instrumental argument about the role of association in developing moral powers, claiming that “fre-

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51. ibid., 742–743.
54. ibid., 726.
dom of association] is essential if people are to be able to exercise their ability to form a conception of the good.\textsuperscript{57} But I believe the claim to have independent appeal. In my own account of the right to family life, I am attempting to get as close as possible to defending the good life. My functional, flexible, neutral, definition and the basic interests on which I found my argument are aimed to protect the unique contribution of the family to living a good life. The relative advantage of my argument is that it does not require the reader to adhere to a specific liberal argument, while Lister’s account requires that the reader adopt the Rawlsian perspective.

Laura Ferracioli presents a strong challenge to my argument. She believes that the focus of immigration preference programs on familial relationships violates the liberal commitment to state neutrality towards different conceptions of the good.\textsuperscript{58} I claimed that my argument was neutral. But Ferracioli says that the justification for the exceptional favourable treatment of the family for immigration purposes relies on the assumption that familial relationships are more valuable than other relationships. The flaw lies, according to Ferracioli, in the fact that the argument is not that familial relationships are more instrumentally valuable, in that they contribute more than other relationships to the well-being of participants, or that participants themselves subjectively value familial relationships more than they do other kinds. Rather, the argument on which family preference programs are founded is that familial relationships are objectively and non-instrumentally, in and of themselves, valuable in a way that other kinds of relationships are not. To correct this flaw, Ferracioli offers an account of a right to preference in immigration that is instead focused on protecting “irreplaceable relationships” that are actually valued by citizens and by society at large. These relationships include, but are not limited to, familial relationships.\textsuperscript{59}

Ferracioli accepts the civil right view according to which the justification for the preference for foreign family members in immigration lies in the moral claims of members towards their states rather than in the claims of foreigners.\textsuperscript{60} She also accepts that immigration has some social costs that cannot be fully internalized by the immigrant, and would be borne by society at large. For this reason, she accepts that the mere personal preference for a relationship by a member of society cannot in itself create an obligation for society to support the relationship by allowing immigration. Another condition is required for this obligation to arise, which is that the relationship in question is “taken to be valuable by society at large.”\textsuperscript{61}

Caleb Yong criticises this necessary condition introduced by Ferracioli, noting that if it requires consensus it is bound to find no relationship is protected (because in a free society there would be disagreement on the issue), and that if it requires the consent of the majority “it holds individual citizens and residents hostage to the tyranny of the majority.”\textsuperscript{62} My concern is that this condition pulls Ferracioli’s argument back into the pitfall she tried to avoid in that it imposes an objective value-ridden condition on the protection of relationships, in violation of the liberal requirement of state neutrality towards different conceptions of the good. I agree with Yong that this condition makes Ferracioli’s account “objectionably illiberal.”\textsuperscript{63}

My disagreement with Ferracioli, as well as with Yong, whose account I discuss next, concerns the
value of family life. It is also how I escape Ferracioli’s critique of the arguments underlying current family immigration programs. I offer a reason to believe that familial relationships have unique value that merits treating them differently than other relationships. The value I point to is instrumental, so that preference to these relationships does not violate the neutrality requirement: families are instrumental to individual wellbeing. Ferracioli applies her account to relationships “valued by citizens”. But valued in what way? How deeply valued? And valued for what reason? My account explains why people value familial relationships in particular. It suggests that they value them deeply because of the basic interests these relationships promote. And it offers these unique reasons for valuing family relationships, reasons that are not met by other relationships.

Caleb Yong finds Ferracioli’s and Lister’s theories to be compelling but also to contain elements that violate their own liberal promises. He offers an alternative account that he believes escapes the flaws of these theories. His theory of preference in immigration—which actually is not limited to familial relationships at all—is composed of two parts: one attending to “dependent-carer” relationships, the other to “intimate caring relationships.” With regards to dependent-carer relationships, Yong argues that non-citizen dependents who rely on the care of citizens and residents have a claim based on human rights and should thus be allowed to immigrate. With regards to intimate caring relationships, Yong argues that states should support their own members in their caring relationships, including by allowing foreign parties of these relationships to immigrate. His account is thus not purely a human right account nor a civil right account but a mixed account, as in each part he relies on a different argument. As I will say shortly, I find this mix of theoretical commitments to actually harm the argument, but I will first present it in more detail.

In the first part of his account, Yong attends to dependent-carer relationships. He claims that “the right of non-citizen dependents to immigrate in order to join their citizen or resident carers can be grounded in the claims of the dependents: it is a matter of global rather than social justice.” This is so because “[a]mong the fundamental interests that human rights protect are interests that an individual has when she is dependent... due to the incapacitation or underdevelopment of her faculties.” Yong identifies childhood as one distinct period of dependency. Children require adult care to meet their material needs and they also need what Yong calls “attitudinal care”—“an affective stance on the art of the carer”—for their emotional well-being and their moral development, which Yong finds is a condition for living a minimally good life. “Hence, children have a fundamental interest in adequately developing their capacities for personal autonomy and for a sense of justice.”

Physical proximity and constant connection are necessary for the provision of material and attitudinal care that children require, and since fundamental interests would be undermined if the caring relationship is disturbed, “each child has a human right not to have these relationships disrupted by social institutions and public policies including immigration restrictions.”

Yong’s account applies also to cases of dependent adults. For dependent adults their relationship with a carer does not serve developmental interests but rather interests in immediate well-being. And although material care can be provided by professionals, the personal relationship with a caregiver produces better material care—for reasons of knowledge of needs and commitment to fulfilling them—

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64. Yong, “Caring Relationships and Family Migration Schemes.” (The titles of the two kinds of relationships covered by his theory first appear at 64).
65. ibid., 64.
66. ibid., 72. (Emphasis in original).
67. ibid., 73.
68. ibid., 74.
and also fulfills the dependent’s fundamental interest in psychological well-being. Intimate relationships with a caregiver thus provide the dependent with material care and attitudinal care. For these reasons, adult dependents have a human right that their relationship with carers not be disrupted, including by immigration policies.

Yong notes that the account of dependent-carer relationships he advances is restrictive in the sense that it requires states to allow immigration of dependents only when non-admittance would harm dependents in a manner so severe that their human right is violated. So if good-enough care can be provided to dependents in their own country, or by someone other than the citizen or resident carer, the requirement of a state to admit does not arise. Yong’s account is on the other hand expansive. It is not limited to familial relationships in the biological or legal sense, and it is very stringent: as it is based on a human right it cannot be easily overridden by competing societal considerations.

In the second part of his account, Yong attends to intimate caring relationships between independent adults. On these Yong says, somewhat similarly to Lister and for the same reasons, that “an independent adult must be able to freely form and maintain intimate caring relationships, because such relationships are essential preconditions for individuals to fully develop and exercise their moral powers for personal autonomy and a sense of justice.” For these reasons “citizens and residents have a basic right of social justice to institutional support for their intimate caring relationships” including though immigration policies. Physical proximity is “normally necessary” to maintain these relationships, so that immigration rules that would prevent it would be unjust.

His account justifies existing family immigration policies targeting partners but goes beyond them to include all non-citizen independent adults participating in intimate caring relationships with member of the state such as “close friendships, relationships between siblings or other relatives, and various adult care networks.” In this sense his account is not one of family immigration but of care immigration.

Yong says his account provides reasons to resist suggestions like Macedo’s and Collier’s, motivated by concerns for economic efficiency, to limit family immigration numbers in exchange of larger admissions of high-skills migrants. But he supports Gibney’s idea that the definition of the family should be limited to partners and dependent children so that more room is left in immigration intakes for refugees.

Yong acknowledges the critique according to which

\[\text{State } P\text{'s laws restricting immigration do not necessarily prevent a citizen of } P \text{ form living in close proximity to a citizen of state } Q \text{ with whom she shares an intimate caring relationship. The participants in this relationship might be able to live together in the territory of } Q, \text{ or even in the territory of a third state; at most, immigration restrictions prevent the citizen of}\]

70. ibid., 75–76.
71. ibid., 76.
72. ibid., 77. For his discussion of the way in which intimate caring relationships develop these capabilities, see ibid., 77–78. As his account is quite similar to Lister’s, described above, I do not repeat it here.
73. ibid., 78.
74. ibid.
75. ibid., 79.
77. In The Ethics and Politics of Asylum, Matthew Gibney claims that since residence in developed states is a scarce resource, the ranking of the claims made by different kinds of would-be immigrants—in particular refugees and family members—is a question of justice. Gibney suggests to give refugees at least equal consideration to that enjoyed by economic migrants and foreign family members of locals. He also suggests that different priority should be given to different family members, distinguishing between immediate and extended families. (Gibney, The Ethics and Politics of Asylum, 232–234).
Chapter 3. On the Right to Bring in Our Foreign Family Members

P from living in close proximity to the citizen of Q on the territory of P. It does not seem, then, that immigration restrictions strictly disrupt citizens and residents’ intimate caring relationships.78

Yong solves this problem by pointing not only to the state’s commitment to support its member’s intimate caring relationships, but also to members’ rights to live within the territory of their own state, if they so choose, similar to Carens.79

I find Yong’s account unpersuasive for the following reasons. First, if in the case of dependents, it is the interests of the foreigner that are being protected by a human right, why do these dependents have to be related to citizens and residents? Why does it not apply to all dependant people under the state’s control? Second, is physical proximity for perpetuity necessary for every intimate caring relationship? Cannot some relationships of this kind flourish by way of visits? Constant communication?

But most importantly, I am confused by the two different accounts of rights. Why is there a difference in the kind of rights? Why do independent adults have a more limited civil right to their relationships and dependents have a human right? What is the qualifying criterion? Depth of need? Dependency itself? Well-being? I feel that some important details are missing from Yong’s account. And the coexistence of the two kinds of rights poses a real challenge to Yong’s account, I believe, as it is unclear what the state’s primary responsibility is. Is it to secure the rights of its members, or human rights? It seems to me that the two normative commitments at the foundation of each rights are competing, so it is hard for me to see how, together, they make a coherent theory.

3.4 Conclusion

In this chapter, building on the argument for the right to family life presented in chapter 2, I argued for a right to family-class immigration: the right of a citizen or a permanent resident to bring into their state a foreign family member. I argued that the right to family-class immigration does not present uniquely burdensome duties, and that therefore we should accept this aspect of the right to family life similarly to our acceptance of other aspects of that right. The right to family-class immigration is no more burdensome than the right of parents to introduce into society as many children as they chose, or than the right of families not to have a family member deported, so the objection that a right to family-class immigration is excessively burdensome fails.

The argument I presented takes a distinct approach to family reunification, according to which the right is held by a member of a state against her state of membership. The foreign family member enjoys a derivative privilege but does not hold a right against the receiving state. I presented the two routes towards a right to family reunification—the human right and the civil right views, and argued in favour of a civil right for being robust and desirable from both the perspective of the receiving state and of the family in need of reunification. Finally, I explored competing civil right views, presented by Carens, Lister, Ferracioli, and Yong, and argued with respect to all of them that my argument requires fewer normative assumptions, and is thus preferable. In the next chapters I will explain how my argument fits within the debate over the right of states to control immigration, and how the argument yields important policy conclusions.

Chapter 4

The Argument in Context: Citizenship and Immigration Ethics

4.1 Introduction

In the last two chapters, I have been exploring the question of how a state should respond to a plea by a family composed of a local and a foreigner to allow the foreigner to settle within the state borders so that the family can exercise family life. In the last chapter I advanced the view that the state is obliged to its citizen or permanent resident to admit her foreign family member, under most circumstances. According to this view, then, the answer to the question leading the thesis turns on the obligations of the state towards its own members, or on the particular duties that co-members have toward one another. The right of citizens and permanent residents to bring in their foreign family members, I argued, forms part of their right to family life (explored in chapter 2), which serves their basic human interests in care and in sharing their lives with others. A liberal state is committed, based on liberal principles, to respecting its members’ right to family life, including the cross-border aspect of this right: the right to family reunification.

So far I made an effort to demonstrate that we can find a conceptually satisfactory solution to the plight of cross-border families by examining the effect of the right to family life. In this chapter, I will consider the other body of literature that is relevant for the thesis’s leading question: the ethics of citizenship and immigration. From this angle, my argument is that, even if states enjoy a general prerogative to control immigration—an aspect of the problem that I will now turn to analyze—their members’ right to family life shapes this prerogative and results in a general obligation to admit foreign family members as immigrants. The right to family life of its individual members has the effect of limiting the state’s discretion with regards to its immigration or membership policies.

Within the immigration ethics literature the question of family-class immigration is mostly ignored. As seen in Chapter 1, the issue of family-class immigration has been considered in policy terms, with different writers interested in specific policies, in equal access to family reunification, and in the human impact of policies. On the other hand, some theoretical work, discussed in Chapter 3, has been dedicated specifically to the conceptual problem presented by cross-border families (or intimate relationships). Nevertheless, the current, central, influential, political theories of immigration ethics largely sidestep the issue, failing to realize that the plight of cross-border families presents a theoretical challenge to
which a theory aspiring to be comprehensive must attend. This chapter addresses this gap and suggests that the theory I promoted in the last two chapters can fill this gap in many different arguments about immigration ethics. This chapter takes a step back from the details of the theory of a right to family reunification so far developed to take account of the larger theoretical picture.

A second aim of the chapter is to argue for the benefits of the theory of family-class immigration that I present in this thesis in the context of the current political debate. My theory is compatible with a wide array of political-theory arguments, and most importantly with political-theory arguments according to which states (or peoples, political groups) enjoy a general prerogative—or a right—to control immigration. For the purpose of advancing legal reform, I will argue, such a theory is more useful. And in philosophical terms, it would be redundant to propose a theory in favour of a right to family-class immigration from within the school that believes that states do not have the right to control their own membership by imposing immigration controls. A viable philosophical argument answers its greatest critics. In the case of access of foreign family members, “regulated-borders” arguments pose the greatest objection.

The central debate in citizenship and immigration ethics and politics revolves around the question of which agent has the right to decide whether an individual can immigrate into a state.1 Does the state concerned hold the right to control immigration, to decide who is allowed in and who is not, and, if so, on what grounds does the state enjoy this power, and how expansive is its discretion? Or—contrarily—do individuals have a right to immigrate that corresponds with an obligation of states to open their borders and accept new members, and, if so, on what grounds and how expansive is this right? Various positions have been presented on this issue, and they move from positions attributing to states (or to otherwise defined political groups) very expansive discretion to decide their immigration policies, to positions arguing for a very strong individual right to be admitted. I refer to the former generally as “regulated-borders” arguments, and to the latter as “open-borders” arguments.2

In section 4.2 I will survey exemplary positions so as to paint a picture of the spectrum of views in the membership debate. The debate is very rich, not only in the number and variety of conclusions and supporting arguments, but also in the kinds of questions each argument attempts to answer—principled or result-oriented—in the kinds of evidence that arguments consider, and in the methods of argumentation that they employ. Different arguments also refer to different agents, some considering the discretion of states to control immigration while others speak of nations, peoples, other kinds of groups, or individuals. Some consider not only the position of receiving societies and incoming individuals, but also of sending countries.3 The arguments included in this survey are the dominant theories in the literature that are also, I find, the best articulations of distinct competing approaches in the field. I will try to boil down each position to its main principled arguments about rights and duties, so that it is easier to compare and contrast the different views. But I will also try to say a bit about the motivation for each argument, so that it can be appreciated in light of its author’s overall goal.

1. Two related but distinct questions have to do with (1) the ethics of birthright citizenship, namely what justice requires when it comes to the automatic inclusion of individuals in political communities, and (2) the justification for jurisdiction or control of a political group over a specific territory. For a discussion of the first, see, e.g., Ayelet Shachar, The Birthright Lottery: Citizenship and Global Inequality (Cambridge, Mass.: Harvard University Press, 2009). For a discussion of the second, see, e.g., Anna Stilz, “Why do States Have Territorial Rights?,” International Theory 1, no. 2 (2009): 185.

2. Following common terminology.

In section 4.3 I will demonstrate that the discussion of the claim of cross-borders families in the immigration ethics literature just surveyed is lacking. I will attend to what has been said in the literature: Carens’s full argument, and Miller’s and Walzer’s passing remarks. I will then suggest what other scholars could say about family-class immigration, given their arguments about access to political membership in general. Section 4.3 will thus demonstrate that there is a gap, and will prepare the ground for me to demonstrate what my argument contributes to the literature.

The overall claim motivating this chapter, and the thesis as a whole, is that, to be complete, a theory of immigration ethics must at least consider, if not answer, the question of families divided by state borders. The problem has the unique feature of an intimate relationship between the immigration candidate and a citizen or a permanent resident. Other migrants or refugees may have strong claims to a state of residence, but not necessarily to a specific state. Family relationship, on the other hand, is agreeably a very strong affiliation to a specific state. And it seems, at least of its face, that this unique feature may have normative consequences. What exactly are these consequences needs to be worked out, in coherence with the rest of the theory. Theorists of citizenship and immigration usually tend carefully to the claims of refugees and migrants of choice, but their accounts do not develop as completely their consequences for cases of family reunification.

But the flaw is even deeper than simple neglect to articulate every entailed detail of the theory because the normative consequences of the familial consideration are not self-evident or non-controversial. For the open-borders advocate, who finds family life valuable and the argument in favour of its protection across borders persuasive, there arises the secondary question of how the claim to family life should rank compared to other claims for entry (life and security of the person, political freedom, destitute, the pursuit of happiness, e. g.). For the regulated-borders advocate who finds family life valuable and the argument in favour of its protection across borders persuasive, the problem is one of principle. Self-governance views rest on the premise that, especially in matters of self-definition, the group makes decision as one body. But here we have a case of designing immigration policies, membership policies, in which some individuals make the decision on the admission of other individuals. This is exactly the result that regulated-borders scholars usually object to. They thus must explain why the familial affiliation gives individual citizens stronger claims than, for example, property rights.

In section 4.4 I will first demonstrate that my argument is compatible with most foundational arguments about access to immigration. I will then argue for the benefits of my argument in the context of the immigration ethics literature. I will do so by way of comparison with the best developed argument: Carens’s. Finally, I will demonstrate how the argument may help to complete different immigration-ethics theories. The regulated-borders side of the immigration debate in particular does not appropriately consider the question of family reunification, given how controversial the subject is within the view. Answering David Miller’s quick reference to the problem, I will offer advocates of self-governance on the matter of immigration a possible argument about family reunification that completes their theories of immigration ethics. Overall, the chapter presents the literature on immigration ethics, the contribution

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4. Even if we do not yet agree on who that specific state is, and even if there is more than one candidate dutiful state, the set of candidates is smaller than in the case of another immigrant or refugee, whose claim for a state of residency is not accompanied by a strong affiliation to a specific state. Family relationships are only one of a number of strong affiliations one could think of, and not necessarily the strongest of those. I only suggest that a family relationship is a very strong affiliation.

5. In section 4.2 below, I will review Carens’s argument that closed borders deny a farmer’s enjoyment of his property if he cannot invite a foreign labourer to work his land. Regulated-borders advocates who admit there is a right to family-class immigration should explain why an insider’s property right does not extend to the international context while an insider’s right to family life does.
that the arguments in previous chapters make to this literature, and the way that my arguments interact with the main arguments in the debate over immigration ethics.

4.2 Arguments about Justice in Membership Distribution

The question explored so far in the thesis—the rights of cross-border family members to be reunited in one state—combines two normatively relevant features: familial relations, and movement across state borders. So far, I have focused on the familial aspect of the problem, exploring the justifications for considering our interest in family life a right, and for extending this right also to cases where family members do not share the same political membership. I have advanced the claim that every family member’s state of citizenship or permanent residence is obliged to respect that family member’s right to family life, with the consequence of being generally obliged to admit her foreign family members as immigrants. In this chapter, I turn the focus to the immigration aspect of the problem.

My argument about the right to bring in our foreign family members rested on obligations of the state towards its members, and by anchoring the claim of the family to the citizen or resident family member took the position that the state is obliged first and foremost to its members, not to foreigners. The way the argument was constructed reveals the fact that the question of cross-border families represents one aspect of a more general theoretical debate concerning the ethics of immigration. In my argument, I presupposed the division of humanity to distinct political units—states—and argued for a specific set of rights and obligations that should correspond with individuals’ political relationships. Immigration ethics is the theoretical debate questioning the assumption of a divided humanity, and exploring the exact set of rights and obligations that individuals ought to hold against one another and to owe to one another, and the relationships between these and the personal and political ties between different individuals.

The question of the relationship between rights and obligations and political membership is a central one to moral and political philosophy. Justice in distribution concerns the distribution of rights and obligations, and later on, and accordingly, the distribution of social and material resources. So the question of distribution of membership and the meaning of membership is foundational for any discussion of justice in distribution. For this reason, many theorists are interested in the prior question of the nature of political membership, and they demand that we cannot speak about justice in distribution before we answer it. Michael Walzer famously stated in 1983 that “the first and most important distributive question” is how the group is constituted,6 and that “[a] theory of distributive justice begins, then, with an account of membership rights.”7 The distribution of political membership is, at least since then, one of the central questions of political theory, and the organising question of the ethics of citizenship and immigration.8

This section presents some of the central arguments from the literature: arguments in favour of bounded polities and their rights to exclude foreigners, and arguments in favour of a human right to

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7. ibid., 53.
political membership and the need to justify boundaries, exclusion, and their control. The review is not meant to be exhaustive but rather to present the central concerns that have guided theorists in developing their views, and to review in some detail key competing arguments. To highlight their points of disagreement, arguments are presented in two groups: arguments for open borders, and arguments for closed borders.

4.2.1 Arguments for Open-Borders

Carens and the argument from equality and liberty

Citizenship in Western liberal democracies is the modern equivalent of feudal privilege—an inherited status that greatly enhances one’s life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely.9

Starting with this provocative picture of the current system of bounded citizenship and control over migration, Carens proposes a “critical perspective” on the issue. His argument concerns the question of legitimacy and challenges the perception that citizens of Western countries are entitled to the life prospects that their democratic societies provide them, and are justified in protecting these by keeping foreigners out. He argues that foreigners enjoy—as a matter of justice—the freedom of movement into wealthy democratic political societies.

The main question that Carens investigates is that of what justice requires in principle.10 He makes explicit that his argument for open borders is not meant to be taken as a viable policy proposal to be implemented immediately.11 He recognizes the institutional and political obstacles facing the regime of open borders that he proposes, and does not purport to provide solutions to them. Furthermore, part of Carens’s argument applies to an ideal set of circumstances that would be realized in what he calls “a just world”. A just world will be one where global levels of inequality are significantly reduced. In such a world, Carens claims, justice requires an international order of open borders. This is not to say that his arguments in favour of open borders do not apply in our unjust world too. But in our world, some of them need to be adjusted to accommodate specific problems that occur specifically because of our current unjust circumstances of severe global inequality. So the arguments in favour of open borders may not have the overwhelming power that they do in a just world, but even in our own world they represent important steps towards the realization of justice.

The ideal aspect of his argument helps Carens to fend against the main resistance to the idea of open borders. As will be discussed below, when he discusses objections to open borders he often refers to the circumstances of a just world as the ones against which the considerations raised in these objections should be measured. And, more generally, the model of a just world helps him paint a less intimidating picture of the effect of open borders on Western communities, their way of life, their values and ideals. The prominent example has to do with the effect of open borders on the meaning of political membership itself. Many are concerned that a world of open borders necessarily means a world of dissolved political communities. They fear the fluidity and constant change that the concept can bring about. But Carens thinks that these concerns are exaggerated, in particular if we think of a just world:

11. ibid., 229, 296.
In defending open borders, I am not arguing for a world in which human beings move frequently from one political community to another, with no sense of home or belonging and no deep attachment to place or people. Political communities require relatively stable, intergenerational populations in order to function effectively over time. This requirement of intergenerational stability would be compatible with open borders, however, if the other requirements of justice were met.... Having open borders would not lead to mass migration, if the differences between political communities were as limited as justice requires.12

Carens argues for his ideal of open borders working from three premises: (a) that there is no natural social order and all political and social arrangements are the product of human choice, (b) that a moral evaluation of political arrangements must rest on the premise that all humans are of equal moral worth, and (c) that restrictions on human freedoms must be justified.13 His argument is thus aimed at challenging the legitimacy of current social institutions using the ideas of equality and freedom. The premises require that any distinction between individuals or restriction of individual freedom will be justified in principle to all those affected.14

These premises, Carens finds, support at least a prima facie case for open borders for three related reasons. First, immigration controls limit individuals’ freedom of movement, and freedom of movement is important both intrinsically—in and of itself—and instrumentally as a condition for other freedoms. Second, Carens finds that freedom of movement is “essential for equality of opportunity.”15 Third, “a commitment to equal moral worth entails some commitment to economic, social, and political equality, partly as a means of realizing equal freedom and equal opportunity and partly as a desirable end in itself.”16 At first glance, then, the argument claims the importance of both freedom and equality, and sees each as supporting the other in a manner that entangles them together and makes them inseparable. The argument also rests on two specific notions of equality. The first could be termed “substantive”, as it interprets the commitment to the equal moral worth of all humans as a commitment to some level of equality in social and economic outcomes. The second is the idea of “equality of opportunity”, which seems to fall short of substantive equality, but to require the provision of equal access to all sorts of resources (particularly health, education, labour markets). The relationship between the two concepts of equality is, at first glance, unclear.

As he goes into defending his argument, Carens separates the contribution of freedom of movement and of equality to the justification of open borders.17 When he explains the relationship between open borders and equality he also details a bit more what kinds of equality are more important to him. He considers the issue of equality by answering critics who question whether open borders would reduce global inequalities or in fact enhance them.

Kymlicka advances the critique that Carens overstates the contribution of freedom of movement to the reduction of global inequalities.18 The greatest factor in global inequalities is the conditions of living

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13. ibid., 226. Carens believes these premises are noncontroversial in that “they undergird the claim to moral legitimacy of every contemporary democratic regime” (ibid., 227).
14. ibid.
15. ibid.
16. ibid., 228.
17. See the section entitled “The Global Justice Challenge,” in which Carens focuses on the relationship between open borders and equality (ibid., 233–236), and the section entitled “Open Borders and Human Freedom,” focusing on the relationship between open borders and liberty (ibid., 236–237).
in poor countries of the world. Open borders can do little to change the life prospects of the worst-off individuals, as they are the least likely to be able to take advantage of open borders to better their lives. At the same time, arguing for global freedom of movement and open borders calls attention away from the need to improve the living conditions of the worst off in the poorest countries. According to this objection, from a global justice perspective, the first priority and the primary moral requirement is to redistribute resources to poor countries and poor people and so improve their living conditions in their places of origin. Carens agrees that reducing international inequalities is of higher moral priority than opening borders. But, unlike his critics, he does not see global redistribution and open borders as conflicting principles, and he advocates for advancing both policies at the same time.

An even stronger objection contends that open borders could exacerbate global inequalities if they would create a flow of the most talented and economically productive members of poor nations into rich nations. Carens rejects the implications that rich nations are closing their borders as a service to poorer nations, or that this is the best way to help poorer nations. But more fundamentally he suggests that even if open borders would not solve the problem of global inequalities, they would create equality of opportunity, which is an important moral goal in itself.

His responses to these equality-based objections reveal that for Carens individual equality of opportunity is of higher priority than global substantive equality. Carens says that equality of opportunity is important in a context of global inequalities even if it does not reduce the levels of global inequality themselves. Even if open borders could not reduce overall levels of inequality, they could make a difference in individuals’ lives and change their personal life prospects. As some countries provide opportunities that others do not, for example in terms of education and employment, the principle of open borders can provide individuals with opportunities that their circumstances of birth into a specific society did not provide. In that way, open borders would create global equality even in a context of unequal background conditions.

Carens’s main concern with equality of opportunity, rather than social or economic equality, may help to explain his interest in individual freedom of movement. In a reality of unequal opportunities in different societies, freedom of movement can arguably provide some individuals greater opportunities, even if it cannot correct unequal background conditions. Discussing the relationship between the value of individual freedom and a policy of open borders, Carens says it is “intuitively obvious” to all who value freedom that requiring permission, particularly from political authorities, in order to enter a

19. A related policy suggestion is made by Ayelet Shachar, although the main question she investigates is how to solve the flaw of arbitrariness undermining the legitimacy of current *birthright* citizenship regimes, rather than the question of access to political membership through global movement. One policy Shachar suggests is that rich countries would pay to poor countries a “birthright citizenship levy” for every child receiving citizenship in a rich state by circumstances of birth (within the territory of the state or to citizen parents). Such a payment, beyond serving as compensation for the privilege given arbitrarily to one child and not another, is also a form of redistribution that is meant to improve the living conditions of a child born in a poor state. In this way the rich state is improving global inequalities by changing living conditions in the poor state rather than by opening its own borders to the citizens of the poor state (Shachar, *The Birthright Lottery: Citizenship and Global Inequality*, 96–108).


21. ibid., 234.

22. ibid., 235.

23. ibid., 234–235.

24. I am leaving aside, as it is not material for this overview, the question of whether freedom of movement can actually create equality of opportunity. Surely, not every world citizen can take advantage of global freedom of movement. At the same time, the call for open borders may shift the focus away from the responsibility to create equal opportunities in countries of origin. It seems that Kymlicka’s concern with the relationship between open borders and substantive equality applies similarly to equality of opportunity. Carens seems to disagree, and he does not attend to the point, and so I am leaving it as a footnote to this overview.
territory and settle within it is a serious constraint on individual freedom that requires justification.\textsuperscript{25} The level of justification such a restriction requires is quite high in his view, as Carens contends that global freedom of movement is a “vital interest” that deserves protection as a human right.\textsuperscript{26} While even rights may be justifiably constrained, Carens claims that “the morally acceptable reasons for restrictions on immigration do not justify discretionary state control over immigration.”\textsuperscript{27} His argument requires two steps: the establishment of global freedom of movement as a human right, and the consideration of possible legitimate restrictions on this right.

Carens builds his argument in favour of a human right to global freedom of movement on the widely recognized right to free movement in the domestic context. He demonstrates that domestic freedom of movement is widely accepted to be a human right by international legal instruments and by national constitutions and laws.\textsuperscript{28} For the most part, Carens does not articulate the justification for according domestic freedom of movement the status of a human right from the ground up, but rather takes it to be a widely shared democratic principle. In one place, though, he refers to the ideal of liberty itself as the source of this human right, suggesting that the vital human interest in being the author of one’s life demands freedom of movement.\textsuperscript{29} Explanation of the relationship between self-determination and movement, or defense for the exact scope of freedom this vital interest demands, are not provided. The central place of domestic freedom of movement in democratic theory is left largely assumed. And so, without articulating the rationale for attributing domestic free movement the status of a right, Carens then simply claims that global freedom of movement is “a logical extension of the right of free movement within states”\textsuperscript{30} and that “whatever the rationale is, the same rationale will apply to movement across borders.”\textsuperscript{31} He claims that the same reasons that cause people to move or want to move about within states’ borders are reasons for which people may want to move between states, and so he seems to be extending the right to the international context based on the same “vital interest”, but without discussion of whether domestic movement and international movement really serve the same interest or deserve the same order of priority.\textsuperscript{32}

Carens considers a number of objections to the extension of the right to free movement to the international context and rejects them all quite persuasively.\textsuperscript{33} But he leaves out the most persuasive objection, as far as I am concerned.\textsuperscript{34} I want to mention it here to suggest that Carens’s argument is not very strong at this point. What I believe is the strongest justification for the domestic right is the equal stake of citizens in their states’ territory. This justification would not be easily used to extend the application of freedom of movement to the international domain.

If domestic freedom of movement is a product of the equal stake of members in their state’s territory then this freedom cannot be extended to the international context as a human right. Admittedly, in this

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{25} Carens, \textit{The Ethics of Immigration}, 236.
\item \textsuperscript{26} ibid., 237.
\item \textsuperscript{27} ibid.
\item \textsuperscript{28} ibid., 238.
\item \textsuperscript{29} ibid., 249: “The vital interest that is at stake here is... freedom itself.”
\item \textsuperscript{30} ibid., 238.
\item \textsuperscript{31} ibid., 239.
\item \textsuperscript{32} ibid.
\item \textsuperscript{33} Carens considers five possible rationales for domestic freedom of movement that cannot be extended to the international realm and rejects them all (ibid., 240–245). I think that the rationales are weak and that his objection to the argument that the freedom cannot be extended to the international context based on these rationales is justified. For this reason, and because the discussion of these is quite long and not exactly relevant, I do not repeat it in this short presentation of Carens’s argument.
\item \textsuperscript{34} Other scholars, most notably Miller and Pevnick, highlight in their works the justifications I refer to here. Their arguments can be seen as objections to Carens’s global freedom of movement argument. Their arguments will be discussed below.
\end{itemize}
\end{footnotes}
variant, domestic freedom of movement is not a human right at all but a civil right—a right guaranteed to subjects of the state by virtue of their membership rather than to all humans by virtue of their humanity. Carens relies on references to this freedom by international legal instruments to support his claim that domestic freedom of movement is a human right. But consider the analogy with the right to citizenship. International instruments entitle all humans to a right to a citizenship, but only the citizens of a state have the right to the citizenship of that state. In the case of citizenship, the human right signals the fact that a citizenship is considered a necessary condition for leading a decent human life, but that this condition is satisfied by each human having at least one citizenship, any citizenship, amongst those available on the globe. Similarly, we could think of the human right to domestic freedom of movement as a human right to have a certain territory within which one is sovereign. It is a human right to have a civil right somewhere on the globe.\(^{35}\) To conclude this point, I find that there are at least two reasonable justifications for domestic freedom of movement for which a global freedom of movement is not “a logical extension”. But, returning to Carens’s view, he believes that the justification for free movement that he prefers—individual self-determination—is simply logically extendable to the global realm.

Having considered its justification, Carens moves to discuss possible legitimate restrictions on the human right to global free movement. He begins with the general opposing view to his, which he calls “bounded justice.”\(^{36}\) The leading idea of this view is that membership in a political society matters morally, that co-members in political communities hold special rights and obligations vis-à-vis one another that exceed the reciprocal rights and obligations that fellow humans hold by virtue of their shared humanity. Supporters of the bounded justice view cite associative obligations—the special set of obligations applying to co-members—as the reason for which immigration controls are justified, sometimes without further explanation or argumentation, simply assuming that these obligations are worthy of protection and require it in the form of closure.

Carens agrees that membership matters morally.\(^{37}\) But he disagrees that “justice is only concerned with our connections to our political community and to our fellow citizens and that therefore the exclusion of people who wish to join our community is not unjust.”\(^{38}\) Carens thus highlights moral obligations that apply to humanity at large. And he implies that any serious bounded justice position must consider the relationship between the two sets of moral obligations and justify why, and under what circumstances, the membership set overrides the humanity set of obligations. His point is that we can agree that membership is morally significant and still submit that membership considerations do not justify all restrictions on human global movement. His overall goal is to show that the demands of equality and freedom are such that co-members do not enjoy the discretion to control immigration, but only the right to restrict it when good reasons justify it.

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\(^{35}\) This interpretation of freedom of movement is adopted at least by some legal instruments. For example, the Canadian Charter of Rights and Freedoms extends the right of settlement (residence and gaining livelihood) in every province of Canada only to citizens and permanent residents (Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, art 6(2)). This right is explicitly not extended, for example, to temporary migrant workers who enter Canada under specific provincial work programs. Carens admits but is not persuaded by this point (at 334, footnote 24).

\(^{36}\) Carens, The Ethics of Immigration, note 6, p. 256.

\(^{37}\) ibid., 257. The first part of his book is dedicated to the theory of social membership and to explicating a number of rights that arise from such social membership.

\(^{38}\) ibid. (emphasis in original). The picture of the bounded justice position that Carens paints here is a misleading caricature, which contradicts his own words a couple of paragraphs earlier: “Most of those who take this [bounded justice] view do not deny that we have some moral duties to people outside our political community.... For example, they usually acknowledge that we have a duty to address the plight of refugees...” (ibid., 256).
Carens details a number of limits on global freedom of movement that he thinks would be justified. Preventing the immigration of individuals who pose actual threats to national security is one such justified limit. The risk of harm to others justifies restricting freedom of movement in these individual cases. But Carens insists that the national security rationale does not justify discretionary control over immigration.\(^{39}\)

Preserving public order—the maintenance of institutions, services and infrastructure that facilitate the orderly operations of society—is another goal that justifies some measures of immigration control in principle. Here, the concern is not with specific individuals but rather with numbers, and even more so with quick changes in population size, to which public systems may take time to adapt. Carens finds that limiting the flow of immigration by restricting intake numbers periodically will be justified because overwhelming admission would harm the freedoms and quality of life of everyone, both current members of the society concerned and newcomers. Nevertheless, Carens believes that public order is not a significant concern, especially not in a just world in which global inequalities are reduced.\(^{40}\) In such a world there will be less incentive to move globally, and the flow of migration to any particular society will supposedly never be such that it would upset public order. And even considering current global inequalities, Carens finds that public order is a very limited justification for closure. To become a consideration, the threat to public order must come from immigration itself, rather than from backlash against it from within the receiving community. The threat must also not be a hypothetical possibility, but rather a reasonable expectation based on evidence and public reasoning. And any limitation on immigration would only be justifiable to the exact extent to which it protects public order. All told, public order does not justify discretionary limits on immigration, but very limited, circumstantial ones.\(^{41}\)

The welfare state presents another challenge to the case in favour of open borders. Some worry that open borders may threaten internal systems and efforts directed at the betterment of the worst-off members of the state. Open borders can pose a threat to such efforts either by letting in individuals who would use more social services (e.g. public education, public health, welfare payments) than their respective economic and tax contribution to these systems, or by flooding the labour market with low-cost labour that would push out of the market the most vulnerable current labourers, who would then turn to welfare and will be themselves net-consumers of social services.

Carens believes that these concerns are heavily based on the current circumstances of global inequalities. Thus, the concern does not harm the ideal of open borders between roughly equal societies. But he also attends to the objection that contends that even between roughly equal states different policy choices can result in very different welfare regimes and in incentives to move to acquire rights in particular social regimes. According to the objection, open borders may threaten attractive social regimes even in circumstances of reduced global inequalities.

Carens first notes that the threat, like threats to security and public order, is a question of fact and so the justification for limiting immigration is contingent.\(^{42}\) He also notes that this justification holds only with respect to the cases in which great intake numbers occur because of the welfare system the state offers. Finally, where immigration poses a real burden on welfare regimes, Carens suggests that some measures to offset the threat would be more justifiable than restrictions on movement. In particular, he suggests that waiting periods before immigrants can join welfare schemes are morally defensible, and

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40. ibid., 277.
41. ibid., 279.
42. ibid., 280.
He does not consider the very strong objection, in my view, that imposing such waiting times renders welfare systems incapable of delivering their main goal: sheltering society at large from the societal effects of extreme poverty. A society insures itself with a mandatory universal welfare regime not only because it feels compassion for the worst off, but also because extreme poverty affects society at large, and not only its poorest members. Extreme poverty affects public order and public health and removes potential economic opportunities in the form of labour and of consumption. When Carens suggests that immigrants will be excluded from welfare regimes for a period, he effectively says that society would not be able to protect itself from some extreme poverty: that which may develop amongst uninsured newcomers. This eliminates the ability to achieve the main goal of welfare regimes, rendering them useless. So his proposal does not solve the problem of access to welfare at all. As I said, Carens does not consider this objection. He believes that the value of access to membership, even without access to social protection, outweighs the value of a universal welfare regime.

Another concern related to social and welfare systems is that open borders would erode the personal commitment that nourishes the public support for these systems, bringing about their abolition. According to the argument, the political will to redistribute resources between different members of society comes from feelings of social solidarity that co-members in stable communities feel towards one another because they share some common identity. Where this common identity does not exist, such as in the case of relationships between strangers, between members and foreigners, and even between members and newcomers, the sentiment of social solidarity does not grow and social and welfare systems lose their democratic support.

Carens believes that this concern is sensitive to the number of newcomers, and only arises where those are considerable enough to change significantly the composition of society. But more fundamentally, he rejects this as a concern with open borders in principle. He questions the normative validity of the reasons for the suggested loss of solidarity in a world of open borders. He suspects that such loss of solidarity, if it occurs, occurs because of prejudice against foreigners. He argues that if and so far as the underlying sentiments towards immigrants are impermissible, they cannot serve as justification for border closure. Finally, Carens objects to the kind of choice that arguments about the welfare state present between the justice of reducing local inequality and the justice of reducing global inequality. He believes that in a just world we should not need to make this choice.

The final objection to his idea of open borders that Carens considers is the objection according to which a democratic state may be interested in protecting its public culture from immigrants who do not share it and may change it. Carens first notes that “a democratic state may not (legitimately) limit immigration for the sake of cultural preservation, if it defines the culture in terms of existing racial, ethnic, or religious patterns within the population.” Liberal democratic states are also limited in the kind of measures they can pursue internally to preserve public culture, and they can only promote culture that is inclusive and open to all, and by measures that are not discriminatory. In the same way, only some kinds of public cultures can be morally promoted through an immigration policy, one example being the promotion of an official and public language. Within the parameters of legitimate promotion of culture that he set, Carens dismisses the significance of the problem that open borders

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44. ibid., 282.
45. ibid., 283.
46. ibid.
47. ibid., 284.
48. ibid., 285.
may cause. Again, he notes that the concern is contingent on the number of immigrants, and contends that this is generally low and would be even lower in a just world. Ultimately, he finds that this justification supports a very limited, contingent, reason to restrict immigration so that it does not support discretionary immigration controls. At best, Carens thinks the concern for public culture justifies “free movement with a cultural caveat.” Overall, answering the concerns for national security, public order, the welfare state, and public culture, Carens is suggesting that they are all contingent and self-limiting, cannot support discretionary powers with respect to immigration, and support a norm of global freedom of movement with caveats for tested cases where threat to the current membership is posed by individual immigrants or by their numbers. He concludes that “there are no compelling arguments against open borders at the level of principle.”

Considering the contribution of equality and of liberty separately

Carens’s arguments were based on the principles of equality and liberty and, for the most part, these two supported one another and were used together to support the idea of open borders. One problem with this approach is that, at least under certain interpretations, the value of equality and the value of personal freedom are incompatible with one another, especially if equality requires deep redistribution of resources and if liberty is interpreted to demand expansive scope of personal liberties. Carens chose to focus on equality of opportunity and very expansive individual freedom, which may have averted the problem of incompatibility. But those who want to achieve substantive equality will have to accept some sacrifice in the scope of individual freedom. Moreover, accounts that rest on multiple values express in less clarity the normative contribution of each value.

Carens’s argument is arguably the most comprehensive case for open borders, but the literature includes more limited arguments that enjoy the benefit of considering the unique contribution of one leading value. Since Carens considers many reasons in favour of open borders and many objections to the idea, both with respect to equality and to liberty, the more focused arguments do not add much that is new to the debate. For this reason, I will not repeat them here. My intention is only to note that others have dedicated efforts to building arguments for open borders on a single normative idea—equality or liberty—and that there may be theoretical advantages to such an approach.

Abizadeh and the argument from democracy

Anyone who accepts a genuinely democratic theory of political legitimation domestically is thereby committed to rejecting the unilateral domestic right to control and close the state’s

50. ibid., 287.
51. Carens himself admits at one point that “the concepts of freedom and equality contain their own internal tensions and each stands in tension with the other” (ibid., 255–256). But he rejects one objection that has to do with the contradicting nature of equality and freedom. In ibid., 253 he answers critics who note that the argument from equality demands priority in admission for the worst off, while the argument from freedom contradicts it as it demands equal access to admission to all. He says that circumstances in which many individuals want to exercise a certain freedom at the same time may require that the freedom would be exercised gradually, according to some formula of preference. The right to health treatment is a good example. But this scheme respects the freedoms rather than restrict it, as it allows its exercise where it would otherwise be impossible. The objection presented above speaks of a different kind of contradiction between the two values, the idea that substantive equality demands significant limitation of personal freedom (redistribution of property, e.g.) and, similarly, expansive freedoms are only compatible with a formal understanding of equality.
boundaries, whether boundaries in the civic sense (which regulate membership) or in the territorial sense (which regulate movement).53

Abizadeh presents his democratic thesis rejecting the right of states to unilateral control over their borders against the mainstream view in immigration literature, which holds that “democracy requires a bounded polity whose members exercise self-determination, including control of their own boundaries.”54 This mainstream view is usually presented, Abizadeh says, against calls to open borders motivated by liberal considerations of individual freedoms. Those who object to open borders answer the liberal challenge by focusing the attention on the democratic system, which they believe requires closure. Abizadeh’s quest is to answer this democratic view in its own terms. Working from within democratic theory, Abizadeh argues that democracy’s demos is “in principle unbounded”, with the result that any policy regarding border crossing must be justified not only to current citizens, but also to foreigners.55

Abizadeh starts with the democratic idea that political power must be justified. Political power is ultimately backed by coercion, and coercion stands in contrast to individual freedom, or autonomy. These two facts create the need for justification of political power in a democratic system, to which a view of humans as autonomous and equal is central. Any coercive policy must be justified in a manner that is consistent with human autonomy. Abizadeh names this requirement “the autonomy principle.”56

He then considers how the autonomy principle can be satisfied. Liberal and democratic theories share this principle, but each pursue it differently. While liberalism requires that a policy could be justified in principle to all, namely that an argument could be made in favour of the policy that all could be reasonably expected to reasonably accept, democracy requires that the policy is “actually justified by and to the very people over whom it is exercised, in a manner consistent with viewing them as free (autonomous) and equal.”57 Liberalism dictates that specific considerations will take part in the justification, and democracy dictates that specific procedures will take place and that specific agents will be involved in them. In sum, democracy is not satisfied with liberalism’s hypothetical justification and adds the requirement of participation, of self-determination.58 This serves as Abizadeh’s first premise: democratic theory itself demands that justification will be offered to all those who are subject to a state’s coercive power. As his second premise, he notes the empirical fact that citizens and foreigners are similarly coerced by a state’s border control policy.59 He rests his argument for the need to justify border control policies to citizens and foreigners alike on these two premises.

Abizadeh admits immediately that “the argument’s point of controversy lies in its tacit premise, which is reflected in the reference to “all” in the first premise—that is, a reference to all persons rather than citizens (members). This formulation of the democratic theory of popular sovereignty tacitly presupposes that the demos to whom democratic justification is owed is in principle unbounded.”60 Abizadeh then moves to defend the unbounded demos thesis by arguing against the alternative: the idea that democratic theory can justify a bounded demos.

54. ibid.
55. ibid.
56. ibid., 39–40. Autonomy is not understood as absolute freedom, which is neither attainable nor desired, but rather as a measure of substantive control over one’s own life, as non-subordination.
57. ibid., 41. Emphasis in original. Abizadeh states this while leaving open questions regarding the exact procedures that democratic theory requires (e.g., direct or representative, formal or deliberative and so forth). He only notes that the conditions of participation as autonomous equals rule out simple majority rule without protection for minorities from the possible tyranny of the majority (ibid., 42).
58. ibid., 41–42.
59. ibid., 44–45.
60. ibid., 45. Emphasis in original.
The idea of a bounded democratic demos is affected by two incoherencies, Abizadeh says. First, democratic theory itself cannot determine its own demos. Democratic political power is legitimate when it reflects the will of the people. But the political question at hand is exactly who belongs to “the people”. So there is no group of persons that can take such a democratic decision. Second, the autonomy principle requires that coercive political power will be democratically justified to all those who are coerced. But constituting a boundary to the polity essentially violates the autonomy principle, as it inherently subjects some to non-membership, to non-participation.\textsuperscript{61} The source of incoherence here, Abizadeh claims, is not democratic theory itself but only the bounded demos thesis that is often associated with it. That bounded demos thesis requires a pre-political demos, and this is the detail that is inconsistent with the democratic theory of legitimation.\textsuperscript{62} On Abizadeh’s view democratic theory can answer the boundary question: the principle of democratic justification defines the polity as unbounded in principle, all questions of membership and borders to be resolved by the will of this unbounded demos at large.\textsuperscript{63} But the bounded demos thesis renders democratic theory incoherent.

One point of criticism that Abizadeh does not consider, and that I would like to mention in short, is that the fact that democratic theory cannot define its own demos is not a case of inconsistency but of incompleteness, and that this flaw may not be as damaging as Abizadeh paints it to be. No theory is fully complete in that every theory only answers some questions on a certain topic but always starts from an undefended premise, which is questionable in and of itself. To use democratic theory as an example, this theory also cannot answer the questions “why be a democrat?” or “what is the value of liberty and equality?” It simply rests on another theory of value, takes up its conclusions with respect to equality and liberty, and derives from their value the conclusion that it is good to be a democrat so as to protect these values. In much the same way, democratic theory could rest—without much theoretical damage—on another theory of membership, so long as that membership theory motivates the adoption of democratic principles.\textsuperscript{64}

The consequence of Abizadeh’s unbounded demos thesis is that border control policies would be legitimate only if they are democratically justified by all: citizens and foreigners who are coerced by them. Given democracy’s requirement of actual participatory justification, legitimate border control policies could only be arrived at by cosmopolitan democratic institutions, namely adjudicative institutions open to all parties who may find themselves coerced by a policy. Since these do not currently exist, current border control policies suffer from “a legitimacy gap.”\textsuperscript{65}

Abizadeh notes that the idea that the demos in is principally bounded is deeply entrenched in democratic literature. It is specifically referred to by democrats who use the idea of self-determination to justify political closure, like Walzer. But, Abizadeh also notes, it is also exactly the leading democratic idea that is highlighted by liberals arguing both for open borders and for the supremacy of liberalism as a theory as a result of its conclusions on the question of borders. The idea should thus be abandoned by democrats.

After defending his positive argument in favour of the unbounded demos, Abizadeh considers and rejects four main arguments for the unilateral right to control borders that rest on the ideal of individual

\textsuperscript{61} Abizadeh, “Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders,” 45–47.
\textsuperscript{62} ibid., 47.
\textsuperscript{63} ibid., 48.
\textsuperscript{64} For a criticism of open borders from within democratic theory, highlighting democracy’s procedural requirements and functions and arguing that democracy requires closure, see Sarah Song, “The Boundary Problem in Democratic Theory and Border Coercion,” \textit{International Theory} 4, no. 1 (2012): 39–68.
autonomy, to which democrats subscribe.\footnote{66} He considers the pluralist argument, according to which distinct bounded communities create a variety of governmental styles that enriches individuals’ experience, minds, and possibilities. He considers the dispersion-of-power argument, according to which distinct bounded communities help reduce the potential oppressive powers of governments, in comparison to one global government, hence securing individual liberty. He attends to the boundary-preferences argument, according to which people express interest in and care for bounded communities, and satisfying this preference would hence respect their right to self-determination. He discusses the subsidiarity argument, according to which individual self-determination can be best served in smaller political communities in which each citizen’s preferences are more likely to be taken into account. Responding to these four arguments, Abizadeh says that they all support bounded political communities, but not the unilateral right to control borders.

Last, Abizadeh assesses the minority-protection argument. In democratic theory political power’s legitimacy stems from the consent of citizens. Entrenched minorities pose a challenge to the theory, because individuals belonging to them are less likely to be able to affect political power and the latter is more likely to be subject to the majority’s will. Bounded political communities allow more individuals to belong to majorities within these communities, fulfilling to a greater extent the ideal of self-determination. Abizadeh accepts that under certain circumstances uncontrolled immigration can offset the composition of society and harm the self-determination of members of certain social groups who would become entrenched minorities. He thus accepts a minority-protecting caveat to the open borders regime under certain empirically-tested conditions. He concludes that “[o]nce we adequately distinguish between arguments for the existence of borders and arguments for regimes of border control, the principle of self-determination is at most seen to favour some domestic control over border policy and some restrictions on entry—that is, jointly controlled and porous (not closed) borders.”\footnote{67}

Abizadeh’s motivation in developing his argument is in part practical and in part theoretical. He holds that the advantage in taking a democratic position on the question of border control, rather than a liberal one, comes down to the institutional solutions that such an endeavour can yield. By arguing from within democratic theory, the argument that states need to justify their border-control policy to foreigners is not left at the level of the proclamation of moral rights but rather gives foreigners a voice in specific procedures and fora. So whereas a debate of the issue from a liberal perspective can only identify rights and obligations, a democratic debate can identify specific political solutions: mechanisms through which rights and obligations should be adjudicated.\footnote{68}

But at the same time, “[i]t is not the role of such a regulative principle to lay out a blueprint either for ideal institutions’ or for the specific political actions that ought to be undertaken here and now to realize them. The unbounded demos qua regulative principle provides a standard for critique, but the implications for which institutional designs are ideal, and which political actions are best, depend on contingent historical circumstances.” His argument provides first and foremost a critique of the legitimacy of current political arrangements, with a view to provide a beginning of policy advice.\footnote{69}

\footnote{66. “Consider (what I take to be) the five most plausible arguments, grounded in the value of autonomy, for the existence of boundaries: (1) the pluralist (or diversity) argument, (2) the dispersion-of-power argument, (3) the boundary-preferences argument, (4) the subsidiarity argument, and (5) the minority-protection argument. In each case, I consider first the justification for the existence of borders and then its compatibility with a unilateral regime of border control” (Abizadeh, “Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders,” 49). See ibid., 49–53 for the full discussion of these.}

\footnote{67. ibid., 53. For the full discussion of the five arguments, see ibid., 49–53.}

\footnote{68. ibid., 38–39.}

\footnote{69. ibid., 56.}
Abizadeh’s argument segues nicely to the discussion of positions in favour of the right to exclude, as these all share an appeal to the idea of self-determination. The different regulated-borders positions diverge, nevertheless, in terms of who holds this right—individuals or groups, and which groups—as well as the right’s specific function or expression.

4.2.2 Arguments for Closed Borders

Walzer and the argument for self-determination

The theory of distributive justice begins, then, with an account of membership rights. It must vindicate at one and the same time the (limited) right of closure, without which there could be no communities at all, and the political inclusiveness of the existing communities. For it is only as members somewhere that men and women can hope to share in all the other social goods—security, wealth, honor, office, and power—that communal life makes possible.\textsuperscript{70}

Walzer’s discussion of political membership is motivated by his broader interest in the requirements of distributive justice. As he wants to unpack these, he is led to concede that the distribution of membership itself should be the first question to which a project about distributive justice must attend:

The idea of distributive justice presupposes a bounded world within which distribution takes place: a group of people committed to dividing, exchanging, and sharing social goods, first of all among themselves.... When we think about distributive justice... [w]e assume an established group and a fixed population, and so we miss the first and most important distributive question: How is that group constituted?\textsuperscript{71}

To understand how a group of members is constituted, Walzer first turns to investigate the meaning of membership itself. He suggests that the value of membership as a social good is constituted by how members themselves understand the ties between them, their function and value. The value of membership is determined by the cooperative efforts of members and by the “conversation” members have about it, which I understand as their deliberation of the appropriate function of this membership, and their shared conception of its meaning to them.\textsuperscript{72} This understanding of membership presumes that there exists a group of individuals who are committed to working together. That group of individuals precedes its political nature, and is not created by any political entity. The group’s cooperative efforts create the political nature of their membership.

In the second stage, Walzer attends to the question of distributing the membership in the political group, once this membership has been constituted. On that matter he says that “then we [members] are in charge (who else could be in charge?) of its distribution. But we don’t distribute it among ourselves; it is already ours. We give it out to strangers.”\textsuperscript{73} Again, the group is constituting the membership (and not the other way around), and then the same group decides upon the terms of extending the membership to strangers who will become new members. In Walzer’s account a group of individuals who are committed to working together creates an entity by their shared effort, and hence gains the right to distribute the membership in this entity to others, non-members.

\textsuperscript{70} Walzer, \textit{Spheres of Justice: A Defense of Pluralism and Equality}, 63.
\textsuperscript{71} ibid., 31.
\textsuperscript{72} ibid., 32.
\textsuperscript{73} ibid.
Walzer defends the right to control immigration by the argument that it is necessary in order to preserve the character of the political group. The cohesiveness of that group seems to play two roles in his account. On the one hand, the group precedes politics and its character has intrinsic value: without it there is nothing to speak of. On the other hand, Walzer seems to view cohesiveness as a condition for the achievement of other desired goals: “The restraint of entry serves to defend the liberty and welfare, the politics and culture of a group of people committed to one another and to their common life.” In these words, he seems to be presenting common character as a psychological condition for a sentiment of reciprocal commitment amongst members. And using the word “commitment” rather than “obligation” suggests that at least some requirements of justice, in particular redistributive justice and the care for the welfare of others, are based on an active personal sense of connectivity rather than on abstract principles.

The rest of Walzer’s discussion is dedicated to the question of criteria for extending membership. Having defined the entity whose right it is to extend the membership—the membership body—he now attends to the question of the scope of its authority: whether it is governed by choice or constrained in any way, and for what reasons. As will be immediately explored, he assigns a great deal of power to the members’ choice, but recognizes important constraints on members’ discretion as well. In particular: “the [current members’] choice is also governed by our relationships with strangers.” He mentions two considerations that have to do with strangers’ interests: “our understanding of those relationships” and “the actual contacts, connections, alliances we have established and the effects we have had beyond our borders.” Walzer is beginning to build an intricate account of the scope of the right of groups to control the boundaries of their group’s membership. A first major constraint hinted at is that of foreigners’ interests, but this constraint is in fact the result of self-determination itself, as—so far—Walzer has noted responsibilities towards strangers that arise either out of the group’s own understanding or out of previously chosen deeds of the group that constrain its choice in the present.

Walzer considers a number of concrete questions of distribution and redistribution of political membership. These include the question of expulsion, prohibited criteria for the selection of new members, the question of refugees and asylum seekers, programs for guest workers, and naturalization policies. In his consideration of them, he maintains the importance of the right to exclude to the self-determination of the group. And he finds that only two constraints apply to this right to self-determination: the principle of mutual aid, and the normative character of the group itself.

When Walzer considers the obligations of the members towards complete strangers he appeals to the long-recognized moral principle of mutual aid and accepts it. He says that “positive assistance [to strangers] is required if (1) it is needed or urgently needed by one of the parties; and (2) if the risks and costs of giving it are relatively low for the other party.” This principle helps explaining the obligation to help strangers who are asylum seekers, namely persons who have presented themselves in person to the membership and claimed urgent need.

More stringent obligations would apply with respect to refugees who have more intimate connections with the group: when the group contributed to their plight or when their plight is a consequence of subscribing to values or identifying with characteristics that are similar to those of the group. Here, it is the group’s understanding of itself and its past deeds that do the moral work rather than the principle

75. ibid., 32.
76. ibid., 33.
of mutual aid. Similarly, the group’s own understanding of itself guides its obligations in other areas of admissions. For example, a diverse group cannot impose racial criteria for selecting new members without harming its own image and some current members. And a democratic group cannot invite guest workers without giving them the opportunity to eventually become full members because the group is committed by its own understanding of itself to the principle that all subject to its political power will have equal political standing. Aside from the principle of mutual aid to strangers, the constraints on the group’s self-determination are all internal, stemming from its own exercise of its self-determination consistently over time.

Waltzer presented an argument for a very strong right to unilateral control of political boundaries that is based on groups’ self-determination. Ultimately, the right is supported by the argument that without it there could not exist “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.” The desire to have these communities is a natural human tendency, and the kind of care for and commitment to the interests of others that (at least some) common moral requirements demand is only felt by individuals when they feel somehow connected to others by a special bond. Walzer’s is an account of human motivation and psychology as well as one about the nature of moral demands.

As a last remark, I want to attend to a foundational critique of Walzer’s position that he himself does not consider. The critique has to do with his basic assumption that communities of character are a desired good. Walzer’s concern with the justification of closure as a means to sustain communities of character suggests that many individuals, at least more than a negligible few who are unable to affect the character of communities, are looking to leave their own communities of character and join others. But, if true, this would suggest that many people value personal opportunities more than they value their own communities of character. People express by their wish to move globally the preference of economic, political, cultural, religious, familial and other considerations over living within their stable communities of character. This throws into question the intrinsic value of communities of character, or at least its ranking amongst other goods, when all other things are being considered.

**Miller and the argument from national identity**

The position I defend could be described in broad terms as “communitarian” and “social democratic.” It places a great deal of weight on social cohesion and social justice and assesses immigration policy from that perspective. Both admission policies and integration policies should aim at ensuring that immigrants become full members of the societies they join, regarded and treated as equal citizens by the indigenous majority, identifying with the society, and participating widely in its social and political life....

A criticism that is sometimes leveled at this position is that by insisting on full equality for immigrants, it raises the stakes of the original decision about whether or not to admit them.

By his own account, Miller’s argument is a “realistic” one. First, he is working from within the statist assumption. He argues that there is good reason to do so when debating immigration questions because,

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78. ibid., 56–61.
79. ibid., 62. Emphasis in original.
by and large, the issues concerning immigration would lose their public importance in a world of less rigid borders and of significantly reduced inequalities between political societies. He further describes his approach as realistic in that it considers immigration from the perspective of political philosophy, thinking about possible institutional solutions in light of concrete evidence including evidence about the sentiments of members of society and the likelihood to change these.\textsuperscript{81} Miller finds this approach more useful than the ideal personal ethics accounts of the issue of immigration.

Miller builds his approach to the question of immigration from the ground up, starting with its basic moral commitment to weak cosmopolitanism. He defines moral cosmopolitanism as the “belief in the equal moral worth of all human beings.”\textsuperscript{82} He then explores two interpretations of moral cosmopolitanism: a strong interpretation and a weak one. Strong cosmopolitanism is the theory according to which our moral obligations towards others are not affected by our relationships with them: we owe all humans exactly the same.\textsuperscript{83} Strong moral cosmopolitanism rejects any form of partiality.

Miller believes that the strong interpretation of cosmopolitanism is not attractive because “it appears to mean giving up much of what we do that gives value to our lives”, such as how we understand our relationships with our families and friends.\textsuperscript{84} He thus opts for weak cosmopolitanism, according to which we must take into account the effects of our actions on all those who may be affected, irrespective of our relationship with them, and that we should consider people equally when there are no relevant differences between them.\textsuperscript{85} Such an interpretation of cosmopolitanism still requires that we consider all humans, and that we provide explanation for our deeds to them all, but it also allows partial obligations that are based on our relationships with different individuals since weak cosmopolitanism sees our relationships with others as relevant differentiating considerations.

Applying the principle of weak cosmopolitanism to states and their policies, Miller argues that states must consider the effects of their policies on all humans who would be affected, but can also give higher weight to the interests of their own citizens. Weak cosmopolitanism is thus compatible with partiality towards compatriots.\textsuperscript{86} What is left to determine is exactly what weight should be given to the interests of members and non-members in any given case. Weak cosmopolitanism itself does not provide this guidance. To perform this task, Miller turns to the idea of associative obligations.

Associative obligations rest on the two premises that (a) personal relationships make our lives better and that (b) personal relationships are exactly the kind of relationships that give rise to special obligations and are defined by these obligations. Special obligations can be thus justified where they support, and are necessary for the existence of, valuable relationships. Miller believes that such obligations can be found between compatriots because the relationship between fellow citizens allows them to “coexist on terms of justice”: they can distribute economic burdens between themselves and control to some extent their future. But this relationship also requires that fellow citizens all follow a strict shared set of rules, laws and policies.\textsuperscript{87}

Miller admits that the move from personal relationships that are clearly valuable in and of themselves to relationships between compatriots requires investigation. The relationships between compatriots are more complex, operating on a number of levels, and it is hard to pinpoint exactly at what level the

\textsuperscript{81} Miller, \textit{Strangers in Our Midst: The Political Philosophy of Immigration}, 16–18.
\textsuperscript{82} ibid., 22.
\textsuperscript{83} Obligations will vary according to different individuals’ needs and preferences, but \textit{not} according to our relationship with them (ibid., 22–23).
\textsuperscript{84} ibid., 23.
\textsuperscript{85} ibid.
\textsuperscript{86} ibid., 24.
\textsuperscript{87} ibid., 27.
associative obligations arise. Miller detects three levels in which compatriots relate to one another: as members in an inclusive scheme of deep cooperation, as citizens participating in a shared political scheme of rights and obligations and decisions regarding their future, and as fellow nationals who share culture and connection to a place and think of themselves as a distinct, historically stable, community amongst other communities.\(^\text{88}\)

Most of the weight of the associative obligations is found in the civic relationships between compatriots, namely their relations to one another as co-citizens and as co-members in a scheme of cooperation. And Miller agrees that it is questionable whether the national aspect of compatriots’ relationship is necessary to explain their associative obligations.\(^\text{89}\) But he also believes that their shared national identity brings added value to compatriots’ relationship in that it creates emotional attachment and solidarity that lack amongst co-members in purely economic or political schemes. Their shared national identity also extends their obligations across time, and explains their relationship to a particular place.\(^\text{90}\) Miller accepts that the national aspect of his argument is more open to criticism than the civic aspect of it. He insists on the added value of nationality, but bases his argument largely on associative obligations between co-citizens.\(^\text{91}\)

Associative obligations give guidance with respect to obligations to compatriots, but not across state boundaries. In the international context, Miller claims, states owe individuals who are non-members respect for their human rights, which are understood as protecting the necessary conditions for decent human lives. But no associative obligations form between states and foreigners.\(^\text{92}\) Beyond respect for their human rights, states owe non-members some consideration of their interests, this much is demanded by weak cosmopolitanism. But when their interests are not human-rights interests, states only owe foreigners weak consideration, some explanation if their interests are not fulfilled, but not fulfillment of their interests or full justification for why their requests are denied.\(^\text{93}\)

With respect to the effect of associative obligations on immigration policy, Miller considers the principle of self-determination as justification for the right to control immigration. He defines self-determination as “the right of a democratic public to make a wide range of policy choices within the limits set by human rights.”\(^\text{94}\) Self-determination is thus a right held by groups satisfying two conditions: respect for members’ human rights, and participation of members in the decision-making process leading to the adoption of policies and their enforcement.

The right to control immigration arises from the right of the group to self-determination. Miller contends that immigrants’ numbers and character can potentially have severe effects on the internal policies of the group, a more severe effect than any internal social change can bring.\(^\text{95}\) Furthermore, immigration may affect self-determination in that the diversity it creates could erode inter-personal trust and trust in institutions.\(^\text{96}\) Lastly, immigration has a direct effect on the population size. The citizenry may be interested in controlling its own size as part of its plan for the future or as part of its understanding of itself and its values. For example, the citizenry may have internal policy reasons

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\(^{88}\) Miller, Strangers in Our Midst: The Political Philosophy of Immigration, 26.

\(^{89}\) ibid., 26–27.

\(^{90}\) ibid., 27–28.

\(^{91}\) ibid., 28–29.

\(^{92}\) ibid., 30–31. What constitutes human rights, or basic conditions for a decent life, is a controversial question. Miller attends to some aspects of it at 31–36. It is beyond the scope of this survey to go into these details.

\(^{93}\) ibid., 37. Only if granting non-members their requests is costless are we obliged to fulfill them (ibid.).

\(^{94}\) ibid., 62.

\(^{95}\) ibid., 62–64, 67–68.

\(^{96}\) ibid., 64–65.
to control its size or global concerns with respect to its size, especially considering the effects of the size of industrialized consumerist populations on the environment.  

For all these reasons, “immigration control is an essential lever in the hands of the demos.”

After presenting his positive account of the right to exclude, Miller turns to criticising and rejecting arguments for open borders. I will repeat here quickly his main objections, as they show how the literature has developed as a lively debate of arguments and objections. Starting with the equality-of-opportunity argument for open borders, Miller claims that the argument appears attractive mainly in the domestic sphere, but cannot be extended to the international context. In the domestic setting, the idea of equality of opportunity rest on two assumptions: (a) that there is sense in which opportunities could be measured and compared, and (b) that political power can effect change towards equality in opportunity. Both these assumptions do not hold on the international context. It is hard to compare the opportunities existing in different societies when the living conditions, economic realities, and cultural expectations are so different. And the policies of one state cannot effect change in the level of opportunities provided in another state, let alone in the world as a whole. Thus a right to immigrate based on this perception of equality does not arise.

Considering the argument for open borders based on a human right to free movement, Miller notes, first and foremost, that the argument is independent from any claim about inequality and that a human right to global movement would apply to all humans alike. So to support it would mean to support also the freedom of movement of citizens of wealthy states around the globe to other wealthy states or to less wealthy ones for any reason or preference. This line of criticism is aimed directly at Carens’s arguments, and it is intended to show that the supporters of the ideal of open borders would be uncomfortable with the logical consequences of some parts of the argument.

Miller considers three arguments in favour of a human right to global free movement: that it protects basic human interests, that it protects human rights as it provides individuals with an escape route from the possible tyranny of their own government, and that it is a logical extension of freedom of movement in the domestic realm. He rejects all three. He says that global movement is not required in order to fulfill basic human needs as long as one lives in a society that provides one with opportunity to meet these needs. Such a person may have preferences to move, but no right to move abroad.

With respect to the instrumental argument, Miller claims that a human right to exit a country together with a regime of access to adequate protection of human rights elsewhere are sufficient to fulfill the aim of protecting individual freedom from tyranny. So the argument about the instrumentality of global freedom of movement supports an arrangement that still falls short from open borders and a perfectly general right to free global movement. Finally, the reasons for recognizing freedom of movement domestically do not extend to the global level. The costs of this right are higher at the international level, and in the domestic context it is granted mainly to protect citizens from the coercive power of the government, a risk that does not exist in the global context.

In response to Abizadeh’s democratic argument for open borders, Miller rejects Abizadeh’s central claim that immigration controls are necessarily coercive. Miller shifts the focus of the discussion from...
the forceful measures states take from time to time in dealing with unauthorized immigration (arrest, detention, forceful removal) to the primary policy measure of denying most foreigners the authorization to immigrate. This measure, Miller claims, is one of prevention rather than coercion. It does not leave the would-be migrant only one alternative for action, but rather removes one alternative from her set of possible actions. Miller concedes that if immigration control were coercive, Abizadeh’s requirement that it must be justified to foreigners in democratic fora might be warranted. But as Miller does not see immigration controls as coercive in and of themselves, he believes that the political group is entitled to outweigh foreigner’s interests in immigrating with consideration of its own interests in self-determination, the functioning of its democracy, and its desired policies.  

As just described, Miller is aware of the main objections to his view and has answered some of them. Obviously, for proponents of open borders such as Abizadeh and Carens, Miller’s view is utterly unpersuasive. But the national aspect of his argument can be found objectionable even by those who accept most of his assumptions and arguments. Miller insists that national identity contributes value to the civic relationship and enforces associative obligations between compatriots because it gives another layer of meaning to their relationship and creates the will to fulfill reciprocal obligations. But there are good reasons to reject the national component of Miller’s account.

First, it is not clear that individuals cannot find reasons to hold reciprocal associative obligations towards their compatriots even if they do not share an identity with them. Self interest in security and prosperity, and a belief that cooperation with others in one’s proximity is likely to fulfill this self-interest may serve as a premise for the adoption and stable commitment to associative rights and obligations. Second, even if we think—like Miller—that a shared identity is more likely to cement reciprocal obligations than self-interest, there are other candidates for shared identities to which an argument can appeal. Most notably, it should be considered that a deep civic identity based on respect for human rights, multiculturalism, civil obedience and mutual interpersonal respect can develop amongst co-citizens even if they do not see their community as stable over generations, historically rooted in a specific place, and distinct form other communities. Or, maybe better put, co-citizens may understand their community in these terms, but it is not some ancient cultural relationships that give rise to this understanding of the community, but the valuable function of it in their lives in the present that gives rise to their commitment to it, and their desire to sustain it. This possibility is particularly important to note given the examples of states composed of a multitude of cultural, even national, groups that understand their citizenship in those terms. Third, and more importantly still, even if it is true that currently most (or, some argue, even all) societies understand their solidarity and cohesion, to the extent they enjoy these, in national terms, fixing the promise of just coexistence to the national identity ignores the potential of civic institutions such as a policy of multiculturalism to create a new, civic, shared identity that could replace the cohesion-creating function of nationalism.  

104. Miller, Strangers in Our Midst: The Political Philosophy of Immigration, 71–75.  
105. On this point see, e.g., Christine Kesler and Irene Bloemraad, “Does Immigration Erode Social Capital? The Conditional Effects of Immigration-Generated Diversity on Trust, Membership, and Participation across 19 Countries, 1981–2000,” Canadian Journal of Political Science/Revue canadienne de science politique 43, no. 2 (2010): 319–347 (investigating the commonly held belief that diversity has a negative impact on a number of collective social capital indicators, such as trust, membership in social and political associations, and political participation. Finding that “there is nothing inevitable about declining collective-mindedness in the face of increasing diversity. Indeed... countries with an institutional or policy context promoting economic equality and recognition and accommodation of immigrant minorities experience less dramatic or no declines in collective-mindedness.” (Ibid., 320).
Wellman and the argument from freedom of association

Without denying that those of us in wealthy societies may have extremely demanding duties of global distributive justice, I ultimately reach the stark conclusion that every legitimate state has the right to close its doors to all potential immigrants, even refugees desperately seeking asylum from incompetent or corrupt political regimes that are either unable or unwilling to protect their citizens’ basic moral rights.\(^\text{106}\)

Wellman supports his very strong conclusion in favour of the state’s right to exclude foreigners by appealing to freedom of association as an aspect of self-determination. He starts his argument with the widely accepted notion that individual freedom of association is important. He demonstrates the wide respect for individual freedom of association by reference to the examples of marriage and religious association. These institutions were once typically involuntary, but we nowadays insist that participation in them should reflect the choice of the individual participant, and we strongly protect them when we have reasons to believe that they do reflect individual choice.\(^\text{107}\) Wellman notes that the idea of freedom of association includes (at least some) freedoms to not associate and even some freedom to disassociate. Again he employs the examples of marriage and religion. One has the freedom to not marry at all, if one so chooses. But if one should choose to marry, one also requires the consent of her chosen spouse. Similarly, one does not have the right to coerce others to associate with her for religious purposes against their will. The right to exclude from association thus forms part of freedom of association.\(^\text{108}\)

Wellman’s argument for the state’s right to control immigration into its territory is built on these ideas of “marriage and religious self-determination.”\(^\text{109}\) He admits that the move from individual freedoms to states’ rights requires special justification because of two reasons: there are morally relevant differences between individuals and groups, and morally relevant differences between interests in marriage or religious practice and interests in controlling immigration.\(^\text{110}\) He considers these issues in turn.

To answer the concern that self-determination does not apply to groups in the same way that it does to individuals, Wellman refers to the example of private clubs. He considers actual cases in which private clubs that excluded certain social groups faced demands that they open their membership to the marginalized groups. In the cases he considers public opinion, court rulings and policy decisions that eventually turned against the clubs’ exclusionary membership policy and in favour of the right of members of the marginalized groups to be included. Wellman notes two facts about these cases. First, even those who supported coercing the clubs to open their membership to some individuals against the club members’ choice did not dispute the clubs’ presumptive right to choose their policies of membership. Second, it was in light of overriding societal concerns, particularly that the groups concerned are marginalized in general society and that membership in the clubs both signals and entrenches their marginalization, that it was found that the freedom of association of the clubs should have yielded to the equal inclusion of the concerned individuals.\(^\text{111}\)


\(^{107}\) ibid., 109–110.

\(^{108}\) ibid., 110.

\(^{109}\) ibid.

\(^{110}\) ibid., 111.

\(^{111}\) ibid. Wellman admits another objection requires attention: that states are not voluntary associations and therefore the case presented here for the self-determination rights of groups does not extend to states. He nevertheless does not attend to defending his arguments against the objection, referring the reader to another piece in which he attends to the task, implying that such a defense is successful (ibid., 112, referring to Christopher Heath Wellman, *A Theory of Secession* (New York: Cambridge University Press, 2005), Chapter 3).
Answering the concern that there are morally relevant differences between interests in marriage or religious practice and interests in controlling immigration, Wellman first concedes that freedom of association is more important in the more intimate setting of marriage than in the less intimate setting of fellow-citizenship. But he refers to the widely agreed-upon freedom of religious association to demonstrate that the level of intimacy of the association does not definitively determine the protection that the freedom to associate in each context deserves.\footnote{Wellman, “Immigration and Freedom of Association,” 113.}

Wellman then turns to consider the justification for states’ freedom to exclude foreigners as part of their freedom of association in more general terms. He struggles with the idea that the position requires justification at all, revealing his axiomatic approach to self-determination and the intuitive appeal he sees in the concept:

Freedom of association is not something that requires an elaborate justification, then, since it is simply one component of the self-determination which is owed to all autonomous individuals and legitimate states. As a consequence, I think that there is a very natural and straightforward case to be made in favor of freedom of association in all realms. Just as one need not explain how playing golf is inextricably related to the development of one’s moral personality, say, in order to justify one’s right to play golf, neither must one show that one’s membership in a golf club is crucial to one’s basic interests to establish the club members’ right to freedom of association. And if no one doubts that golf clubs have a presumptive right to exclude others, then there seems no reason to suspect that a group of citizens cannot also have the right to freedom of association, even if control over membership in a country is not nearly as significant as control regarding one’s potential spouse.\footnote{Ibid., 114–115.}

But to enforce the argument for states’ freedom of association, Wellman also suggests that the importance of the freedom not to associate in the case of states does not fall from the importance of this freedom in the cases of other groups. Using again the example of a golf club, Wellman notes that controlling the membership in the club is a useful instrument for controlling the policies set by the club. Wellman argues that states’ affairs are particularly important to their citizens, and that controlling the membership through immigration is a potent instrument by which citizens can control the policies that will apply to them, and thus plays a significant part in their self-determination.\footnote{Ibid., 114–115.} One area of policy that highlights the interest of citizens in the freedom to not associate is redistributive duties. Wellman believes that compatriots have special redistributive duties to one another. As immigration can directly affect their redistributive duties, citizens have a good reason to want to control immigration.\footnote{Ibid., 115.} Wellman concludes his positive case in favour of presumptive right of states to control immigration:

In sum, the conclusion initially offered only tentatively can now be endorsed with greater conviction: just as an individual has a right to determine whom (if anyone) he or she would like to marry, a group of fellow-citizens has a right to determine whom (if anyone) it would like to invite into its political community. And just as an individual’s freedom of association entitles him or her to remain single, a state’s freedom of association entitles it to exclude all foreigners from its political community.\footnote{Ibid., 116.}
Having argued for the presumptive right to control immigration, Wellman discusses two considerations that may limit the right: foreigners’ right to equality and individuals’ freedoms of movement and of property. Starting with equality, Wellman assesses Carens’s argument that equality demands a policy of open borders. The luck-egalitarian argument cites the facts that for most people their citizenship is determined by unchosen circumstances of birth (place or lineage) and that citizenship has significant consequences with respect to individuals’ life prospects. It then appeals to the idea that all humans possess equal moral status, and interprets this equal status to mean that individuals’ life prospects should not be determined by circumstances of brute luck. The solution to the problem of the relationship between luck, citizenship and life prospects, so the argument goes, lies in a policy of open borders.

Wellman offers two answers to this argument from equality. Principally, Wellman rejects the luck-egalitarian theory of equality and prefers a relational theory instead. He does not think that equality demands that we correct the consequences of luck, but more minimally that we correct inequalities that subject individuals to oppression, which he does not believe apply to the case of immigration. But he also thinks that even if luck-egalitarianism is the correct interpretation of the requirement of equality, the commitment it creates for us can be fulfilled by redistribution of resources rather than by open borders, and thus luck egalitarianism does not necessitates the conclusion that Carens, for example, pushes for.

Considering liberty-based arguments for open borders, Wellman refers to Carens’s argument according to which closed borders violate citizens’ property rights, foreigners’ freedom of movement, and, ultimately, both kinds of individuals’ freedom of association. Starting with the rights of citizens, Wellman concedes that individual freedoms may conflict with group rights and, though he describes himself as a “stanch defender of individual self-determination,” prefers the group’s freedom of association in the case of immigration control because he believes that “(1) an inability to invite foreigners onto one’s land is typically not an onerous imposition and (2) bringing outsiders into the political community has real consequences for one’s compatriots.”

Wellman also concedes individuals’ general freedom of movement. But, similarly to his argument about property rights, he contends that this freedom is not “perfectly general and absolute,” and insists that it cannot override the freedom of states to not associate with certain individuals. To the objection that argues that recognising an overriding state right to not associate would empty individuals’ freedom of movement from its content, Wellman answers that this is not the case as long as some states are willing to receive some individuals. He returns to the example of marriage and notes that one’s freedom to marry cannot mean others’ obligation to marry one against their will. If the freedom to marry is not emptied of its content in this example, Wellman says, then freedom of movement is not emptied of its content only because some states choose to control immigration.
Wellman presents a theoretical argument about principles of morals and justice. He provides a positive argument about a presumptive right to control immigration, and answers objections and possible limitations on this right. Though, as all theories, his argument has some clear policy implications, he is not interested in considering immigration policies as such in his piece. He refers to different questions of immigration—asylum seekers, guest workers—incomprehensively and only as illustrations for his points. And at a number of points he clearly states that he defends a “deontological” view of the right to limit immigration rather than an account of what is the best policy for a state to adopt.124

Wellman himself refers to his immediate critics, such as Carens. Obviously, proponents of luck-egalitarianism, proponents of equality of individual opportunity, and those who favour the liberties of individuals over those of groups would all object to his arguments. Most of these concerns have been described above, and Wellman attempts to include in his arguments responses to most, even if some will not find them completely satisfying.

I think there could be raised objections that are more narrowly tailored to Wellman’s argument in that they do not reject his whole approach but rather question some of his assumptions. One such objection takes issue with the examples he employs and the analogies he draws to support his argument. Are marriage and private clubs appropriate analogies to the state? The nature of the political association may be relevantly different from other associations and demand different protection. For example, Wellman says that even disassociation is in some cases an aspect of freedom of association. In the example of marriage, we think it is important part of the freedom that individuals are free to dissolve marriages by choice. But in the case of the state, we would be less inclined to allow the citizenship body to revoke the citizenship of individuals by choice. It seems that the nature of the political association is relevantly different. What is required is a deeper investigation of the unique nature of political association, which is something that Wellman overlooks by focusing on drawing analogies.

There are at least two directions that an investigation of the unique nature of political association can take. First, a serious discussion should be directed at the fact that states are, for most of their citizens, non-voluntary associations. Second, an exploration of the purpose of the association and of its function in the lives of the individual members may reveal some normative implications. We should consider what goods, services, and guarantees membership in the political association provides and try to understand if these are more or less protected when membership is closed or when it is open. As will be immediately shown, Ryan Pevnick goes a step further than Wellman in exploring the nature and purpose of citizenship and the implications with respect to immigration policy.

Pevnick and the argument from associative ownership

In what follows, I shall argue that states have claims of ownership over institutions and territory that are an important, though oft neglected, consideration in arguments regarding the ethics of immigration. I will attempt to demonstrate that this account casts doubt on the open borders position and provides us a framework from which we can consider controversial policy questions. For now, though, the important points are that (a) the efforts and contributions of citizens may give them a claim of ownership over state institutions that justifies a limited right of self-determination; and (b) this right of self-determination is an important consideration in arguments regarding the proper shape of immigration policy.125

Pevnick fits well with the contemporary group of scholars arguing for a right to control immigration. Though he disagrees with each of them on different points, like Miller and Wellman, Pevnick regards the question of political boundaries as one of justice, and takes justice to require that all individuals will be treated “as possessing an equal moral status.” As political boundaries are subject to this requirement, states’ discretion with respect to their immigration policy is constrained, and must be sensitive to the effects it has on foreigners. But Pevnick also insists that there are moral implications for membership, and he argues that these make room for treating members’ and foreigners’ interests differently in the context of immigration, and justify some closure.

Pevnick’s account turns on the specific justification he offers for the principle of self-determination. His account of self-determination is civic and individualistic. By civic self-determination, Pevnick means that citizens of a state, “whether or not they share a national identity,” have a presumptive right to decide the rules and policies that will apply to them. The right is held by individuals, rather than the political group as an entity in itself, making the argument an individualistic one.

Pevnick open his discussion with a negative argument. He evaluates the analogy between states and other purposive groups and how persuasive it is as grounds for state self-determination. The supposed power of the argument lies in the “pre-theoretical intuition” that purposive groups—groups of individuals that come together to advance a shared goal—have a right to control their own membership and policies at least to some extent. This right is justified by the individual members’ right to self-determination. Each one of them is joining the group willing to sign away some freedoms under a certain understanding of the conditions under which these freedoms are signed away, and with a certain understanding of the rules that will apply to the activities of the group. The character of the group’s membership is an important condition under which individuals are willing to sign off some of their freedoms to the collective. Respect for groups’ self-determination is a consequence, on this account, of the commitment to respect individual autonomy. Pevnick finds that this argument for self-determination, while it is commonly accepted and seemingly persuasive, cannot be extended to states in the same way that it extends to groups of choice because citizenship, for most people, is not a voluntary relationship. Another route to states’ right to self-determination is needed.

The principle of self-determination can be better justified, Pevnick claims, by individual members’ ownership of the institutions and goods for which they contribute. To adjust this account of groups’ self-determination to states would require only to attend to their non-voluntary and intergenerational nature. But unlike arguments from freedom of association, the idea of ownership is not dependent on personal choice and is not damaged by a lack thereof.

Pevnick uses the examples of property created under duress and of inherited property to demonstrate that the claim of ownership is not dependent on the choice of the proprietor and is not damaged by involuntariness. He argues that, in the same way, citizens can be viewed as owners of the state’s institutions without the involuntariness of their relationship to this property, or the intergenerational

127. ibid., 20–21.
128. ibid., 27. Emphasis in original.
129. ibid., 28.
132. ibid., 35. Pevnick notes at this point that this account does not create unlimited rights with respect to goods and institutions but limited ownership claims.
contribution to that property, harming their claim of ownership.\textsuperscript{133}

The claims of ownership do not have absolute justificatory power, and do not result in an unlimited right of the citizenry to decide the policies of membership. Other considerations, such as the need of refugees or of children born within the territory to illegal migrants, may override them. The equal moral worth of all requires that individuals included in a cooperative scheme through no choice of their own will have equal membership status in it. Nevertheless, Pevnick insists, membership makes a justificatory difference. And excluding foreigners who do have other schemes of cooperation and associative ownership to rely on would not amount to violation of these foreigners’ equal moral worth. In such a scenario, claims of ownership tilt the balance in favour of exclusion.\textsuperscript{134}

Pevnick is aware that the concept of citizenship as property is open to objection. He considers what he finds to be the two strongest objections, and rejects them. The first objection highlights considerations of justice in acquisition. Before an individual can claim a property right in an asset, the argument goes, the asset must have been acquired by the individual in a manner that conforms to the requirements of justice. Thus, for example, a thief does not have property rights in a stolen object. With respect to citizenship and its accompanying advantages, the objection continues, too many unjust events throughout the chain of acquisitions damage the property claim of current citizens. The argument has a weak version that applies to only some claims of citizens in some countries, and a strong version that views the history of the world as infested with injustices in a way that undermines the ownership claim in its totality. Pevnick refers to the strong version of the objection, and suggests that the claim that citizenries do not have ownership claims in their states should be rejected because its adoption would logically lead to the undoing of all ownership claims. Every current property right, from public to private, is a product of a historic chain of acquisitions some links of which were inevitably unjust. This is an unfortunate fact about the history of our world. “However, the rejection of all claims of ownership is surely a medicine worse than the symptom.”\textsuperscript{135}

The second objection claims that it is a mistake to talk of the state’s claim as one of property. It is jurisdiction that the state is exercising, not private property rights:

\begin{quote}
Jurisdiction is the authority to administer a system of property rights; it includes the right to enforce rules, regulate the use of property (as in zoning rules), and adjudicate conflicts. These, and not rights of ownership, are—according to the objection—the kinds of rights that the state claims and that self-determination involves.\textsuperscript{136}
\end{quote}

Pevnick finds that the objection rests on the differences between the claims that are associated with private property and those that are associated with the exercising of state jurisdiction. But he notes that ownership claims come in a variety of forms, and the bundles of rights that are associated with the ownership of an asset differ dramatically from one case to another based on a variety of considerations. It would thus be a mistake to reject the view of citizenship as associative ownership just because the bundle of rights it contains differs significantly from the bundle of rights typically associated with private property. He concludes this point:

\begin{quote}
So, the claim is that by jointly constructing state institutions and contributing the resources necessary for their continuing feasibility, the citizenry gains an ownership claim that affords
\end{quote}

\textsuperscript{133} Pevnick, \textit{Immigration and the Constraints of Justice}, 36–39.
\textsuperscript{134} ibid., 40.
\textsuperscript{135} ibid., 42. For the full discussion of the objection, see 41–43.
\textsuperscript{136} ibid., 43.
them at least some discretion in making future decisions about how those resources will be used (including specifying to whom the resources will be given in the future).  

This section has presented a number of exemplary arguments from the access to political membership debate, and the conversation that they create by responding to one another. Arguments for open borders and arguments for closed borders do not only stand each on its own but also play the role of objections to one another. The same is true for different arguments within each category. As they argue for the best justification for the conclusion they support, they question the assumptions other arguments rest on and propose different focal points from which to understand the stakes involved in the question of access to immigration.

The goal of this chapter is to show how the argument about our right to bring in our foreign family members (presented in chapter 2) intervenes in this literature about access to political membership. Now that the general lines of the conversation about access to political membership, and major arguments within it, have been presented, I can move to work towards achieving this goal. In the next section I will show that a normative account of the claim of cross-border families is so far largely missing from the literature. In the last section of this chapter I will advance my two main claims regarding the place of my argument about the right to family reunification within the literature: that the argument is compatible with a majority of approaches to access to political membership, and that the argument can assist in completing some incomplete accounts of immigration ethics.

4.3 Arguments about Family Reunification

Specific normative arguments regarding family reunification are largely missing for immigration ethics theories such as the ones described above. For example, amongst the scholars reviewed in section 4.2, Abizadeh, Wellman and Pevnick do not consider specifically the problem of cross-border families at all. Miller dedicates a few guiding words to the issue in explanation of his refusal to consider it in detail. Walzer only makes a short descriptive point with a few evaluative suggestions. And Carens, who provides the most elaborate discussion of the topic, still leaves some principled questions unresolved. In this section I describe what has been said in the literature and speculate about what could be said about family-class immigration by different authors. This is in preparation for the next section, in which I argue that the argument about our right to bring in our foreign family members could coherently complete theories of self-governance in matters of immigration, and that this argument is preferable to the best available argument, which is Carens's.

4.3.1 Carens on Family Reunification under the Conventional Assumption and in a Just World

Carens’s book is concerned with two questions of justice in the context of immigration. The first question arises in our current international political system and takes as given the assumption on which states

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137. Pevnick, *Immigration and the Constraints of Justice*, 44. For the full discussion of the objection, see 43–45.

138. I survey a number of prominent arguments without attempting to cover the whole field. I merely want to show main pillars of the debate, or to point at major different categories of arguments. For example, Sarah Song is working on an argument in the vein of groups’ rights to self-determination that I didn’t include here. And Michael Blake presented an argument about an individual right against new duties which supports state discretion in immigration matters. Song’s argument will probably share many features of Walzer’s and Miller’s, and Blake’s shares many of Wellman’s.
operate today, and which is accepted by many scholars of immigration, that states rightfully enjoy discretion with respect to immigration admissions and restrictions. Carens calls this the “conventional assumption.” Even within the framework of the conventional assumption, Carens claims, some important moral constraints apply that limit the state’s discretion. The first part of his book elaborates on some of these. It repeats to a great extent Carens’s discussion in a previous article on the ethics of admissions, and I will use both sources to flesh out his position.

In the second part of his book, Carens presents his own ideal theory of justice in immigration. As I have described in the last section, Carens contends that justice requires open borders. In the same way as he approached the general ethical question of discretion over immigration, Carens looks at the question of family reunification from both within the conventional assumption, and from within the ideal requirements of justice.

Considering the question of family reunification from within the conventional approach according to which states rightfully enjoy discretion with respect to immigration, Carens finds that the question “is primarily about the moral claims of membership.” Under the conventional assumptions, states have only weak moral obligations towards outsiders. But liberal states do have obligations towards their own members. Thus, “[t]he state’s obligation to admit family members living elsewhere is derived not so much from the claims of those seeking to enter as the claims of those they seek to join: citizens or residents or others who have been admitted for an extended period.”

Once it is established whose claim is considered, the next question is that of the strength of the claim of insiders looking to reunite with foreign family members, and what kind of a requirement it creates for the state. Carens describes the interest in being able to live with one’s immediate family members as “deep and vital”. He also notes that this interest is widely protected by national laws and by human rights documents.

Carens builds his right to family-class immigration as a membership-based right to be able to live with our close family members within our states of membership. He considers the further complication that it should be explained why a family has a right to be reunited in the state concerned, rather than that state being obliged only to not obstruct the insider family member form moving away and establishing family life elsewhere (presuming that the other state would allow this). He contends that “people also have a deep and vital interest in being able to continue living in a society where they settled and sunk roots.” While people may choose to move for a variety of personal reasons, “no one should be forced by the state to choose between home and family.” It seems that for Carens there exists a right to be able to live with one’s close family members in one’s country of settlement. This right is justified by the conjuncture of two rights: the right to family life and the right to live in a society where one is settled.

Carens attends next to the question of the right’s scope. The right to family reunification, like any

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141. Carens, *The Ethics of Immigration*, 186. Carens has expressed the same view when considering the way family-class admissions are treated in liberal states in Carens, “Who Should Get in? The Ethics of Immigration Admissions” (“So liberal democratic states act as though they have a moral obligation to permit family reunification, even when they do not think it is in their interest to do so. How should this self-imposed requirement to permit family reunification be morally evaluated? It must be kept in mind that family reunification is primarily about the moral claims of insiders, not outsiders.” [96–97]).
other right, is not absolute. A foreign family member who poses a threat to national security or to individuals can be justifiably excluded.\textsuperscript{146} But family members cannot be excluded, in Carens's view, for reasons of financial need or health risks (which are permitted reasons for excluding discretionary immigrants, given the conventional assumption).\textsuperscript{147} In the same way, family members cannot be excluded if they fail to meet criteria for selection that are used for discretionary immigrants, such as knowledge of the language and culture, and possession of economic potential. Last, Carens considers policy limitations that are not attached to a characteristic of the immigrant. He objects both to numerical quotas on family intakes and to the differentiation between family members of citizens and other long-term residents.\textsuperscript{148} “An immediate family member stands in a different relationship to the state from other potential immigrants. She has a specific and strong moral claim to admission that can only be overridden in extreme cases.”\textsuperscript{149}

Finally, Carens describes the scope of the right to family reunification in terms of the definition of “family” that is protected by it. Carens believes that the definition “clearly must include a spouse and minor children,”\textsuperscript{150} but also that “the conventional view of the family is too narrow” and requires expansion.\textsuperscript{151} He considers relationships in which individuals have interests in living together similar to those of conventionally defined families and suggests that same-sex couples and long-term cohabitating relationships that are not formalized by marriage should be included in the definition, “but there will still have to be legal criteria and definitions.”\textsuperscript{152} He leaves the question of definition open, hints only that the parents and minor children must be contained in it, and, concluding his discussion of family reunification under the conventional assumption, provides only general guidelines:

\begin{quote}
[I]t is too restrictive to say that the only understanding of the family that matters is the one held by the majority in the receiving state, but too expansive to say that the understanding of the family held by actual or potential immigrants is the only one that counts in assessing their claims to family reunification. I don’t think there is an easy solution to this issue, and I don’t have the space to pursue it in more detail.\textsuperscript{153}
\end{quote}

The ethics of family reunification in Carens’s version of an ideal world are less clear. In a just world of open borders states would not normally have a right to select immigrants, so normally there would not be need for an argument in favour of family reunification, let alone a definition of it as a specific right or a prioritized claim for admission. But even in such a just world, Carens agrees that circumstances may arise in which the global freedom of movement could be justifiably restricted.\textsuperscript{154} In particular, reasons of public order may require that the flow of immigration may be managed. In such circumstances, certain priorities should be set so that a queue is formed on just grounds. The claim for family reunification, its weight and scope, should thus be discussed in this ideal context as well. And it is here that Carens sends contradicting messages.

On the one hand, Carens notes that in a context in which some restriction of immigration is justified

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\textsuperscript{146} Carens, \textit{The Ethics of Immigration}, 187; Carens, “Who Should Get in? The Ethics of Immigration Admissions,” 97. Compared with discretionary immigrants, though, “the threshold for excludability should be raised” when family members are considered. (Carens, \textit{The Ethics of Immigration}, 187).
\textsuperscript{147} ibid. This point is stated but not argued for.
\textsuperscript{148} ibid., 190.
\textsuperscript{149} ibid., 187.
\textsuperscript{150} ibid., 188; Carens, “Who Should Get in? The Ethics of Immigration Admissions,” 98.
\textsuperscript{151} Carens, \textit{The Ethics of Immigration}, 188.
\textsuperscript{152} ibid. This point is stated but not explained.
\textsuperscript{153} ibid., 189.
\textsuperscript{154} ibid., 293.
\end{flushleft}
“family reunification would still set a limit to the state’s exercise of control over immigration.”\textsuperscript{155} But on the other hand, in a different place he says that “[i]f we were simply comparing the relative moral urgency of claims put forward by outsiders seeking to join family members already inside with outsiders seeking to enter for other reasons (e.g., needy people seeking a chance at a better life), it is not obvious that the claims for family reunification would always be stronger.”\textsuperscript{156}

While under the conventional assumption, in which Carens discussed the claim for family reunification, the priority of insiders’ claims was clear and unproblematic (it rests at the foundation of the conventional assumption), in a just world this priority requires special justification, or it cannot stand. And if the priority of insiders’ interests is not assumed, the claims for access into the polity of different outsiders should be ranked according to relevant differentiating factors that have to do with the outsiders’ claims. The strength, or moral urgency, of the different claims is one such factor. As Carens notes above, the claim of an outsider for family reunification may not be stronger than the claim of a needy outsider who is looking for a decent life.\textsuperscript{157} And although a just world is envisioned as one of relative equality between states, and where all states provide their members with decent lives, we could still imagine strong individual claims for access, such as cultural and religious affiliation, or special interest in a specific industry. These claims may give individuals reason to seek migration that, in a case of need for restriction of immigration, should be measured against the claim for family reunification. Maybe connection to the receiving society could serve as a relevant differentiating factor that could be used to rank potential immigrants in situations where the restriction of immigration is necessary. If so, then this consideration may strengthen the claim of outsider family members (or offset its weakness with comparison to other claims based on stronger needs). But the consequences of such a consideration, even if it is taken into account, are much less clear in a just world in which the highest moral principle is that of freedom of movement than under the conventional assumption, where the claim for family reunification is assessed from the perspective of insiders who have rights against the particular state and priority over outsiders when immigration is concerned. In a just world but under circumstances of scarcity of access to immigration, assessing the strength and priority of the family reunification claim is much more complicated. Carens’s discussion is incomplete on this point.

### 4.3.2 Miller about Family-Class Immigration under States’ Discretion

Miller has dedicated a whole book to the political philosophy of immigration. I have described in short above his arguments regarding the principal question of the right to exclude. After defending his view on this general issue, Miller considers the claim of refugees and its weight against the right of states to exclude. Later in his book he attends to a number of immigration policy questions. He considers the criteria for selecting, and the terms of admission that should apply to, economic migrants—migrants who do not possess a human right claim to enter but express an interest in immigration. Finally, he considers the appropriate treatment of migrants within their adoptive society once they have been admitted for a long term. One question, or a category of immigration, that Miller explicitly leaves aside is the plea of cross-border families to be together, its normative status and its normative status’ policy implications.

\textsuperscript{155} Carens, \textit{The Ethics of Immigration}, 293.
\textsuperscript{156} ibid., 186; Carens, “Who Should Get in? The Ethics of Immigration Admissions,” 97.
\textsuperscript{157} Carens expresses the same thought in ibid. (“In a world of vast inequalities, many people would like access to rich liberal democratic states, but relatively few obtain it. If the comparison were simply between the relative moral urgency of claims put forward by outsiders seeking to join family members already inside and outsiders seeking to enter for other reasons, such as needy people seeking a chance at a better life, it is not obvious that the claims for family reunification would always be stronger”).
Miller offers a reason for setting aside the discussion of the claim of “people who apply to enter on grounds of family reunification”: that the claim in this case is that of the resident family member and not the foreigner family member. Miller believes that this is the case despite the fact that all possess a human right to family life. The human right to family life does not suffice to create a claim for admission because “to turn this [the human right to family life] into a right to engage in family life in a specific place it needs to be coupled with a right on the part of at least one family member to reside there.” Miller settles on a normative analysis of the right to family reunification that resembles Carens’s analysis under the conventional assumption.

In terms of policy implications, the fact that Miller’s account does not see family reunification as a universal human right means that a family that cannot stay united within its own state of citizenship, though its right to family life is clearly violated, does not gain any claim against any other state to be taken in as a family for the purposes of maintaining family life. His account also implies that unauthorized migrants and temporary migrants do not have a claim for family reunification. But that is all that can be surmised from his passing remarks on the issue. And Miller thinks that that is all that needs to be said. He concludes his words on the matter only by referring in brief to the question of the definition of “family” saying that “there are questions to be asked about how far the right to family reunification should extend beyond a person’s partner and their children, but these are matters of policy that cannot be resolved by appeal to general principle”. I respectfully disagree.

Miller is wrong, I believe, that family reunification policies are matters of policy that cannot be resolved by appeal to general principle for two reasons. First, by his own account, the claim for family reunification is based on rights. Rights are general principles that give us at least some guidance with respect to policy: they set the parameters of the debate in that they exclude certain policy options, and they impose the requirement that every policy solution will be coupled by a suitable justification. Rights mean that our policy options are not subject only to our choice but also to some constraints. The constraints depend on the specific interpretation we agree to give a general statement of right. In the case of “family life”, for example, we have to discuss what is the appropriate definition of a family, in what way family life is distinct (if at all) from family itself and what does this mean for the right, and when does family life exist and when does it not. For example: if my elderly father lives abroad and I, his adult daughter, skype with him on a regular basis and visit periodically: is this family life? What if we want to live together but borders stand between us? Does our interest have a normative power? Does it matter that we didn’t live together for years before, even when borders did not separate us? Does it matter why borders separate us (for example, by my choice to move abroad?) Does it matter that we are both adults? Or if at least one of us can use the continuous assistance of the other? All of these questions and more are questions we want to be able to answer when we speak of a right to family life in general, and a right to family reunification in particular. We can answer these if we pay more attention to defining and defending the justifications for the general principle of “a right to family life”.

My effort in the first two chapters of this thesis was focused on achieving just such a detailed account of the meaning of the general principle of a right to family life. I believe that it is exactly such an exercise

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158. Miller, *Strangers in Our Midst: The Political Philosophy of Immigration*, 113. This is stated but not argued for. It is implied from the statement that the right to family life has universal aspects and membership-specific aspects. Presumably, the human right covers only negative aspects of the right—a protection against intervention in family life. The membership-specific right covers the positive aspects of the right—a promise to supply the conditions for the maintenance of family life.

159. ibid., p. 199, footnote 3.

160. ibid., 113.
that needs to take place when policy options are considered. It is not the case that policies in this area are independent from moral and political principles.

Second, Miller’s own position is not value-neutral. It is based on a specific understanding of the balance of considerations on the question of immigration. His view that the right to family reunification in a specific country is membership-based arises from his weak-cosmopolitanism and his support of associative obligations. His view is based upon specific general principles. I understand his statement that the details of a policy of family reunification should be determined at the level of policy-making to mean that by and large family reunification policies should be the product of the democratic decision of the citizenry in question. But the understanding of the issue as one of rights on the one hand and the allocation of the discretionary power to the citizenry on the other are statements of principle that constrain policy-making options. Because I agree with Miller that family reunification is a question of right, I believe that any account of immigration ethics must attend to the consequence of the argument for the question of family reunification in greater detail than Miller does.

Lastly, Miller’s discussion of the question of family reunification is problematic as it renders his theory of immigration ethics incoherent. Following his short presentation of his view that the right to family reunification is held by the individual who is a member of the state concerned, Miller says in a footnote “[h]ere I follow M. Lister.”161 In chapter 2 I presented Matthew Lister’s argument about the right to family-class immigration. In a nutshell, Lister believes the right is held by the individual who is a member of the state concerned, and he believes the individual holds this right against the state as part of the individual’s freedom of association. Freedom of association justifies both the right to create and maintain intimate relationships of choice, and the right to create and maintain exclusionary political associations. In the battle between the right of the political association to exclude foreigners and the interest of the individual member in bringing into the political association her family member the individual’s interest possesses the weightier normative power. Lister justifies this by claiming that more intimate associations contribute more to individual’s autonomy, and thus deserve priority.162

The problem with Miller’s referral to Lister’s argument lies in the balance between the self-determination of the political group and the self-determination of individuals that each view supports. Lister’s argument, based loosely on Wellman’s view, clearly prefers individual self-determination. It is individual autonomy that gives rise to the freedom of association in both the intimate and the political realms. And since Lister thinks that the intimate association expresses individual autonomy to a greater extent than does the political association, he believes that restrictions on the former are less legitimate that restrictions on the latter. If one has to yield to the other, the political association should limit itself so as to allow the intimate association to flourish. Miller’s argument, on the contrary, is not concerned with the self-determination of individuals but rather of groups, and in particular the national group. It is true that his argument is based on the intrinsic value of relationships, and that personal relationships are the prototype for these. But he then moves to build an argument for political self-determination that highlights the communitarian aspects of the political association: the shared identity that gives meaning to common life and a feeling of a shared fate. It seems to me that his quick remark that individuals hold the right to bring in foreign family members against their community stands in tension with the communitarian aspects of his argument. If individuals understand themselves first and foremost through their place in a community, as communitarianism suggests, then they would not see it as their right to

162. And Lister himself says that he is sympathetic to Wellman’s theory of immigration ethics (Lister, “Immigration, Association, and the Family,” 730, citing Wellman, “Immigration and Freedom of Association”).
bring in foreigners against the will of their community. And the community is likely to see a right to bring in specific foreigners without the control or say of the community in the matter as a serious limitation on its ability to control its own shape and character, and as an affront to its self-determination. As a self-proclaimed liberal communitarian, Miller should provide more detail and solve this tension. It is not that an explanation for a communitarian society respecting the right to family-reunification cannot be given in principle. It is just that such an explanation should be offered so that it can be assessed.

4.3.3 Walzer on the family

Walzer makes a point of fact about family reunification, and offers a short normative evaluation of it:

The state recognizes what we can call the "kinship principle" when it gives priority in immigration to the relatives of citizens. That is current policy in the United States, and it seems especially appropriate in a political community largely formed by the admission of immigrants. It is a way of acknowledging that labor mobility has a social price: since laborers are men and women with families, one cannot admit them for the sake of their labor without accepting some commitment to their aged parents, say, or to their sickly brothers and sisters.\footnote{Walzer, \textit{Spheres of Justice: A Defense of Pluralism and Equality}, 41.}

For Walzer, priority for family-class immigrants is appropriate especially in states that understand themselves as immigration societies. This is consistent with his view that immigration policy is constrained mainly by the polity’s self-understanding and values. It is also consistent with his idea that immigrants cannot be invited for labour purposes without being extended equal status within the community in the long run. His reference to the social price of labour mobility brings home the consequences of inviting economic migrants in. He seems to settle on a position according to which the claim to family reunification is held by the insider family member, and obliges the community either by the community’s own values and identity, or by the community’s past deeds (in the case of a formerly-admitted immigrant looking to be reunited with a family member).\footnote{It may be worth noting that his argument doesn’t seem to address the case of citizens born in the country who form cross-border families; it seems to speak exclusively to families that formed elsewhere, separated for economic reasons, and now seek reunification.}

4.3.4 Suggesting Scholars’ Views on Family Reunification

Abizadeh does not attend to the problem of cross-border families, but in light of his view it is clear why he does not see it as a special problem. For him, family members—insiders and outsiders alike—are coerced to stay separated by border control. In his view, the interests of all those who are coerced by political power should receive equal consideration, and the policies coercing them should be adjudicated in democratic fora open to them all. In his view, then, the claim for family reunification is held by both insider and outsider family members and, since there is no right to unilaterally close borders, there is no reason to define specifically the interest in family life as a right. General freedom from coercion should solve the plight of cross-border families.

Wellman’s view on the question of family reunification is probably very similar to the one presented by Lister, and described in chapter 2.\footnote{Wellman builds his argument for political self-determination on the foundations of individual self-determination. The underlying justificatory principle in his account sees himself as a liberal communitarian, and as an affront to its self-determination. As a self-proclaimed liberal communitarian, Miller should provide more detail and solve this tension.} Wellman builds his argument for political self-determination on the foundations of individual self-determination. The underlying justificatory principle in his account
is individual liberty. And he himself refers to the example of the right to marry by choice, which shows that he views familial relationships, particularly spousal relationships, as fulfilling individual autonomy. Furthermore, he himself concedes that freedom of association is more important in the more intimate setting of marriage than in the less intimate setting of fellow-citizenship.\textsuperscript{166} He may be pushed to differentiate between familial relationships of choice and non-voluntary familial relationships (such as that between children and their parents). He may want to protect under a right to family reunification only those familial relationships that can be persuasively shown to promote personal autonomy. But overall it seems inevitable that in his view family reunification would be an individual right overriding the interest of the group in self-determination and exclusion. What is left to clarify is to whom Wellman would assign the right: any family member, or only the insider family member against the political group.

Pevnick, though he considers a number of specific policy questions, does not refer to the question of family reunification. But his debate of other questions may be illuminating for the purposes of the discussion of family reunification. The ownership claim is very strong in Pevnick’s view, and allows the citizenry to reject requests of most foreigners to join the state. But the ownership claim yields to that of the children of illegal migrants and to that of refugees. In these cases, the foreigners are included in the state’s scheme through no choice of their own and to deny them full and equal status would subject them to indecent lives and violate the requirement of justice. “While granting such individuals full membership indeed limits the ability of citizens to collectively determine their future political lives, there is ultimately no alternative consistent with recognizing the equality and humanity of the children of illegal immigrants [and refugees].”\textsuperscript{167} The solution to the question of cross-border families depends on Pevnick’s assessment of the part that choice plays in their plight and on his assessment of the harm suffered by separated family members. He could differentiate between different cases based on the reasons for separation and the living conditions of family members in different countries. I cannot conclude with confidence what balance he would assign to the family-life claim in comparison with citizens’ claim of ownership. Nor can I conclude whether he would consider access to family reunification as part of the bundle of rights and privileges that every citizen holds as owner of their state’s institutions. Pevnick’s principled argument is the least informative one with respect to the question of family reunification.

This section has surveyed the little that has been written about the question of cross-border families in the literature about access to membership. I have demonstrated that the discussion is porous and incomplete. Since the problem of cross-border families involves the relationships of the state, an insider member, and a foreigner, I believe that it presents a unique challenge to any approach on immigration ethics. Not only is this question important because of the deep and basic interest of individuals in uninterrupted family life. It is also the case that because the question involves the perspective and interests of states, members and foreigners, by discussing the question, an argument about immigration ethics will reveal many more details about the values it upholds and the balance of different considerations it calls for. By discussing the question, arguments about immigration ethics will be presented more fully.

\textsuperscript{166} Wellman, “Immigration and Freedom of Association,” 113.
\textsuperscript{167} Pevnick, \textit{Immigration and the Constraints of Justice}, 169.
4.4 Conclusion: Our Right to Bring in Our Foreign Family Members and the Membership Debate

I believe that, to be complete, every theory of immigration ethics must at least consider its position on the plea of cross-borders families. This is because the juxtaposition of the right to family life and membership ethics creates a unique, pressing, conceptual challenge. My thesis provides a candidate solution that enjoys a number of advantages. My argument about our right to bring in our foreign family members is compatible with most foundational arguments about access to immigration. It can thus assist in filling the gaps in different immigration ethics theories. And my argument is preferable to other accounts of rights with respect to family reunification exactly in that other accounts are less flexible, some being written from within a specific theory of immigration ethics. Finally, and most importantly, my argument can speak to family reunification’s greatest critics: closed-borders advocates of the statist variety, such as Miller.

I argued in chapters 2 and 3 that citizens and permanent residents have a right to be reunited in their state with their foreign family members. This right forms part of our right to family life. It protects their basic interests in care and in sharing their lives. I also argued that though these interests are basic and universal, we can be satisfied, indeed it is in everybody’s best interest, if our right to bring in our foreign family members is understood as a civil, or a membership-specific, right first and foremost. To view it as a human right would be to weaken it, as its protection will be weaker.\footnote{168. I am not rejecting the idea that we all have a human right to family life. I believe that we do. But on top of that right, and that is the really important part, we have a civil right to family life. This is a right to family life in a specific place, and it is stronger in that it identify a small set of duty holders with strong affinity to the individual at the heart of each case considered. Or, another way to interpret my argument, is to say that we should understand human rights as imposing different duties on different states, with the state of citizenship or permanent residence (at least with respect to family life) holding first order of duty.}

That is, the right should be aimed in the first stage at our state of residence and not against all states of the world.\footnote{169. This is compatible with the existing international order, in which states hold the primary obligation to protect the basic interests of their citizens, and in some cases of persons within their authority. The question of universal obligations comes at second stage in one of two scenarios: when a state is unable or unwilling to protect the basic rights of their people, or when an individual lacks membership in any state and thus no state holds the responsibility to protect that individual’s basic rights. In these scenarios, the responsibility falls on the entire international community to protect the basic interest, and the exact state to be under specific obligation can be determined by an number of criteria: the state in which control the individual finds herself; a state able to assist, etc.}

This conclusion is supported by the converging interests of individuals and political groups represented by states. Thus, even if they have the general prerogative to control immigration, states are compelled to generally admit foreign family members in respect of citizens’ and permanent residents’ right to family life.

Consider first arguments for open borders. These interact with the claim of cross-border families in one of the following two ways. For the argument from global freedom of movement the reason for immigration is inconsequential. Attributing the right to immigrate to every human being equally, irrespective of specific circumstances, the argument eliminates the problem of cross-border families altogether because individual family members have an independent claim for admission. The family claim becomes redundant. On the other hand, for arguments that want to see borders flexing for different groups differently the family claim is very consequential. These may consider the special position of foreign family members in favour of their priority or may conclude that the plea of family members is less morally pressing than others. But in any event, the detailed account of the right to family life I presented in chapter 2 may give their authors ideas on how to assess and compare different claims to admission, in
order to complete their arguments.\textsuperscript{170}

Now consider regulated-borders arguments. My argument speaks to these, too. It is perfectly compatible with those arguments that prioritize, at least in some cases, the rights of individual members over those of the political group. Wellman and Pevnick’s arguments seem to be able to support the right to family-class immigration because their arguments are founded on individual rights: liberty in the case of Wellman, property in the case of Pevnick. Both support associative, partial, obligations and thus both are likely to support the argument that the right to family reunification is held by the member of the political group against her peers.

Arguments that consider the rights of groups, such as Walzer and Miller, must particularly explain their conclusion in favour of general openness to family-class immigration. This is because they speak in terms of shared identity and seem to prioritize the group’s self-determination over the individual rights of its members. And too often they present a unified “us” versus “them” narrative. But the plea of cross-border families shows that the demos is not united on all fronts. Some members of the polity would prefer not to accept foreign family members while others, particularly those who have foreign family members, will be in favour of a policy of openness to family reunification. At the same time, some of “us” share interests with some foreigners. The conclusion that the rights of individual members shall entail certain admissions must be supported by a justification in a theory that by and large adheres to political decisions.

Overall, the chapter presented main arguments from the literature on immigration ethics and how they play out in terms of family reunification, as well as the contribution that the arguments I made in previous chapters make to this literature. In considering the right to family-class immigration in the context of citizenship and immigration ethics, I hope to have shown that the family class showcases different theories’ deepest commitments in an illuminating fashion.

\textsuperscript{170} See, e.g., Gibney, \textit{The Ethics and Politics of Asylum}, ?? (In a book that is dedicated to the problem of refugees, Gibney makes reference to the relationship between the claim of refugees and that of cross-border families, and he suggests that at least in the American context some relief to the former could achieved by some limitation of the latter.).
Chapter 5

On Limitations of the Right to Bring in our Foreign Family

5.1 Introduction

So far, this thesis has considered the issue of family-class immigration from a conceptual perspective and has advocated for a right to bring in our foreign family members and its merits. This chapter will complete the conceptual analysis of the right to family-class immigration, but will also perform a practical task. By considering the limitations to which the state can justifiably subject the proposed right, I will both continue to describe the right to bring in our foreign family members as I conceive of it, and will offer some legal reforms aiming to solve actual problems currently affecting family-class immigration.

What I call “conceptual” questions are questions of normative and legal theory. These pertain to the status of the claim of cross-border families to be together and the relationship between this claim and other immigration-related issues, such as asylum, economic immigration, the status of citizenship and the control of borders at large. These questions belong in the academic discourse of immigration ethics or theory. The main gap in that discourse is the consistent failure to consider fully and in depth the normative status of family-class immigration. Surveying the immigration ethics corpus, as I have done in the last chapter, we find murkiness with respect to the normative status of the claim of cross-border families to live together in one state. This gap is unfortunate not only from the perspective of those who, like me, are interested in family-class immigration itself. As I have argued in the last chapter, the different possible standpoints on the normative status of the claim of cross-border families to be together have direct and important implications for a theory of immigration ethics as a whole, and vice versa.

In the last three chapters I have attended to conceptual questions, having tried to close this theoretical gap by suggesting one possible normative theory of family-class immigration and by advocating for its merits. I first developed, in chapter 2, a functional account of the right to family life. According to this account, family life deserves the special protection provided by a right because family life fulfills the basic human interest in caring and sharing. Based on this rationale, the right to family life should protect all kinds of relationships that perform the function of providing long-term, daily, committed care and sharing. Thus, the subject of the right to family life is defined by the function of the relationship rather than by the form of the relationship, and “families” for the purposes of being protected under the right,
come in all sorts and forms. Based on this functional account of family life, I argued in chapter 3 that the claim of cross-border families to be reunited in one state ought to be understood as a right-claim held by an individual against her state of citizenship or permanent residence, to be allowed to bring into that particular state her foreign family members. Finally, I positioned my argument within the current citizenship and immigration literature, and argued for its advantages in chapter 4.

Considering some of the justified and unjustified limitations on the right to bring in our foreign family members in this chapter will help to complete the normative account of family-class immigration I offer in this thesis, as it will provide detail on the appropriate scope of the right to bring in our foreign family members, and its appropriate extent of protection. The scope “marks the right’s boundaries and defines its content”, while the extent of its protection “defines the justifications for the right’s limitation.”

What I call “practical” questions are questions pertaining to legal policies and their effects on the lives of cross-border families and family members. Surveying the policies regulating family-class immigration worldwide, we find that many legal policies result in either prolonged separation or in outright denial of reunification to bona fide families whose members pose no risk to the would-be adopting state. Some policies further create a pattern of inequality, where the denied families share characteristics such as origin, culture or economic status. Considering some of the justified and unjustified limitations on the right to bring in our foreign family members in this chapter will serve also as a discussion of what I consider to be some of the most important policy questions regarding family-class immigration.

Like most rights, the right to bring in our foreign family members is not absolute. Having conceded this, I find some of the current limitations on family-class immigration to be outright illegitimate. In this chapter I will identify three kinds of policies that violate the right. First, current legal definitions of who are the “family members” eligible for family-class immigration violate the right. In section 5.2, I will discuss this primary policy question and will argue that the functional definition I defended in chapter 2 should be adopted in immigration law so that all foreign functional family members, and only they, are eligible for reunification with their citizen or permanent resident family members. Second, in section 5.3, I will discuss family-class immigration quotas, which are practiced in some jurisdictions. These violate the right to family reunification, I will argue, and should be abolished. In section 5.4, I will argue against the elsewhere approach—a legal doctrine according to which the state is only obliged to reunite families in its territory if a reasonable alternative for the family to reunite elsewhere does not exist. I will argue that, despite its claims to the contrary, this legal doctrine is incompatible with the concept of a right to family reunification whatsoever. Needless to say, the application of the doctrine violates the right I advocate for and should be ceased.

In sub-section 5.5, I will discuss a group of legitimate limitations on the right to bring in our foreign

1. Aharon Barak describes modern constitutional theory as based on “a fundamental distinction between the scope of the constitutional right, and the extent of its protection.” (Aharon Barak, Proportionality: Constitutional Rights and Their Limitations, trans. Doron Kalir (New York: Cambridge University Press, 2012), 19) This thesis does not discuss black-letter law and is not limited to actual constitutional rights (rights enumerated in constitutions or developed by constitutional courts). It rather discusses legal normative theory and provides an argument for what the law should be like. But I envision the right to bring in our foreign family members as a constitutional right: a right held by citizens against their governments and protecting basic interests. For this reason I see it fitting to apply constitutional theory to the right.
2. I bid.
3. By “members posing no risk” I mean individuals who are not of any security or criminality concern. For the purposes of this thesis I do not question the right of a state to refuse the admission of individuals whom the state deems to pose violent risk to others. I acknowledge that whether or not states ought to have such a right is in itself a question worthy of research and debate, but it is not one which I intend to explore here.
4. Here I take Barak’s minimalist approach according to which at least most rights are not absolute (ibid., 27–37). The question is nevertheless a matter for debate between right theorists, but this discussion is beyond the scope of this thesis. For the purposes of the argument presented here, the minimalist approach to the question will suffice.
family members. These policies, even though they complicate the process of reunification for all families, are legitimate. I will discuss an array of conditions and limitations on family reunification, from minimum income requirements to language tests. These are legitimate if they are applied proportionately, which means that their application to a specific case is permitted so long as it does not deny reunification. The discussion of these four policy areas completes the project of building a comprehensive theory of family-class immigration.

Finally, a few more preliminary remarks may be in order before I move to discuss policy measures. Despite my special concern with the current access-limiting trend, which I have described in the introduction to this thesis, this chapter is not limited to newly introduced policy measures. The elsewhere approach, for example, has long been applied to reunification cases. In some regimes, quotas formed part of the category from its inception. And the definition of family members eligible for reunification has always been restrictive. But these policies set the stage for the latest trend by entrenching the idea that family reunification can be severely restricted. And the chapter does consider many policies that are relatively new, and thus form part of the access-limiting trend. Most importantly, the chapter is interested in the principle of the matter and in a view towards the future. As we see a trend of limiting the access to family reunification, the chapter makes an argument about the kinds of policy tools that are permitted and those that are forbidden in principle, and which tool can and cannot be used when we design family immigration policies.

While I discuss justified and unjustified limitations on the right to family reunification, I also try to answer persistent concerns with family-class immigration, such as the possibility of abuse of the category and the concern that it is a drain on society. This I do without assuming that every claim about the potential detrimental effect of family immigration is based on facts, but also without rejecting concerns with family-class immigration or objections to it off-hand. I take concerns seriously and will treat them hypothetically, considering what is the legitimate policy reaction to a concern, should it reflect a fact, given the right to bring in our foreign family members.

In terms of the viability of the policy recommendations I make, I want to stress that I am only interested in making arguments that I believe have room in current liberal democracies’ laws. Although I am not going to argue for a specific legal route to realizing the reforms I suggest here, I argue for policy conclusions that I believe are entailed from the liberal values entrenched in our legal systems, and that I believe are achievable.

Finally, and most importantly, I would like to explain my use of examples. I use examples illustratively rather than comprehensively. Throughout the chapter I offer the strongest examples of the policies I discuss. I give examples from different jurisdictions wherever I find them, and I do not attempt, with respect to each policy, to give a comprehensive global view of its place in different legal systems. I am not offering a comprehensive comparative law analysis but merely give examples for current trends. I chose examples that I find illuminating and, though I claim there exists a trend of limiting access to family-reunification, this chapter is not concerned with demonstrating this fact but in analysing some of its components.5

Nevertheless, there is some system to the choice of examples in this chapter. As the theory I advance here is based on liberal and democratic ideas, I only consider the laws and policies of major immigration jurisdictions that conceive of themselves, and are generally thought of, as liberal democracies. And as I am interested in offering a conceptual, universal, analysis of the issues plaguing family-class immigration

5. I argued for the existence of the trend in the Introduction (Chapter 1).
rather than a localized legal analysis, I choose to discuss in this chapter examples of prevalent policies from a variety of major immigration-receiving jurisdictions.

5.2 Definition: “family member”

5.2.1 The Primary Policy Question

After establishing the right to bring in foreign family members that is held by citizens and permanent residents, the primary question with respect to this right is that of its scope: what “marks the right’s boundaries and defines its content.” More precisely, the scope of the right is constituted by defining who holds the right, and by defining which foreign family members are allowed to be brought in. I answered the former question in part in chapter 2. Here I attend to the latter.

With respect to the right to bring in our foreign family members, the scope can be captured by the definition of “family member” eligible for immigration for the purpose of family reunification. The definition of the relationships that make individuals eligible for family-class immigration constitutes the scope of the right to bring in our foreign family members since it determines which relationships maintained by citizens and permanent residents bring them under the protective umbrella of the right. It thus gives the right its content and marks the borders of application to foreigners.

What is the scope of the right is not only a primary policy question in practical terms, because it helps answering different actual cases, but also in conceptual terms. The group of family members that are eligible to be brought in for family reunification purposes reflects the conception of family underlying the immigration policy. Different conceptions of family in turn reflect different approaches to the value in families and in family life, which justifies policies supporting families. For this reason, defining the scope of the right—namely, which individuals are eligible for reunification—directly expresses the justification for the family reunification policy and for the right to family life that underlies it. I thus open the policy part of my investigation with this question of definition of “family member”. Not surprisingly, the discussion here will follow closely the argument made in chapter 2.

5.2.2 The Proposal

In accordance with the interest-based functional account of the right to family life I presented in chapter 2, I propose that the definition of “family member” eligible for reunification ought to follow these lines:

For the purposes of immigration, a family member is an individual who, on a day-to-day basis, maintains with a citizen or a permanent resident a relationship of mutual care, responsibility, and sharing of resources and experiences which contains a promise, or a shared understanding, of eternal connection.

I have argued for the advantages of the functional approach in chapters 2 and 3. In a nutshell, I argue that the right to bring in our foreign family members is entailed by our right to family life and forms

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6. I haven’t asked and answered many questions regarding the identity of the holders of the right. Two important ones that I concede, but am not going to discuss, are: (1) age, and in particular majority vs minority; and (2) whether my argument is minimalist, meaning that at least citizens and legal permanent residents are entitled to family reunification, but maybe other members of the polity can be entitled to family reunification under certain circumstances as well; or whether it is restrictive, meaning that it is only citizens and legal permanent residents that are entitled family reunification. I will return to this point in Chapter 6, the Conclusion.

part and parcel of it. The proper justification for our right to family life is our basic interest in care and in sharing. Stemming from this justification is the norm of protecting functional families (rather than any kind of formal ones). Here I offered a legal definition that captures functional families.

It may be helpful to understand my proposal by way of contrast with proposals made by other commentators on the issue. In chapter 2 I described Lister’s account of a right to family-class immigration. His account pivots on the idea of freedom of association, and he believes that as much as this freedom permits national groups to exclude others it also requires them to allow their members to create familial associations with foreigners and to include them within the national society. When he come to discussing the definition of “family”, Lister suggests that it is satisfactory to rely on the nuclear model of two adult partners and their dependent children with the support of the prevalent conception of the family in any given society to fill in the definition of “family” for the purposes of immigration beyond this core model. I resist this idea in principle. In my view, the justification for the definition must be narrowly tailored to meet the justification for the right to bring in our foreign family members itself. Prevalent public conceptions at different times do not reflect the justifications for the right to family life. On the contrary, prevalent societal conceptions of the family are usually informed by popular ideas of which families are good, which are informed by moral, cultural and social norms practiced at the time by the majority. They are not necessarily ideas that withstand critical evaluation. Furthermore, giving the prevalent perceptions of family a legislative role will systematically disadvantage members of minority groups, who have similar need and desire for family life, but may achieve it in a non-conventional manner.

Having established the rationale for my proposed definition before, in the rest of this section I want to demonstrate the current legal context in which I make my proposal. I will explore illuminating examples of current definitions, the core of which falls on the formalistic side, but also some that pave the way for the adoption of a definition along the lines I offered here. Finally, I will show that a legal definition along the lines presented above offers three distinct advantages, and bears no particular administrative costs. As a whole, I hope to show that not only is the definition I offer theoretically sound (as argued before), but that it is good and valid legal policy.

5.2.3 Current Definitions

In all jurisdictions, the definition of family members eligible for immigration under the family class is mostly formalistic and quite restrictive. In all jurisdictions the definition reflects a certain position on the desired family rather than protecting relationships of care as such. And while in many jurisdictions the definition has changed over time to reflect some changes in the social conception of the family, all definitions still include normative judgements on what constitutes a “good” family in one way or another. In this way, current definitions exclude some functional families from reunification. All

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9. ibid.
10. I am not suggesting that the state is always unjustified in enumerating kinds of families that it does not desire and therefore excluding such families from immigration benefits. For example, states are allowed to deny reunification for families whose members pose a security or violent threat to the general public. But most of the selection must be done through the application of the functional approach, so that families are denied only because their form is considered to hinder the fulfillment of their members’ interests in care and sharing, i.e. harmful families are not families. Polygenic families may be restricted from reunification if the reason is that the family relationship does not benefit certain family members.
11. For example, on the struggle of same-sex families to achieve equal immigration right see, e.g., Canada. Status of Women Canada. Prepared by LEGIT-Vancouver, Beyond Borders: The Journey Towards Equal Immigration Rights for Lesbian and Gay Canadian: Report on Regional Organizing and National Strategizing Project (Vancouver: LEGIT-Vancouver, 1998); LaViolette, ‘Coming Out in Canada: The Immigration of Same-Sex Couples Under the Immigration
jurisdictions use some sort of a list of relations and relationships that are eligible for immigration and, in most jurisdictions, the list is a closed one. In many jurisdictions the definition is further restricted in that the list contains only biological or formal legal relationships and excludes relationships of similar functions that lack biological or formal characteristics. In all these senses, the definition of “family member(s)” eligible for reunification is commonly a formalistic and restrictive one.

Furthermore, even as definitions of “family” have expanded in some regards throughout history, they have become more exclusive in others. Changes such as the inclusion of same-sex, common-law, or conjugal partners in the definition of “spouse” have occurred in many jurisdictions, but at the same time most jurisdictions have moved to exclude more distant relatives that once were eligible for family-class immigration from the definition of “family members”, such as parents, grandparents, and siblings. The latest universal trend is focusing the definition on members of the nuclear family, typically two partners and their biological or legally adopted children. And lately, even the nuclear family’s access to immigration is being limited, for example by lowering the maximum age of children eligible for reunification, or by setting a minimum age for spouses eligible for reunification. The latest universal trend is thus focusing the category on a specific conception of the nuclear, dependent, family.

Finally, it is important to note that in most cases the definition of the family for the purposes of family-class immigration is more restrictive than the definitions of the family adopted in other areas of the law, most notably family law. Looking at the American example, Kerry Abrams and Kent Piacenti explain this policy choice as an attempt to relieve the state from responsibility. In family law, the state’s main interest is to assure individuals are taken care of by other individuals so that the state does not need to step in and provide services. Therefore definitions of family ties in this area tend to be wide and inclusive. In immigration law, the state’s main interest is to assure that the significant benefits attached to immigration status would be distributed to few individuals. Hence the definition of familial ties in immigration law tends to be restrictive. While it may be an accurate description of incentives and their effect on legal policy, this account does not provide an appropriate justification for the different understanding of family in the two areas of law. I have argued in chapters 2 and 3 that family-class immigration should be understood as another aspect of the right to family life of members of the state, and should be designed in light of the value in family life. The same value and right underlie the regulation of the family domestically. And so, in my view, the definition of familial ties should be one for both areas of law. Whenever relationships that provide the benefits of mutual care and sharing are excluded from the legal protection extended to families, the law or policy creating the distinction are unjustified. Nevertheless, it is common to find diverging definitions of familial ties in different areas of a legal system.

Having described the general tendency, and why I believe it is unjustified, I now move to introducing some examples of current definitions. The examples show both the general formalistic trend, but also

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12. For example, in Canada the change pertains to the age of children (Canada. Citizenship and Immigration Canada, “Notice—Changes to the Definition of a Dependent Child”). In Europe, changes pertain both to children, such as in Denmark, France, the Netherlands, Germany, Austria and the UK (Ruffer, “Pushed Beyond Recognition?” The Liberality of Family Reunification Policies in the EU,” 936), and to spouses, such as in the case of Germany, Denmark and the Netherlands (ibid., 947–48).


14. Abrams and Piacenti are aware of this possible critique but propose an even stronger one. They suggest that the problem with immigration law’s definition of the family is that it fails immigration law by its own standards, rather than by the family law standards. ibid.
exhibit some variations, and a number of cases in which functional components are being included in the definition. Although formalistic definitions continue to reign the category, the occasional inclusion of functional components in the legal definition of “family member” signals that states acknowledge the functional justification for family reunification and opens the possibility for expansion of the functional trend in the future.

The United States provides an extreme example of a purely formalistic definition for “family member”. The American family-based category of immigration consists of two streams: immediate relatives of US citizens, and four “preference categories” for distant relatives of US citizens and immediate relatives of US permanent residents. “Immediate relatives” are defined in §201(b) of the Immigration and Nationality Act (INA) as spouses, minor children (under the age of twenty one), and parents of US citizens twenty-one years old or older. Similar formalistic definitions apply in the four “preference categories”: The first preference (F1) is reserved for unmarried, adult (twenty-one years of age or older) sons and daughters of US citizens. The first group in the second preference (F2A) is reserved for spouses and unmarried children (under the age of twenty-one) of permanent residents, and the second group in the second preference (F2B) is reserved for unmarried sons and daughters (twenty-one years or age or older) of permanent residents. The third Preference (F3) is reserved for married sons and daughters of US citizens, their spouses and their minor children. The fourth Preference (F4) is reserved for brothers and sisters of adult US citizens, their spouses and their minor children.

American immigration law provides comparatively restrictive access to family reunification. It provides comparatively few avenues for family reunification, and the definitions of family members eligible for immigration are limited to biological and marriage ties, so it defines a family in strictly formalistic terms. As Abrams notes, with respect to partnerships, American immigration law takes a comparatively hard line. Whereas other jurisdictions acknowledge a number of partnership ties, American law only recognizes “spouses”—formally married individuals—as family members. It “makes no exception for couples who are cohabitating, or coparenting, but not married.”

The restrictive and formalistic nature of family-based immigration policies in the US is highlighted when it is compared with the policies adopted by other liberal nations of large immigration. In most, the definition of “family member” is wider, and includes some functional components. For example, the Canadian Immigration and Refugee Protection Regulations [IRPR] define as follows family members who are eligible for immigration under the family class:

Member

117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

(a) the sponsor’s spouse, common-law partner or conjugal partner;

21. Surveying family-based immigration policies in nine countries—Australia, France, Germany, Luxembourg, the Netherlands, Spain, Switzerland, United Kingdom, United States—Beine et al find that “The United States... has the fewest family-related tracks of entry.” (Michel Beine et al., “Comparing Immigration Policies: An Overview from the IMPALA Database,” International Migration Review 50, no. 4 (2016): 847).
(b) a dependent child of the sponsor;
(c) the sponsor’s mother or father;
(d) the mother or father of the sponsor’s mother or father;

... 
(f) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is
   (i) a child of the sponsor’s mother or father,
   (ii) a child of a child of the sponsor’s mother or father, or
   (iii) a child of the sponsor’s child;

(g) a person under 18 years of age whom the sponsor intends to adopt in Canada if

... 
(h) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father of that mother or father
   (i) who is a Canadian citizen, Indian or permanent resident, or
   (ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.\(^\text{23}\)

While the majority of the relations falling under the Canadian definition are of blood or formal legal status, the list includes two functional components. First, Canadian law recognizes as partners eligible for reunification spouses common-law partners and conjugal partners.\(^{24}\) A common-law partner is defined as “an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year.”\(^{25}\) A conjugal partner is defined as “in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year.”\(^{26}\) Second, Canadian law allows citizens and permanent residents to sponsor a more distant relative who would otherwise be ineligible for immigration under the family class, if that relative is their only family member. In allowing common-law partners and conjugal partners in, Canadian law is leveling the playing field for functional life-partners of different life circumstances. By allowing Canadians to sponsor their only living relatives even if they are distant relatives, Canadian law recognizes the intensity of the interest in family life on the one hand, and the reality in which relationships of care and co-responsibility come in a variety of ways on the other.

A number of countries join Canada in accommodating cases of dependency or need for personal care by expanding the definition of “family member”. For example, Australia’s family immigration

\(^{23}\) IRPR, part 7, division 1, section 117 (my emphasis).

\(^{24}\) See the definition of “conjugal partner” at s. 2 of the IRPR as well as s. 117(1)(a) and the definition of “family member” at s. 1(3) of the IRPR. (Note that conjugal partners have a somewhat different status than spouses and common-law partners under the IRPR. The recognition of conjugal partners under the IRPR allows a Canadian to sponsor a partner where the partners do not reside in the same country. “Conjugal partner” thus refers only to a person in a conjugal relationship with the sponsor (for a period of at least one year). Whereas spouses and common-law partners are eligible for permanent residence by virtue of their relationship with the sponsor (qualifying them as members of the family class) or by virtue of their relationship with a member of the family class (qualifying them as a family members of a member of the family class), conjugal partners are only eligible for permanent residence by virtue of their relationship with the sponsor and not with any other member of the family class (Canada. Legal Services. Immigration and Refugee Board of Canada., “Sponsorship Appeals: Spouses, Common-law Partners and Conjugal Partners—Chapter 5,” Immigration and Refugee Board of Canada, 2008, http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Documents/SpoPar05_e.pdf).

\(^{25}\) IRPR, part 1, division 1, section 1(1).

\(^{26}\) IRPR, part 1, division 1, section 2.
category provides for reunification opportunities between more distant relatives, and in cases of required personal care. Australian family immigration visas include visas for partners, \(^{27}\) prospective marriage, \(^{28}\) children, \(^{29}\) adoptees, \(^{30}\) parents, \(^{31}\) aged dependent relatives, \(^{32}\) remaining relatives, \(^{33}\) carers, \(^{34}\) and orphan relatives. \(^{35}\) The last four visas in this list highlight the role of caring and the definition of family in the family immigration category. The United Kingdom also complements the core routes of immigration for partners, children and parents with a route based on the need for care. In this case, a mirror-image of the Australian visa, the care is provided by the UK resident to the incoming family member. \(^{36}\) And Sweden complements the routes for partners, children and dependent parents with the ability to sponsor “another family member who is dependent on you for their subsistence or is part of your or your partner’s household or if you are required personally to take care of the family member for serious health reasons.” \(^{37}\)

Looking at eligibility criteria, the different jurisdictions’ conceptions of “family member” appear to be formalistic, with some marginal functional components in most immigration policies. But, in fact, functional requirements play a larger role in the definition of “family member” than it may at first seem. This fact is exposed only by looking at the different exceptions to eligibility. For example, a functional approach to familial relationships is reflected in the following Canadian regulations:

**Bad faith**

**4 (1)** For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

**Adopted children**

(2) A foreign national shall not be considered an adopted child of a person if the adoption

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) did not create a genuine parent-child relationship. \(^{38}\)

Similar provisions exist in other jurisdictions. For example, in the European system,

It has been held that ‘(t)he mere existence of a family relationship is not sufficient for the applicability of Article 8 ...’ and that some examination of the relationship invoked by an

\(^{27}\) Subclasses 100, 309, 801, and 820.

\(^{28}\) Subclass 300.

\(^{29}\) Subclasses 101, 445, and 802.

\(^{30}\) Subclass 102.

\(^{31}\) Subclasses 103, 143, 173, 804, 864 and 884.

\(^{32}\) Subclasses 114 and 838.

\(^{33}\) Subclasses 115 and 835.

\(^{34}\) Subclasses 116 and 836.

\(^{35}\) Subclasses 117 and 837.


\(^{38}\) IRPR, part 1, division 2, section 4.
applicants, i.e., whether there is a 'sufficiently close factual tie,' or a 'genuine tie,' is necessary in all Article 8 matters. Thus, it is the social as opposed to the legal family which is relevant at the outset in the Strasbourg decisions.\textsuperscript{39}

And in the US, a functional approach can be found in the interpretation of some family relationships. For instance, the term “child” applies also to illegitimate children, but when a father wants to sponsor his illegitimate child (and vice-versa), he has to show a bona-fide relationship.\textsuperscript{40}

The requirement that familial relationships be genuine incorporates the functional approach in the definition of “family member” in immigration policies. By excluding non-genuine relationships, the application of the formalistic definition is limited to those formal relationships which are also functional relationships. Thus, formalistic and functional components play an equally decisive role in immigration policies: both are necessary but insufficient conditions for eligibility for family-class immigration.\textsuperscript{41}

The use of the functional approach to also exclude individuals from immigration, as is done by Canadian law, is legitimate. The purpose of family reunification policies is to protect individuals' interests in care and sharing that is fulfilled by family life. Where no genuine familial relationship has formed, these interests will not be protected by a policy of family reunification, and there is thus no justification to grant reunification in these cases. But the same logic should be applied to the main section which defines family member for the purpose of reunification. Formal relationships can be used as examples, signals or prima facie evidence for the existence of a functional familial relationship. But there should be access for other individuals who may not fall within these formal categories to show that they form family ties and to access reunification.

\textbf{5.2.4 The Problem with Current Definitions}

The legal situation in which “family member” for the purpose of family-class immigration is defined in both formalistic and functional terms can be explained in two ways. First, it could be said that the definition is normatively desirable: that the families that deserve access to family reunification are those that answer both the formalistic criteria of blood or formal ties and the functional criterion of genuine family life. As noted before, I reject this explanation. The normative explanation for formalistic criteria being necessary conditions for eligibility for reunification is obviously incompatible with the rationale of a basic human interest in caring and sharing. As humans create a variety of relationships to fulfill these basic interests, and as the right to family life is—I argue—justified by these interests, all relationships that fulfill these interests should be receiving equal legal treatment when the right to family life is engaged. The local’s right to family life is engaged in a case of cross-border family members looking to reunite in the local’s state. Descriptively speaking, current legal definitions may reflect a normative position according to which those deserving of family reunification are formal-functioning families and them alone. However, as I argued, these explanations do not pass a critical liberal evaluation. The heavy

\textsuperscript{39} Anderfuhren-Wayne, “Family Unity in Immigration and Refugee Matters: United States and European Approaches,” 356–357. Further in the European context, “The Commission has maintained that close de facto relationships which do not have the necessary legal characteristics for ‘family life’ may be covered under the right to respect for private life in article 8(1). Thus, other ‘family-like’ relationships, not considered ‘family’ in a traditional sense, such as those between homosexuals or foster parents and children, may fall under the private life provision of article 8.” (ibid., 357–358).

\textsuperscript{40} INA §101(b)(1)(D).

\textsuperscript{41} It could be argued that formalistic components still enjoy somewhat of a preferred status. With respect to blood relationships no genuine requirement is conferred by immigration rules. In these cases, the default assumption is that the relationship is genuine. It is true that if the functional approach would have been wholeheartedly adopted, even blood relationships would have been subject to a genuineness assessment. It would not be assumed that in any case of blood relation relatives share a family life.
reliance on formal criteria violates the underlying justification for family-class immigration. We are left, then, with the administrative explanation.

The administrative explanation for the use of formal definitions highlights their clarity. As Kerry Abrams writes:

In choosing a formal definition over a functional one, [US] Congress privileges clarity and administrability over accuracy. However, it could just as easily have taken another approach. One can imagine, for example, cases in which the purpose of reuniting families would be more accurately served by reuniting some couples who are not married but are nevertheless in a committed relationship and denying immigration status to spouses who are married but whose relationships are dysfunctional or unlikely to succeed. This approach, however, would require immigration officials to spend much more time screening couples and intrude on their privacy more extensively. The decision to adopt a formal rather than a functional definition of marriage, therefore, serves a straightforward immigration law purpose: if we want to admit people quickly, without unnecessary and intrusive delay, then requiring a marriage certificate for those who would use marriage as a basis for immigration makes good administrative sense. 42

In a nutshell: formal criteria are easy to check, but functional relationships are hard to fake. It is easy to understand why, from their perspectives, governments prefer the use of both sets of criteria together. Together, the two sets of criteria create immigration policies that exclude many families in advance—those lacking formal status plus all those unable to go the lengths to prove their functional relationships—and simplify the assessment of applications by relying on documentation and formal categories.

The exclusion of as many families as possible from access to family reunification is obviously unjustified in my view as a policy goal in itself or if it is achieved by use of arbitrary criteria. But the policy goal of achieving administrative efficiency is legitimate, I believe. Every public system of distributing benefits would be better if, all things being equal, it was more effective and efficient. In public systems, all resources are provided by the public. Public resources are finite, and so the resources required by one system affect the possible use of resources to provide services in another. Liberal democratic societies handle the scarcity of resources as part of their right-protection systems. And so the goal of administrative efficiency must be accepted as a legitimate consideration when a state designs its immigration policies. But even if the goal of administrative efficiency is legitimate, it is still unclear that the method of using a mix of formalistic and functional requirements truly achieves it. I hope to raise doubt with respect to whether current definitions of “family member” achieve this legitimate goal.

5.2.5 The Advantages of the Proposed Definition

Formalistic criteria are useful because formal status is binary: one is either a spouse or one is not. Formalistic criteria are also easy to assess since formal status usually creates a paper trail. Nevertheless, I believe that relying on formalistic requirements does not add much efficiency to the process of assessing

42. Abrams, “Immigration Law and the Regulation of Marriage,” 1669. Here she mentions also the number-limiting function of formalistic definitions that I discussed above, saying: “The decision to adopt a formal definition might also serve to limit the numbers of immigrants seeking to use the immediate relative category: if every person who was involved in a romantic relationship with a US citizen could claim immigration status based on their relationships, we might no longer be able to provide this status to an unlimited number of partners” (Abrams and Piacenti, “Immigration’s Family Values,” 1669).
family-class immigration applications. At the same time, relying on formalistic criteria defies the justification underlying family-class immigration and denies many individuals their right to family life. To the extent that the use of formalistic criteria also systematically disadvantages defined minority groups, relying on formalistic criteria also violates many individuals’ right to equality. Adopting the functional definition I propose is advantageous both in terms of legitimacy and of efficacy. I have discussed legitimacy in length before, and for that reason the rest of this section is dedicated to the argument that the functional definition offers efficacy advantages.

Using functional criteria can significantly reduce the problem of immigration fraud.43 The abuse of the family-based route of immigration by persons who are otherwise ineligible for immigration as either economic migrants or as asylum seekers arguably concerns all jurisdictions. Indeed, the family-based route is quite appealing, because it does not require of an applicant much in terms of skills, assets, or economic potential. The core requirement is a familial relationship with an eligible local sponsor. And the main criteria that are both easy to obtain and to demonstrate to authorities, such in the case of the formal criterion of marriage, are pooling factors for abusers of the system. Not surprisingly, the typical case states are concerned with is that of marriages of convenience. The considerable possible gains in terms of immigration on the one hand and the availability of the formal status on the other create the problem of abuse of the family category of immigration.

Introducing functional criteria to the immigration process has the power to counteract the incentives to engage in marriages of convenience. If as part of the immigration process the married couple will have to provide evidence for an ongoing relationship of mutual care and sharing, marriages of convenience will not be able to produce the evidence required to obtain the immigration status.

States have discovered the power of functional requirements in circumventing the problem of abuse. Over the years main family-based immigration systems have deepened their reliance on functional criteria in an attempt to solve the problem of fraud. For example, Canadian spouses are required to provide evidence of their relationship, the familiarity of friends and family members with the relationship, and evidence that the marriage was celebrated as a major event in the life of the couple and their respective community.44 But states have stopped short of moving to functional requirements exclusively. I suggest that they should complete this move in the name of legitimacy and that they would suffer nothing in terms of efficiency if they did. Since states already employ some functional criteria, moving to a full functional approach would not present unbearable administrative burdens, I believe.45

Functional criteria can be implemented without necessarily requiring new administrative burdens. One way to achieve administrative efficacy would be to use the clarity and simplicity that formalistic criteria offer. Formalistic criteria can have a justified place in immigration as legal presumptions. For example, the fact that a binational couple is married under the law of the state in which they are asking

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43. Caleb Young mentions, in the context of his care-based functional account of immigration, the concerns of some critics that functional, flexible definitions are prone to abuse. Yong, “Caring Relationships and Family Migration Schemes.”
45. A concern highlighted by some scholars, such as Gibney, is with levels of family-immigration intakes themselves. Assuming that total immigrant intakes are rather fixed, Matthew Gibney is worried that the preference for family immigration comes at the expense of refugees. To correct this injustice, Gibney suggests that the definition of family members eligible for immigration under the family class would include partners and dependent children only. I am not sure that overall immigration intakes are given. But even if they are, I suggest that adopting the functional approach will result in optimal family immigration numbers, while intakes will be supported by a justified basis rather than the arbitrary formalistic basis Gibney suggests. By posing barriers to fraud on the one hand and continuing to rest on evidence of genuine relationship on the other, the functional approach is likely to result in similar levels of applications to family reunification to current ones. I am not dedicating further discussion to the concern with tradeoffs. (Gibney, The Ethics and Politics of Asylum).
to be reunited will be taken as an indication that that couple maintains a functional family life. What level of indication is necessary to establish a genuine relationship which merits family reunification should be further discussed, but I will not do so here.\footnote{46}

To summarize, the first advantage of my proposed definition is, of course, that it corresponds with the justifications for the right to bring in our foreign family members, as stated above and explained in chapter 2. This is an advantage in terms of the legitimacy of a legal policy. The functional definition further solves the inequality that is created by formalistic definitions, where some functioning families are denied the treatment extended to families that also enjoy formal status. The proposed definition reduces this inequality, and this also contributes to its legitimacy as legal policy. The second advantage of the proposed definition is that it can reduce fraud and abuse of the immigration category. Both these advantages can be achieved without exacerbating the administrative burden of family-class applications for immigration, a point to which I now move.

5.2.6 Answering Objections to the Proposed Definition

The first objection to the idea of moving to functional definitions is that it would be administratively burdensome. But surprisingly, the functional definition is also not more administratively burdensome than the formalistic definitions currently used.\footnote{47} As noted above, current definitions already incorporate some functional components, requiring administrators to closely assess relationships’ history and content. A move to a functional-focused definition would not present new administrative challenges.

A second concern with practicality is that functional definitions are impossible as the term is an oxymoron. Law requires some certainty and for this reason looks for clear definitions, while functional qualities are vague and elusive. But it is not the case that formalistic definitions achieve certainty. Words themselves are vague and elusive and every text requires interpretation.\footnote{48}

It has been objected that the functional definition I suggested fails on neutrality grounds. According to the objection, my definition will exclude certain families that are already disadvantaged. New forms of families, particularly non-hetero-normative families, are composed of multiple co-parents and their children in a variety of different responsibility sharing schemes. The functional definition I am suggesting is likely to not capture all members of these families, and its effect is to restrict their immigration under the family class. As the definition is likely to exclude non-hetero-normative families, it is not neutral.\footnote{49}

\footnote{46. I do not have a fully-fledged suggestion of the appropriate structure of the burden of proof in family-immigration applications, nor a suggestion regarding the strength of different indications for genuine relationships or of bad faith. Accordingly, I cannot state exactly what kind of power I expect formalistic indications to have: as strong as a sufficient condition, or as weak as a not necessary nor sufficient condition. Of course, states don’t want formalistic evidence to be conclusive because this make formal status more appealing for potential abusers of the system. So the strength of the legal presumption is likely to be persuasive rather than conclusive, and states will retain the power to question formalistic evidence, as they do today. But they can still require less documentation, less evidence of functional life from families of formal status if they have any reason to believe that most formal families are also functional ones. In this way, immigration policies can assume that relationships that contain certain formal components are genuine relationships. The assessments of reunification applications for such relationships will be administratively easier than cases lacking any evidence of formal relationship. Good candidates for such presumed-genuine relationships are relationships between parents and their young children (whether biological or legally adopted). It is safe to assume that most immigration applications based on such relationships are made by applicants who genuinely share family life with their relatives. The same could be said of long term partnerships between co-parents. These are mere suggestions, and they do not exhaust the possible policy alternatives.

\footnote{47. Caleb Yong mentions, in the context of his care-based functional account of immigration, the concerns of some critics that functional, flexible definitions can create excessively intrusive administrative procedures. (Yong, “Caring Relationships and Family Migration Schemes”).}


\footnote{49. I thank Haim Eschel for presenting me with this objection. For more on multiparent families, see Haim Abraham,
To this objection I respond in two ways. Firstly, I must confess that it is not clear to me that many multiple-parent families would be excluded from the definition. Secondly, familial ties that would be excluded from my definition are, as I understand it, not deserving of an entitlement to family-class immigration. We should remember that I am defining “family” only for the purposes of family-class immigration. A tie that does not qualify for that category may nevertheless be recognized as a family relationship in numerous other contexts in which the right to family life is consequential. Members of multi-parent families that would be denied family-class immigration to be reunited in one territory with other members of their family are akin to other relatives, frequenting two-parent hetero-normative families: aunts and uncles and cousins and many, many more.

I have proposed that the legal definition of “family member” for the purpose of family reunification will be a functional one, following the lines articulated by me here and in chapter 2. While functional components find greater room in legislation and jurisprudence lately, family reunification is still unjustly limited by formalistic definitions that cause insufferable inequality. I encourage the functional trend, and would push to expand it. The right to family life will be better served if we take the functional approach and the public interest will not be sacrificed.

5.3 Quotas

5.3.1 The Importance of the Policy Question

Quotas on family-class immigration are policies limiting the maximum number of immigration licenses granted under this immigration category in a certain period. As will be described shortly, some states have official policies limiting certain kinds of family-class immigration. For example, in Canada, the Parents-Grandparents Program’s intakes have been capped in recent years. In Australia, some relative’s visas are similarly capped occasionally. And in the United States, as a matter of law, legal permanent residents’ applications to sponsor their family members are capped to a certain quota per year, whereas US citizens are not subject to these quotas. Another, more concerning phenomenon, is unofficial quotas. These are cases where states limit the numbers of immigration licenses given under the category, but without publicly acknowledging that this is the case.

I find that quotas on family-class immigration are a distinctive category of limitations on the right to family life. Unlike other limitations on family-class immigration, in the case of a quota, a request for immigration can be denied even if the relationship at the basis of the immigration application meets all of the qualitative requirements set by the official immigration policy. In the case of a quota, a request can be denied simply for the reason that the periodical quota in the category has been filled before the application in question was considered. Thus, two identical cases will be treated differently—i.e. granted or denied—based on a consideration of numbers or of when each application was submitted. The merits of the individual case do not play a part in the denial of the application, nor can they save an application from a negative decision. In my view, it is their merit-blindness that makes quotas a unique limitation on family-class immigration worthy of normative investigation.

The effects of quotas are devastating both in terms of family life itself and in terms of equality. In terms of their effect on family life, quotas can result in long waiting periods, from several years to several decades. This means that many families lose precious, unrecoverable, portions of their family life.

life. Their quality of family life is severely affected. In some cases, long waiting periods may even result in the destruction of family life altogether. Finally, long waiting periods create a chilling effect, as prospective applicants may be discouraged in advance from applying for visas that are subject to quotas where long queues have already formed, or where the chances of winning a slot are particularly low. Indeed, arguably, this chilling effect is desirable from the standpoint of the state that is looking to limit a certain kind of family-class immigration. Some familial relationships could thus be damaged or severed permanently as a result of a quota policy.

In terms of their effect on equality, quotas create, knowingly and in advance, a state of unequal enjoyment of family life by different members of the state. Two similar cases will be treated differently under a policy of quotas depending on the time in which each application was made. But it is not only on the individual level that quotas create inequality. Depending on the design of the quota system, a competition for immigration permits may arise that severely disadvantages the least well-off members of society looking to reunite with foreign family members. Thus, a pattern of inequality may develop under a policy of quotas. Finally, if quotas are applied to family-class application made by only some members of the state based on their political status (such as the situation in the US), their devastating effects become a form of group discrimination, where some distinct groups within society enjoy access to family life that others are denied. In such a case the inequality created by a policy of quotas is not just inequality in effect, but in design. Arguably, such discrimination is deplorable on distinct grounds.

Given the unique nature of the limitation on family life created by quotas, and quotas’ effects on equality, I argue that quotas are inherently incompatible with a conception of family immigration as a right. An a priori denial of the right to family life for parts of the public that is not merit-based violates the spirit of a right. This kind of limitation on our right to family life is unjustified. In legal terms, it amounts to a violation of the right. This section is dedicated to the development of this argument.

5.3.2 The Proposal

I propose simply that family-class immigration quotas are illegitimate and should be abolished. I will argue for this in the following manner. First I will present current quota policies from Canada, Australia and the US. I will present each policy’s structure, and will highlight in particular the differences between the Canadian and Australian programs on the one hand and the American program on the other. I will then discuss in depth what is wrong with the quota policies described.

Taking inspiration from ethical debates concerning the rationing of healthcare, I will argue that to be legitimate, any policy rationing the fulfillment of any right must apply criteria that are connected to the right itself, and must treat right-holders equally. I will then show in what way current quota policies violate these principles. Current family-class immigration quotas are illegitimate because the criteria they apply are not connected with the underlying norm of preserving family life, and because they treat persons unequally. I will argue that the only justifiable basis for discriminating between different cases for the purpose of family reunification must be functionality: the quality of a functional family relationship. I will close with a remark on unofficial quotas.

50. As noted in chapter 2, by “members of the state” I refer to—in the least—legal permanent residents and citizens. Permanent residents are members. A quick literal analysis shows it: citizens are known as “full members.” Who, then, are “members” in a policy who aren’t “full members?” Surely there are some (otherwise it would not be needed to define “full” members but rather, simply, “members” as citizens). However we define this category of “not full members,” surely the group of legal permanent residents is included in this definition.
5.3.3 Current Policies

In Canada, Australia and the United States, the access of different individuals to immigration under the family class is subject to quotas, so that the number of applications approved in each year is restricted.\(^{51}\) Each program is designed differently but, in all of them, if the number of applications submitted surpasses the designated quota for the period, subsequent applications are not considered. As will be immediately described, these states’ quota policies vary in terms of the persons to which they apply and in the policy rationales supporting them. In what follows, I will describe in short the Canadian, Australian, and American policies in order.

Canada

Most sub-streams of the family class are not subject to quotas in Canada: the immigration of partners, children, sons and daughters,\(^{52}\) and orphaned relatives of Canadian citizens and permanent residents is not numerically limited under Canadian immigration policies.\(^{53}\) The only Canadian family class sub-stream that is currently subject to quotas is the Parents and Grandparents Program (“the Program”).

The Program allows Canadian citizens and permanent residents who are 18 or older to sponsor their parents and grandparents to become permanent residents of Canada. Originally, the Program was not subject to quotas. High volume of applications and limited administrative resources dedicated to the Program resulted in long queues by 2010-2011.\(^{54}\) At the same time, policy advocates raised concerns regarding the cost of public services provided to parents and grandparents who immigrate under the Program.\(^{55}\) In 2011, the Program underwent significant changes to address these concerns. While the government took consultations regarding the future of the Program and increased administrative efforts to solve the backlog, a moratorium was placed on new applications.\(^{56}\) At the same time, a new Super Visa was created that allows parents and grandparents to visit Canada multiple times within a period of 10 years and for up to two years in each visit.\(^{57}\) Allowing relatives to visit their families in Canada frequently and for long periods, the Super Visa was meant to ease some of the pressure on the Parent and Grandparent Program, as well as to appease those concerned for the public cost associated with older immigration.\(^{58}\) When the Program was reopened for new applications in 2014, an annual quota on intake was introduced for the first time, totaling 5,000 that year.\(^{59}\)

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51. I give examples from liberal democracies that are what is known as “states of immigrants” or “states of immigration,” and also have policies of quotas. Europe does not allow quotas. New Zealand, UK, Denmark do not have quotas. These three countries are the only examples I know of. Their programs are also examples of different approaches to quotas in family immigration.
52. “Children” are defined as younger and dependent on their parents, while “sons and daughters” are independent adults. The distinction appears in most immigration systems.
54. A backlog of 160,000 has accumulated by the end of 2010, and by the end of 2011 the wait time was estimated to be around seven years (ibid., 5, 6, 11).
55. ibid.
58. Presumably, the Super Visa created an alternative for relatives who previously applied for the Parent and Grandparent Program not intending to settle in Canada and only using the Program to visit frequently and for long periods, a possibility that regular tourist visas do not provide. The Super Visa also reduces the financial burden of the Parent and Grandparent Program on the Canadian public purse. Being a tourist visa rather than a permanent resident license, the Super Visa requires its holder and the sponsor to take responsibility for the visa holder’s livelihood and health-care needs while in Canada themselves. See ibid., 16–17.
59. Mas, “Canada Will Take in 10,000 Parent, Grandparent Sponsorship Applications This Year”; Collacott, “Canadian
The regulation of capped intakes has seen some changes throughout the relatively short time the Program has been subject to quotas. At the beginning, the Program ran as a competition. The first completed applications to be submitted after January 2 in each year were processed, until the cap was reached, usually within days. Further applications were returned to applicants, unconsidered. In 2014 and 2015 the cap was set at 5,000 applications. In 2016 it was 10,000. The quota remained much lower than demand and spots filled within days, leading to fierce competition to file applications as soon as the opening of the Program for the year was announced. The competition increased sponsors’ spending on legal assistance and expedited delivery fees, and was met with frustration and claims that it was unfair.

By the end of 2016, reacting to public dissatisfaction, the new Liberal government changed the method of selection to a random lottery. When the Program opened in 2017, all interested sponsors (eligible citizens and permanent residents interested in bringing in their foreign parents or grandparents) were asked to state their interest in applying for a visa and to enter a lottery for the 10,000 spots. 95,000 statements of interest were submitted. The 10,000 invitations to apply and the 85,000 letters of rejection were sent out in late April, 2017. The invitations to submit a full application afforded would-be sponsors and applicants until the end of July to complete the application, but in June IRCC officials revealed that only 700 of the 10,000 invitations to apply resulted in full applications, and that 15 per cent of these were incomplete, and that the government was considering a second lottery in an attempt to meet the quota. In terms of its planning for the future, the government recently published an immigration plan for the next three years increasing the target intakes, and planning to welcome 20,000 parents and grandparents in 2018, 20,500 in 2019, and 21,000 in 2020. The future method of selection is yet unknown.

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Family Class Immigration: The Parent and Grandparent Component Under Review,” 5, 17 (noting also that at the time of reopening the program to 5,000 new applications, the conditions for sponsoring parents and grandparents were also changed, becoming more demanding of the sponsor).

60. Toughill, “Federal Immigration Lottery Backfires: Thousands of Families Left Behind.”


63. Canada. Immigration, Refugees & Citizenship Canada, “Operational Bulletin 634—Randomized Selection Intake Management Process for Sponsors of Parents and Grandparents,” 2016, http://www.cic.gc.ca/english/resources/manuals/bulletins/2016/ob634.asp. See also Toughill, “Federal Immigration Lottery Backfires: Thousands of Families Left Behind” (saying that “In a December 2016 media press statement that announced the new lottery system, officials said they were changing it to ‘improve access to the application process’ and ‘to give the same chance to all Canadians who are interested in applying to sponsor their parents or grandparents.’”).


65. Toughill, “Federal Immigration Lottery Backfires: Thousands of Families Left Behind” (claiming that this is “according to statistics from IRC.”).

66. ibid. (claiming that this is “according to statistics from IRC.”).

Australia

Australia provides an example of family-class immigration visas being subject to quotas that is similar, though not identical, to the Canadian one. Section 85 of the Australian Migration Act 1958 authorizes the Minister for Immigration and Border Protection to limit the number of visas that will be granted in each financial year in specific visa subclasses.68 Section 87 specifically restricts this power so that the Minister cannot use it to deny a visa from “a person who applied for it on the ground that he or she is the spouse, de facto partner or dependent child of” Australian citizens or permanent residents.69 Similarly to Canada, then, quotas do not apply to partners, dependent children, and orphaned relatives.70 The Minister is left with the power to restrict the number of visas granted to other kinds of family members.

Under the ministerial power to set immigration quotas, three subcategories are currently subject to numerical caps in Australia: Parent (non-contributory) visas, Contributory Parent visas, and Other Family visas (which include Carer visas, Remaining Relative visas, and Aged Dependent Relative visas).71 In the 2015-2016 migration programme year, 1,500 places have been allocated to Parent (non-contributory) visas and 7,175 places have been allocated to Contributory Parent visas.72 In 2016-2017, 500 places have been allocated to the Other Family subcategory.73

The Australian policy retains submitted applications in a queue, approving the allotted quota a year and leaving the rest of the applications to be considered in the future, based on their place in the queue, which is determined by time of application. The Australian government recently advertised that “[b]ased on current planning levels, applicants for a Parent (non-contributory) visa can expect an approximate 30 year wait before visa grant consideration after being allocated a queue date.” With respect to Contributory Parent visas, the government said that “[t]he Contributory Parent visa is currently not

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69. Migration Act 1958 [Aus], sect. 87(1).
70. See also Australia. Department of Immigration & Border Protection, “Capping and Queueing,” https://www.border.gov.au/Trav/Brin/Fami/Capping-and-queuing (Noting also that prospective marriage visas can be capped. These visas are currently not capped.).

subject to queuing arrangements.” With respect to Other Family visas, delays in processing and a past reduction in the number of places available for visas in this subcategory mean long waiting times. According to the Australian government

It is currently estimated that Carer visa applications that were lodged in 2016 and meet the criteria to be queued, are likely to take approximately four and a half years to be released for final processing (calculated from August 2016).

Based on current planning levels and the allocation of the majority of the Other Family places to the Carer visa category, it is currently estimated that Remaining Relative and Aged Dependent Relative visa applications that were lodged in 2014 and meet the criteria to be queued are likely to take approximately 50 years to be released for final processing (calculated from 14 August 2014).

United States

The US takes a distinctively different approach to quotas from the ones adopted by Canada and Australia, in the sense that it subjects citizens and legal permanent residents to different rules. Family immigration in the United States is composed of two main programs, one for family members of American citizens and one for family members of legal permanent residents and for some family members of citizens. The Immediate Relatives Program applies to spouses of US citizens, unmarried children of US citizens under 21, orphans adopted by US citizens, and parents of US citizens. This program is not subject to numerical limitations.

The Family Preference Immigration Program applies to other relatives of US citizens and to all relatives of US permanent residents—including permanent residents' spouses and dependent children. Each of the subset streams of the Family Preference Program is subject to different yearly quotas. Family Preference Immigrant Visas include the following streams, and are subject to numerical limitations in each fiscal year as follows: Unmarried sons and daughters of US citizens and their minor children (Family First Preference (F1)) are allotted 23,400 visas a year. Spouses and minor children of US permanent residents (Family Second Preference (F2A)) are allotted at least 77% of 114,200 visas available in the Family Second Preference stream a year. Unmarried sons and daughters (age 21 and over) of US permanent residents (Family Second Preference (F2B)) are allotted at most 23% of the 114,200 visas available in the Family Second Preference stream a year. Married sons and daughters of US citizens, and their spouses and minor children (Family Third Preference (F3)) are allotted 23,400 spaces a year. Finally, brothers and sisters of US citizens, and their spouses and minor children, provided the US citizens are at least 21 years of age (Family Fourth Preference (F4)) are allotted 65,000 spaces a year. Available immigrant visas are issued according to the order in which they were submitted and until the yearly quota is reached. Unsuccessful applications are retained in the system to be considered in the future. In

74. Australia. Department of Immigration & Border Protection, “Parent Visa Queue.”


77. The preference levels mean that if the quota of visas in a higher preference category was not issued in a year, the unused quota will be allocated to other subcategories in declining order of preference.
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5.3.4 The Problem with Quotas

I claim that if family-class immigration is indeed a right—as I have been arguing it is in this thesis—then quotas are an illegitimate limitation on this right. In legal terms, quota policies violate the right to family life. Here I want to explain what exactly about quotas disqualifies them from being a permitted limitation on the right to family life. The first premise of my argument, then, is that there are some legitimate, permitted, limitations that a state could impose on access to family reunification. In other words, the problem with quotas is not that they limit the right to family reunification. The problem with quotas on family-class immigration is rather the manner in which, and the reasons for which, they limit the right to family reunification. I believe there are two problems with quotas: a general problem, and a problem pertaining to the specific quota policies that are currently in place. In general terms, given the serious effect they have on family life, imposing quotas requires a special justification that is often lacking. With respect to quota policies currently in place, they impose quotas on different kinds of family reunification cases based on irrelevant and thus arbitrary criteria. In legal terms, they discriminate against some individuals. In this section I investigate these concerns in depth, starting with the latter.

Evaluating the criteria used by current quota policies, I work with the assumption that in some cases a state may be justified in numerically limiting admissions in the family class. I am not suggesting that this assumption is always correct, nor that it is correct in the context in which Canada, Australia and the US find themselves today. I use this assumption, rather, to support a principled discussion regarding permitted and prohibited manners of numerically limiting family-class immigration. In arguing that the current criteria are unjustified, I draw inspiration from an ethical framework developed by two ethicists for the evaluation of healthcare rations.

The main concern with current quotas is that they limit the right to family life in a particular case without proper justification. In Canada, Australia, and to some extent in the US, the question of which kinds of family-class immigration cases will be subject to quotas is answered by reference to the “distance” as relatives between the insider and the would-be migrant. And in the US, to a greater extent, the question of which kinds of family-class immigration cases will be subject to quotas is answered by reference to the political status—citizen vs. legal permanent resident—of the insider family member (the sponsor). I claim that these are improper criteria because they are not informed by the underlying norm of preserving family life. This weak connection between the limiting criterion and the underlying value protected by the right to family-class immigration is what creates the problem of arbitrariness, which is the source of the normatively reprehensible taste of policies imposing quotas on family-class immigration. A similar idea was suggested by Nancy Jecker and Robert Pearlman in their ethical framework for healthcare rations.


79. This is the prevalent term in American law.

Jecker and Pearlman’s proposals are based on the premises that (a) at least some form of healthcare is a right and that (b) scarce resources mean that not all healthcare needs can be provided for by public funds. The ethical question thus becomes how to choose which patients will receive which treatments.

Jecker and Pearlman suggest dividing ethical criteria applying to healthcare rations into two groups. *Resource-centered criteria* consider certain qualities of healthcare resources as ethically determinative, such as price or efficacy, and ignore differences between patients. Resource-centered criteria would typically apply to decisions of prioritizing between different categories of healthcare (such as preventative treatment like vaccines versus acute care such as cancer treatment) and are typically the concern of policymakers. *81 Patient-centered criteria* consider certain qualities of patients as ethically determinative, such as age, ability to pay or contribution to insurance schemes, access to health facilities, expectant health results and the like. Patient-centered criteria would typically apply to decisions of prioritising between different patients within the same category of healthcare (such as: who should receive the first available liver for transplant) and are typically the concern of physicians. *82*

With respect to resource-centered criteria, Jecker and Pearlman prefer the criterion of basic vs. non-basic treatment for deciding which treatments can be rationed, if need be. For them, “basic health care refers to health services that prevent, cure or compensate for deficiencies in the normal opportunities persons enjoy at each stage of life.” *83* This may not be a completely satisfactory definition, but it suggests the underlying ethical thought, especially given the contrast with non-basic care: “In contrast to basic care, non-basic care either aims to improve conditions unrelated to normal opportunities or it aims to correct or compensate for deficiencies in normal opportunities but is ineffective in doing so.” *84* They found their idea that rationing non-basic healthcare is legitimate on two premises: a) public resources are limited and the funding of non-basic healthcare would mean a lack of resources to invest in other social goods, *85* and b) “persons have no right to receive extravagant health services in the first place.” *86* Their articulation of the idea may be clumsy, but in essence they point to the norm underlying the public provision of healthcare—the preservation of life and of good health—and they distinguish between treatments that are more closely tied to these goals and those that are more remote from it.

With respect to patient-centred criteria, Jecker and Pearlman reject criteria that compare different persons in terms of social worth, such as age. They prefer a more nuanced criterion of medical benefit, saying that “rationing on the basis of medical benefit builds on the idea that physicians’ obligation to offer care strengthens as the quality and likelihood of benefits increase, yet no physician is obligated to offer futile treatment.” *87* Being committed to the moral equality of different people, Jecker and Pearlman also support the idea of rationing health services that are not equally accessible to all. *88*


*81. Jecker and Pearlman, “An Ethical Framework for Rationing Health Care,” 80. The examples of vaccines and cancer treatment are mine and are meant to be illustrative. 82. ibid. 83. ibid., 84. 84. ibid. 85. ibid., 86. 86. ibid. 87. ibid., 88. “Futile treatment does not refer only to situations where the physician literally cannot do anything that will have any effect at all. It also includes cases in which medical benefits are highly improbable and situations where although the likelihood of some benefit may be good, the quality of benefit is extremely poor.” (ibid.). 88. ibid., 90.*
care to persons unable to pay for it. Furthermore, justice in health care requires limiting publicly-financed non-basic health care, striving for equality in access to basic health care, and relying on medical benefit to ration non-basic health care.  

The ethical consideration of healthcare rationing offered by Jecker and Perlman provides an insight useful in the case of family-class quotas as well. Jecker and Perlman treat healthcare as a right on the one hand, and as a need suffering from a permanent state of limited resources on the other. Their discussion thus suits the topic of family reunification when conceived of as a right, if we were to accept the idea that the resources required to fulfill this right for all worthy applicants are limited, and thus rationing is necessary.  

In their preferred criteria, Jecker and Perlman follow two normative guidelines. First, the criteria for rations are informed by the norm underlying healthcare: the preservation of life and the promotion of good physical health. Second, the choice of criteria is informed by the moral ideal of the equal moral worth of different persons. I believe that these two principles should be applied to the question of rationing family-class admissions as well, as they should be applied to the limitation of any right. In my view, if there is a need to limit the number of admissions, the criterion for distinguishing between cases must be in itself related to the underlying norm of preserving family life, and different individuals should be treated with equal moral consideration.

Do any of the criteria exemplified by the quota policies presented above comply with the requirement that it be connected to the underlying norm of family life? The examples of Canada, Australia and the US surveyed above present two selection criteria: the “distance” of the family relation between the would-be immigrant and the insider family member, and the political status of the insider family member, whether she is a citizen or a permanent resident. I consider the criterion of “distance” employed by Canada, Australia, and to lesser extent the US first, and the criterion of citizenship status employed by the US second.

In Canada and Australia’s family immigration programs only few groups of would-be immigrants are subject to quotas, and they are arguably the more distant relatives eligible for family-class immigration: parents and grandparents of independent insider adults in particular.  

The American program also subjects all sorts of more distant relatives to quotas, both relatives of citizens and relatives of legal permanent residents.

On its face, the states have a plausible argument for rationing immigration permits when it is limited to these groups: The individuals caught by these quota policies do not share family life with the insider family members (sponsors). These relatives are family in the larger sense of the term. One sees them as forming part of one’s immediate community, but most likely one does not share with them family life, a daily connection of dependency and mutual responsibility. In particular it is clear that they do not share family life with one when compared with partners and dependent children. It seems clear that distant relatives could not be said to share a basic interest in access to life together. According to this interpretation, it is permissible to limit the access of distant relatives to immigration as such a limitation  

90. Again, I do not claim that we must accept this claim. Indeed, I will argue later that the state is under the obligation to substantiate it. But for now I wish to work with it to see what would be the normative requirements if the claim were true.  
91. “Distance” here is measured according to the nuclear conception of the family. Under this model, the first circle of family includes—with respect to adult individuals—partners and dependent children. Parents and siblings form the second circle. Aunts, Uncles and Grandparents the third circle, and so forth. There are different possible alternative configurations of the circles and more details to consider, such as the effect on placement caused by a relative’s personal status and the placement of a relative’s own family members, and so forth. Of course, under the functional approach the degree of relationship should not be a determinative factor. I will return to this point later in this section.
will not affect any insider’s right to *family life*. The Canadian and Australian quota systems could be understood as proclaiming that more distant relatives in fact do not belong in the family reunification program, but form a distinct immigration category that—unlike family immigration—is governed not by the right to family life of insiders, but by policy considerations of costs and benefits to society at large.

It seems to me that under some formalistic interpretation of family relationships this view is correct. Under some formalistic interpretations of family relationships the criterion of level of familial relationship, or distance from the nuclear family, is relevant for discriminating between different cases of family-class immigration, and subjecting more distant relatives to quotas would thus not affect the right to family life of insiders. But I have rejected the formalistic understanding of the family.

Under the functional approach for which I advocate, this criterion of distance is irrelevant. What matters is not how two individuals are related, but rather what relationship they have, what function their relationship plays in each life. An elderly parent and their adult child can share family life if they have a mutual commitment and responsibility to one another, share relevant aspects of their lives, and care for one another on a daily basis. Current quota policies that apply to distant relatives are based on the assumption that distant relatives do not share family life. But this assumption is mistaken and it is wrong to design policies on its basis. The functional meaning of family life—that I believe is the appropriate one—excludes the justifiability of this criterion.

Rejecting the criterion of distance based on the functional understanding of the family highlights the relationship between the question of the *definition* of family and the question of *quotas*. Under the functional account, there could not be made a distinction between different families based on the formal relations between the individuals involved, however defined. Any distinction between different families must attend to the functionality of the relationship between family members.

What about the criterion of political status of the insider family member (the sponsor)? The American system discriminates quite seriously between citizens and legal permanent residents in terms of their access to family-class immigration. It subjects *all* applications for family reunification made by legal permanent residents to quotas, including the immigration of spouses and dependent children. It subjects only *some* applications made by citizens to quotas, and they apply only to the immigration of more distant relatives that legal permanent residents cannot sponsor for immigration at all.

The use of the criterion of political status of the insider family member seems to have, more than just limiting the numbers of family-class admissions, the goals of signaling value of citizenship, enhancing this value, and encouraging naturalization. By offering the carrot of better access to family reunification as citizens, the American family immigration system actively encourages permanent residents to naturalize.

The use of family-class immigration for the purpose of signaling and enhancing the value of citizenship and for the purpose of encouraging naturalization is, in my view, illegitimate. From the right to family life perspective, I explained in chapter 3 why I believe that permanent residents should enjoy the right to family reunification equally to citizens. Family life is a component of decent life similar to the right to work or study, the freedom to move and settle within the territory, and the equal protection of the country’s law. All of these rights must be attached to a legal licence to settle permanently that states grant permanent residents. In a quota policy that uses access to family reunification as incentive to naturalize, the resident’s interest in family life is being used as means to achieve policy goals that are not related to family life. Even if the policy goal of encouraging naturalization is legitimate in and of

92. Cf Joseph H. Carens, who says “it is particularly striking that states permit family reunification not only for citizens but also for noncitizen residents.” (Carens, “Who Should Get in? The Ethics of Immigration Admissions,” 96).
itself, a state is limited in its choice of policy means used to this end. It cannot make the realization of other rights conditional upon an individual’s behavior with respect to the policy goal in question. The status of a right protects these private interest from being used as means.

Coming back to the analogy with healthcare rationing, what is wrong with the criterion of political status of the insider is that it has no connection to the underlying norm supporting the family-class immigration category: the preservation of family life. So, even if encouraging naturalization is a legitimate policy aim in itself, and even if quotas on family class immigration can under some conditions be justified, their imposition as means to achieve the aim of naturalization is illegitimate. Any limitation of the right to family reunification needs to be sensitive and informed by the underlying norm. As a result, the right can only be limited for the reason that available resources are insufficient to realize this right and other rights fully. And when a limitation on the right is implemented for this reason, the applications for family-class immigration that will be subject to quotas must be those in which the delay or rejection of admission will cause the least harm to family life.93

The last point brings me to consider another kind of quotas: unofficial quotas. These belong to one of two types: either the government stops considering applications at a certain moment in the immigration period, or the government’s administrative capacity fails consistently to answer demand, and its failure to do so is not justified.94 Both policies effectively impose quotas on family-class immigration, but without publicizing this fact or making quotas an official policy. These governmental behaviours fail to respect the right to family reunification. The limitation they impose on the right are unjustified in the two senses of the word. First, the government does not justify the policy to its people, as it should do with any limitation imposed on a right. Here, the unadvertised nature of unofficial quotas serves as a means to avoid the justification requirement. Second, since the government has not offered a valid reason for which quotas, as they are employed, are necessary, the quotas are not justified, in the sense of being legitimate.

From the prohibition on unofficial quotas we learn something new about the duties of the state that correlate to the right to bring in our foreign family members: the requirement to designate adequate

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93. I am not attempting to fully investigate what exactly such criterion would look like, and how applications will be divided.

94. See, e.g., Krystle Alarcon and Stephanie Law, “Immigrants Feel Betrayed by Conservative Decision to Make Family Reunions Harder,” The Tyee.ca, 2011, https://theyee.ca/news/2011/04/08/FamilyReunions/ reporting that “Leading into the election, the Conservative government admitted it had changed internal immigration targets to stretch wait times for parents and grandparents of immigrants applying to come to Canada to join their relatives. In February, when documents obtained through a freedom-of-information request brought that shift to light, Immigration Minister Jason Kenney defended the decision, arguing immigrants who brought higher earning skills should trump parents and grandparents wanting to come to Canada.” And with respect to resources designated to administer family-class applications: “That would mean going through a two-step procedure. First, Citizenship and Immigration Canada checks to see if the immigrant qualifies as a sponsor, which includes an income threshold. This step takes about 42 months, according to CIC. Second, CIC assesses the parents themselves, which involves, among other tests, a thorough medical examination. The time it takes for this part varies depending on the country of origin. The expected wait time for sponsoring parents from India is 30 months, according to CIC.” And with respect to relationship between demand for family-class immigration, and supply of immigration permits: “But Patel’s story isn’t an anomaly. There are 147,768 other families also waiting for parents or grandparents to join them in Canada, according to the access-to-information request obtained by immigration lawyer Richard Kurland that revealed the new government policies. The wait will be over for about 11,200 of those families in 2011, according to the same documents. But this is a 19 per cent decrease from the number granted permanent residency in 2010. Canada issued 11,486 visas to parents and grandparents in 2010 between January and September alone.” Compare this with “Towards this end, the government has made a number of positive changes. The 2017 Immigration Plan reveals a government target of 84,000 sponsored immigrants through family sponsorship programs, including 64,000 spouses, partners, and children, as well as 20,000 sponsored parents and grandparents. Moreover, the government plans on repealing the conditional permanent residence regulatory provisions for certain sponsored spouses and common-law partners. If approved, the change is expected to come into force in spring 2017. Finally, the government has also made strong headway on reducing family sponsorship processing times: the latest figures show an overall reduction in processing times of 15 percent over the past year.” (Canada. Citizenship and Immigration Canada, “Immigration Plan 2017: Canada to Welcome Increased Number of Immigrants through Economic and Family Sponsorship Programs”).
resources to the administration of family-class admissions.95

To conclude, in this section I considered the legitimacy of quotas on family-class admissions in light of current polices imposing numerical caps on family-class immigration in Canada, Australia, and the US. I considered whether distinguishing between immediate and distant relatives for the purposes of family-class immigration is legitimate, and I have argued that any distinction based on a formalistic understanding of the family is illegitimate. In considering this normative question, I highlighted the close relationship between the definition of a “family member” and the issue of quotas in family-class immigration.

I considered whether discriminating between citizens and permanent residents with respect to their access to family reunification is legitimate, and I found that it was not, as this would amount to using one’s interest in family life as means to achieve unrelated policy goals and violate one’s right.

Finally, I considered the issue of informal quotas. This issue is more elusive, but ultimately of the greatest concern. I considered this issue in a superficial manner, and only attempted to sketch the administrative obligations that must be borne by a state if it is to be said to respect its members’ right to bring in their foreign family members.

In general terms, I argued that, to be legitimate, quota policies need to meet two standards: the quotas must be imposed for the reason that full realization is impossible, and the cases to which the quotas will apply must be those in which the harm to family life will be minimal. Family reunification being a right of a state’s member, limitations on this right require an argument that is sensitive to the facts and considerations applying in each individual case, as well as to the underlying norm of preserving family life. Numerical quotas, as they are applied today, violate this requirement since they are arbitrary from the point of view of the individual (in the sense that she is caught in the quota for irrelevant considerations), and potentially also from the point of view of the state (in the sense that it may be imposing quotas without evidence of their necessity). As such they are inherently insensitive to the basic human need underlying the right to bring in our foreign family members. For these reasons, the quotas currently imposed on family-class immigration are illegitimate.

Limitations on immigration can, however, be designed along the lines of the functional definition I called for in section 5.2. This means that relatives who do not satisfy the functional definition do not deserve the same access to immigration (under the family class) as relatives who fall under the functional definition. The distinction between different family members must be drawn exclusively along the lines of functionality, and not of formal categories of relations.

I am not the first to say that numerical limitations on family-class immigration are unjust. Carens has been even harsher than me, rejecting numerical limits in principle, rather than based on the details of the policies.96 But I have offered here a more nuanced explanation of what I believe are the reasons

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95. What is “adequate” designation of resources is a question beyond the scope of this thesis, but can probably be measured roughly along the lines of the idea of “reasonableness” developed in administrative law. See, e.g., Carens, “Who Should Get in? The Ethics of Immigration Admissions,” 98–99 (“Often the obstacles to family reunification are not formal but administrative and procedural, which creates unjust practices even though the policy is formally just. In Canada, for example, there are frequent complaints that people with spouses and children in some areas of the world, such as South Asia, have to wait years for permission for their family members to immigrate because there is a huge backlog of applications. States have a moral obligation not only to respect the right of family reunification in principle but also to develop administrative procedures that ensure that the right will be substantive.”). We can also take inspiration from administrative requirements in the European context. In Tanda-Muzinga v. France, §82 it was ruled that the family reunification process must be adequately transparent and processed without undue delays. (E.U. European Court of Human Rights, “Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life (1st edition),” Council of Europe/European Court of Human Rights, 2017, 49, http://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf).

96. Carens, “Who Should Get in? The Ethics of Immigration Admissions,” 98. (“Given the importance of family reunification, numerical limits on the entry of immediate family members are not morally defensible, and criteria that
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for which quota policies currently in effect are unjust.

5.4 The Elsewhere Approach

5.4.1 The Importance of the Policy Question

The *elsewhere approach* is a common term for a legal doctrine employed by different jurisdictions, but most prominently by the European Court of Human Rights. According to the doctrine, a state’s refusal to admit a foreign family member of a citizen or a permanent resident does not violate the right to family life of that citizen or permanent resident if the family did not show that it could not reasonably reunite in another country (usually the country of origin of the foreign family member).

The elsewhere approach’s application is problematic. The legal arguments invoking the doctrine rarely investigate the actual viability of the supposed alternative, and its mere assumption is enough to dent an individual’s claim based on the right to family life. The doctrine is also applied discriminatorily, so that applications of women to bring in their male partners are more often rejected under the doctrine than applications of men to bring in their female foreign family member.

But this section is concerned with the principled flaws of the elsewhere approach, rather than with its problematic application. As I will argue hereafter, the elsewhere approach cannot be universalized as a legal rule, and as such it is illegitimate. Furthermore, the refusal of states to realize the right to family life within their own borders defies the basic structure of rights and violates the liberal order in which the responsibility for the realization of rights is vested as a matter of first order in individual states, and only residually to the community of states as a whole. With developments in international law that condition the sovereignty of states on fulfillment of individual rights, the elsewhere approach also negates the long-term interests of states, as it pushes individuals to look for uber-state mechanisms of enforcement that would interfere with states’ sovereignty.

The elsewhere approach undermines directly and completely the conception of a right to family-class immigration, and the two cannot coexist. And indeed, the idea that a right can be fulfilled elsewhere, under the control of another state, is never invoked with respect to other rights of citizens or permanent residents by their states, nor should it. As Anderfuhren-Wayne put it, “[t]his manner of characterizing an interference [as only occurring if reunification elsewhere is impossible] is unique: With regards to almost any other basic right, an interference would constitute a restriction or limitation on that right.”

Since the elsewhere approach violates the right I argue for by definition, it is clearly a policy question I must attend to in this thesis. Since the elsewhere approach is a product of states’ insistence on seeing the right to family life as a *human right*—as will be discussed below—discussing the shortfalls of the doctrine will also help me to advocate for an account of the right to bring in our foreign family members as a *civil right*, in which case the elsewhere approach will cease to exist.

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98. The *elsewhere approach* is also invoked in cases of removal of family members, but for the purposes of this thesis I am only looking at its application in cases of first admission. See, e.g., ibid.; Hart, “Love Thy Neighbour: Family Reunification and the Rights of Insiders”; Costello, *The Human Rights of Migrants and Refugees in European Law*, Chapter 4.


5.4.2 The Proposal

I propose that the elsewhere approach should cease to be used as a legal basis for the rejection of family-reunification applications. In any case in which a court finds it justifiable that a request for family-class immigration be rejected, it should justify this rejection by reference to the harm caused to the family as if there was no alternative for reunification elsewhere (as if the family will be left divided by the decision). The presumed circumstances of the family outside the state’s territory should not be included in the assessment of the limitation.

5.4.3 Current Policies

The elsewhere approach is most pronounced in the jurisprudence of the European Court of Human Rights (“the Court”).\(^{101}\) The Court has jurisdiction to decide applications of individuals and states concerning violations of the European Convention on Human Rights (“the Convention”) by states parties to the convention. For family-class immigration matters, applications concern the violation of Article 8, which states:

**ARTICLE 8**

**Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.\(^{102}\)

Of this Article, it is the right to respect for family life (8.1) that is relevant to family reunification. The legal question in cases contesting denied applications for family reunification is whether the denial of admission amounts to interference with the exercise of this right and, if so, whether such interference is in accordance with the law, is necessary in a democratic society, and is in the interests of the public as enumerated in 8.2. The elsewhere approach answers the question of interference, the first stage of the test in 8.2.

The leading precedent establishing the elsewhere approach, and which still influences the Court’s case law, is the case of *Abdulaziz*.\(^{103}\) The female applicants in *Abdulaziz* were residents affected by

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101. The jurisprudence of the European Court of Human Rights in Strasbourg has developed in greatest detail the elsewhere approach, and for this reason I will bring examples to the phenomenon from this jurisprudence. Not only is Europe a central arena of immigration, making the discussion of its immigration policies important for gaining a perspective on major immigration policies in the world. It is also my suspicion that this approach underlines many states’ positions and courts’ decisions against the application of the right to family life to cases of immigration of foreign family members, in particular partners. For example, the most restrictive and formalized “elsewhere” rule is the Danish “subjective attachment” requirement, adopted in 2002. As part and parcel of its family immigration policies, Denmark requires that couples looking to be reunited in the country demonstrate that their combined subjective attachment to Denmark is greater than their attachment to another country (Anne Staaver, “From right to earned privilege? The development of stricter family immigration rules in denmark, norway and the united kingdom” (PhD diss., University of Toronto, 2014), 21, http://myaccess.library.utoronto.ca/login?url=https://search-proquest-com.myaccess.library.utoronto.ca/docview/1764222660?accountid=14771). Furthermore, the approach presents a conceptual challenge to the right I argue for—the right to bring in our foreign family members—and so discussing it here is necessary.


103. EU. European Court of Human Rights., *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, 9214/80, 9473/81, 9474/81.
old British immigration rules that posed stricter conditions for the immigration of husbands joining wives settled in Britain than for incoming foreign wives of settled men. The applicants claimed various different violations of their right to family life (Article 8) and of their right to equality (Article 14). With respect to the right to family life, they argued that it entailed the right to establish family life in one’s state of citizenship or lawful residence.

The Court acknowledged that when the admission of foreign family members is considered, at issue are the rights of citizens and permanent residents to family life within their country:

The applicants are not the husbands but the wives, and they are complaining not of being refused leave to enter or remain in the United Kingdom but, as persons lawfully settled in that country, of being deprived (...) or threatened with deprivation (...) of the society of their spouses there. Nevertheless, as de Hart puts it, “although the Court has acknowledged that family reunification is about insiders, it has not taken account of the consequences of such a position.”

The Court concluded that Article 8 could entail a positive duty on states to admit foreign family members, but states had a wide margin of appreciation in designing their immigration policies, even family immigration policies, because immigration is a matter of state sovereignty. The extent of the positive obligation to admit relatives of settled immigrants thus depends on the particular circumstances of the persons involved.

In the case at hand, the Court found it relevant that the women did not ask to bring in family members with whom they had family ties prior to the women themselves being admitted as immigrants, but rather members of families they established after settling in the UK:

The Court observes that the present proceedings do not relate to immigrants who already had a family which they left behind in another country until they had achieved settled status in the United Kingdom. It was only after becoming settled in the United Kingdom, as single persons, that the applicants contracted marriage. The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.

Respecting their right that their chosen husbands be admitted as immigrants would amount, the Court found, to a positive obligation on the state to respect the choice of residence by binational

104. ARTICLE 14 Prohibition of discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.


105. EU. European Court of Human Rights., Abdulaziz, Cabales and Balkandali v. The United Kingdom, 9214/80, 9473/81, 9474/81, quoted in Hart, “Love Thy Neighbour: Family Reunification and the Rights of Insiders,” 235. Cathryn Costello agrees that the elsewhere approach discriminates on sexual grounds in that more often women are assumed to need to stay in the country to exercise their family life with their children, while fathers are said to be able to continue the relationship from away, even in similar circumstances. (Costello, The Human Rights of Migrants and Refugees in European Law, 117–118).


107. I leave it as an open question for now, but will come back to this point in the conclusion to this thesis (Chapter 6), the question of how the applicants being settled immigrants rather than birthright citizens affects the Court’s position.

108. EU. European Court of Human Rights., Abdulaziz, Cabales and Balkandali v. The United Kingdom, 9214/80, 9473/81, 9474/81, para 68.
couples. The Court found this conclusion reprehensible, and established the principle according to which states are not generally obliged to respect the choice of matrimonial residence by binational couples. This principle was not limited to cases in which individuals have broken immigration or other rules, but was applied generally. Even couples who had broken no immigration rules were put at the mercy of state discretion with respect to immigration admissions.

The Court did find that a relevant consideration in favour of a positive obligation on the state to admit a foreign partner would be if there were obstacles to establishing family life elsewhere, and more specifically “in their own or their husbands’ home countries.” With respect to the case at hand, while the applicants argued they suffered such obstacles, the Court, without discussion, found that “the applicants have not shown that there were obstacles to establishing family life in their own or their husbands’ home countries or that there were special reasons why that could not be expected of them.” There was accordingly no “lack of respect” for family life and, hence, no breach of Article 8 taken alone.

The Court’s position has been reproduced in a series of cases since Abdulaziz, and is applied against birthright citizens, naturalized citizens, and legal permanent residents. As de Hart put it, “the Court requires even those born in the country to choose between home and family.” Even as the elsewhere approach was subsequently weakened with respect to the admission of children, and in cases of expulsion, the case of Abdulaziz remains the leading authority with respect to the immigration of foreign partners.

Reviewing the case law and the Court’s approach to the interests of citizens and permanent residents who are married to foreigners as it is reflected in the case law, de Hart concludes that citizens’ and permanent residents’ interests weigh little in the consideration. While the Court affirmed in principle the idea of citizens’ and permanent residents’ right to family reunification, “it did not attach much consequence to this principle.” And Costello adds that “the statist assumption means that some family migration issues, particular family formation migration, do not even raise infringements under Article 8(1) refusing admission is the State’s permitted default position.” She highlights the fact that states are not required to offer any particular justification for refusal of admission. Rather, applicants must convince that reunification elsewhere cannot reasonably be expected of them, while their connection to their state of residence tends to be obscured in the assessment of reasonableness. Not surprisingly, as consequence, the gravity of the interference with an individual’s enjoyment of life within their country is diminished.
5.4.4 The Problem with the Elsewhere Approach

As a legal principle, the elsewhere approach is flawed as its consequences are ridiculous and its effect is arbitrary. A hypothetical example may demonstrate the problem. As discussed in the last section, according to the elsewhere approach, the right to bring in a foreign partner to one’s state is limited to cases in which establishment of family life in another state cannot be reasonably expected of the couple as it will cause serious hardship. In a series of cases, the Court detailed a number of factors that may be considered as part of an assessment of the hardship facing a member of one state in settling in another. These include, among others, the language of the foreign country, its public culture, and the mainstream religion. 120

Given the Court’s guidelines, some binational couples may find that they have no right to settle in any of their states of membership. This would be the case for couples composed of members of two jurisdictions that share the same official language, that subscribe to similar political systems, such as liberal democracy, and that enjoy public cultures neutral to religion. To give some concrete examples, it seems that a Flemish Belgian and a Dutch national could be rejected reunification in both countries, as both partners can reasonably establish themselves, according to the criteria developed by the Court, in the other partner’s country. A Belgian Walloon and a French national would be in the same situation. A Canadian and an American would be denied establishment of family life in both countries, as would a German and a German-speaking Swiss, and so forth. If the elsewhere approach were to be universally adopted, some individuals would be completely denied the right to family life of their choice. Importantly, these individuals would be denied this right completely, because under the elsewhere approach no jurisdiction would be obliged to allow the family life of the couple within its boundaries. The elsewhere approach can thus not be universalized if the right to family life of one’s choice is to be recognized.

The same point can be demonstrated also by considering the cases arriving in court in which the elsewhere approach is applied. When a couple applies for reunification in one state, it does so because establishing their life in that state is desired for both the local family member and the foreign family member. A state that denies the application based on the elsewhere approach can do so and still claim to respect the right to family life of the couple only if other states in which the couple can presumably establish family life do not subscribe to the elsewhere approach. This is because if other

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120. Costello, The Human Rights of Migrants and Refugees in European Law, 128–129. de Hart reaffirms the sense that the elsewhere approach results in applicants exoticifying and orientalising their countries of origin (Hart, “Love Thy Neighbour: Family Reunification and the Rights of Insiders.”)
states subscribe to the elsewhere approach, then from their perspective, the state in which the couple made the application is clearly a state in which the couple can reasonably settle. So those other states could apply the elsewhere approach and deny reunification in their territory. If the state of application ignores the results of possible applications elsewhere, it cannot claim that the right to family life of the couple is respected while reunification in its territory is denied. The result is that the application of the elsewhere approach in one state depends either on the non-universality of the approach—on the fact that other states do not subscribe to it—or on denial of the right to family life of one’s choice. The elsewhere approach cannot be universalized and still be compatible with a right to family life.

The problem with the elsewhere approach is twofold. First, applying the elsewhere approach results in ridiculous situations because it is extremely easy for a couple to avoid being sent elsewhere. All that is required is a strategic application plan. Whether or not the state to which the couple does not want to be sent subscribes to the elsewhere approach itself, the couple can take a simple step to make it an unreasonable alternative to settlement in the state of the couple’s desire. If the state subscribes to the elsewhere approach, the couple could apply there first, be rejected, and then turn to state they desire to reside in and claim it is obliged to take the couple in. If the undesired state does not subscribe to the elsewhere approach, the couple can violate immigration rules there (by overstaying a tourist visa, for example), be removed, and turn to the desired state as the only reasonable alternative for reunification.

Given the possible manipulation of the elsewhere doctrine, the effects of the elsewhere approach are perversely arbitrary. The policy discriminates according to the path of immigration applications each couple takes, rather than based on relevant considering having to do with the right to family life itself.

Of course, it is trivial to say that the elsewhere approach is incompatible with my account of our right to bring in our foreign family members. Mine is an account of a civil right to family-class immigration: a right of a member against her state. By definition, then, the right of the member is a right to be reunited with family in that particular state and not anywhere else. When a state denies that in the great majority of cases a member holds the right to reunification within its territory, it rejects this civil right account completely. But I believe that the elsewhere approach fails even the terms of a good theory of a human right to family-class immigration.

Even in the field of international human rights, the ultimate duty bearers are specific states, and states’ claim to sovereignty is conditional upon their guaranteeing human rights. Specific states of duty are identified by their relationship with the alleged violation of the human right in question. And with respect to any such claim, some particular state(s) would be identified as holding the primary obligation to respect the human rights of the individual applicant. Relevant duty-holders are identified by their proximity to the alleged violation. Usually, when human rights are concerned, the duty-holding state is that which actively limited the individual’s freedom, or one under whose control such private violation has occurred, and the state has failed to prevent it despite a duty to protect. A state of permanent

121. Others who have attended to the challenge presented by the elsewhere approach arrived at a similar conclusion that the right to family-class immigration is a civil right:

Why must this interest in family life be met by admitting the family members? Could it not be satisfied just as well by the departure of the family members to join those abroad, assuming that the state where the other family members reside would permit this? Why is the state obliged to shape its admissions policies to suit the locational preferences of individuals?

In addition to their interest in family life, people also have a deep and vital interest in being able to continue living in a society where they have settled and sunk roots.... no one should be forced by the state to choose between home and family. (Carens, “Who Should Get in? The Ethics of Immigration Admissions,” 97)

Yong gives a similar explanation in Yong, “Caring Relationships and Family Migration Schemes,” 78–79.
residence is a most likely candidate to be a state of first-priority duty to respect the human rights of a person legally and permanently residing in that state.

So when the states of Europe impose the elsewhere approach, they are working against their own interests. They are offering a flimsy legal excuse for their refusal to take responsibility for their multilateral obligations, by which they dump the responsibility on their fellow convention parties. At the same time, at the global level, they support the right and duty of third party states to interfere with foreign governments when these are unwilling or unable to protect human right within their control. The elsewhere approach is likely to create costly externalities. As such, the elsewhere approach undermines a system which rests on the strongest enforcing powers: states. Pushing the limits of citizens’ tolerance, they may face a backlash and calls to further erode state sovereignty and empower international agencies.

The inconsistency of the elsewhere approach with any prevailing understanding of human rights is obvious if we consider how the elsewhere approach would have been received if it was applied to any other basic human right. For example, can a state of residency deny equal health services to dual-nationals who are eligible in a foreign country?122

As Anderfuhren-Wayne notes, the clear flaws of the elsewhere approach led the Court in some cases to abandon the doctrine, ignoring the questions of possibility of re-establishing family life elsewhere and emphasizing the applicant’s connections to the state in which the applicant is asking to conduct family life.123 I advise that the Court abandon the elsewhere approach completely.

5.5 Proportionality

5.5.1 The Importance of the Policy Question

Some conditions and limitations on family class immigration are compatible with the idea of a right to family reunification. Theorists of rights agree that at least the majority of rights are legitimately subject to limitations.124 Each right is limited internally, and each individual only holds her right to the extent that it is compatible with the equal enjoyment of others of that right. Each right is also limited externally, by other rights and justifiable social goals.125

What are legitimate limitations on the right to bring in our foreign family members? The well-established theory of proportionality provides an answer that I believe is correct: legitimate limitations on rights are done by law, for a worthy cause, and by imposing minimal harms. In this subsection I will give examples of appropriate applications of the requirement of proportionality to family reunification cases. I will further argue that the appropriate interpretation of the requirement of proportionality in the context of family reunification is to accept even very costly conditions on reunification that are necessary to achieve a worthy cause as long as the imposition of a specific limitation on an individual family member would not (?) result in the exclusion of that individual from family reunification. In other words: legitimate limitations can impose a cost on family reunification which each family will have

122. As noted above, Anderfuhren-Wayne rightly notes that “[t]his manner of characterizing an interference is unique: With regards to almost any other basic right, an interference would constitute a restriction or limitation on that right.” (Anderfuhren-Wayne, “Family Unity in Immigration and Refugee Matters: United States and European Approaches,” 361).
124. See Barak on the few cases of absolute rights: the prohibition of slavery, the prohibition of torture, human dignity. (Barak, Proportionality: Constitutional Rights and Their Limitations, 27–29).
125. ibid., 45–82.
to bear, and some more than others, according to their circumstances. But legitimate limitations cannot result in family separation.

Numerous conditions on the right of families to be reunited in one state are in place in most jurisdictions. These include economic conditions, “integration contracts, language requirements and civic tests with which a family member must comply before entry,”126 or conditions to be completed after reunification to achieve permanent status.127 For example, some jurisdictions have recently raised the financial thresholds citizen or permanent residents must meet in order to qualify as sponsors for their foreign family members.128 These policies create new barriers and inequalities in access to family reunification, based on cultural or economic status.

The group of legitimate limitations is composed of a number of different conditions. Of these, I will particularly consider language requirements, economic status requirements, fees, and civic integration tests. States imposing these limitations claim to be assuring the social and economic welfare of the public, while still allowing the immigration of foreign family members.129

This group of legitimate policy measures differs from the previously mentioned limits on the right to family reunification (those deriving from the definition of the family, numerical quotas, and the elsewhere approach) in that legitimate limitations are flexible and allow accommodation for specific cases to avoid family separation. The definition of the family, numerical quotas, and the elsewhere approach, on the other hand, are rigid policies, any deviation from which would undermine the whole policy. For example, a policy requiring incoming family members to profess basic command of the local language would still achieve the goal of facilitating integration if an old family member who cannot learn a new language would be admitted despite not meeting the requirement. But there could be no exemptions from quotas

126. Ruffer, “Pushed Beyond Recognition? The Liberality of Family Reunification Policies in the EU,” 937. See also Orgad, “Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe.” In Sweden, the sponsor’s home must be of a sufficient size and standard for the sponsor and her family. The maintenance and housing requirement does not apply to a sponsor if she is a child, a refugee, for example (Sweden. Migrationsverket Swedish Migration Agency, “Family Reunification,” 2018, https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/When-you-have-received-a-decision-on-your-asylum-application/If-you-are-allowed-to-stay/Family-reunification.html).

127. An example for a condition families must satisfy after reunification to achieve permanent status is the “conditional permanent residence” status imposed by Australia, USA and UK on incoming partners. Following these countries, Canada adopted in 2012 the “conditional permanent residence” status, which applies to sponsored partners who, at the time of application, had no shared children with their Canadian partner and were in a relationship with the Canadian for less than two years. Under this category partners were admitted to Canada under the condition that they cohabitate in a conjugal relationship with their sponsor for a period of two years. Failure to meet the condition will result, under some exceptions, in loss of permanent residence status and in possible removal from Canada (Immigration and Refugee Protection Regulations, Reg 72.1, SOR/2012-227, s 1; Canada. Citizenship and Immigration Canada, “Operational Bulletin 480 (Modified): Conditional Permanent Residence Measure for Spouses and Partners in Relationships of Two Years or Less Who Have no Children in Common,” Government of Canada, 2014, http://www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob480.asp). Canada has recently cancelled this condition out of concern that it was putting incoming partners at risk of abuse.

128. For example, in Norway, the sponsor must demonstrate that she has four years of full-time studies or full-time work in Norway, an income above a set threshold, that it is likely that he/she will have a future annual income above a set threshold (which in May 2016 was increased to 34,000 € per year before tax), a job with an unlimited contract, no received social security benefits during the last 12 months and a pension that is not time limited. (E.U. Council of Europe. Commissioner for Human Rights., “Realising the Right to Family Reunification of Refugees in Europe,” 2017). In Canada, on January 2nd, 2014 the sponsorship program for parents and grandparents saw a 30% increase in the minimum necessary income (MNI) of the sponsors, and a lengthened period of demonstrating such MNI from 1 to 3 years. (Immigration and Refugee Protection Regulations, Reg 133(1)(j)(B), SOR/2014-140, s 10(E)) Denmark, France, the Netherlands, Germany, Austria and the UK similarly heightened financial thresholds. (Ruffer, “Pushed Beyond Recognition? The Liberality of Family Reunification Policies in the EU.” 937).

129. See Barak on the role of “the rights of others” or “social considerations” in adjudicating constitutional rights. (Barak, Proportionality: Constitutional Rights and Their Limitations). Denmark, France, the Netherlands, Germany, Austria, the UK, and Canada heightened financial thresholds lately. See Ruffer, “Pushed Beyond Recognition? The Liberality of Family Reunification Policies in the EU,” 937; Immigration and Refugee Protection Regulations, Reg 133(1)(j)(B), SOR/2014-140, s 10(E) (Can). See also Orgad, “Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe.”
without destabilizing the quota system. Being flexible, legitimate measures are consistent with a right to family life, and therefore would survive as policies should states agree that families enjoy a right to family reunification. The measures discussed in the previous three subsections, meanwhile, being rigid, are inconsistent with my conception of family immigration as a right.

Another important distinction between the two groups of limitations—the legitimate and the illegitimate—is their effect on individuals. Illegitimate limitations cause family separation. Legitimate limitations impose costs on family reunification and may affect the length of separation (or precarious status), but they do not cause family separation. Legitimate limitations essentially compel the beneficiaries of family reunification policies to internalize the costs supposedly created by their inclusion in society.

I believe that proportionality can provide guidance as to which limitations on the right to family reunification are legitimate, and for this reason I find it an important policy question to consider in this thesis.\footnote{Lister has defended modest financial conditions on family migration by appeal to the importance of domestic distributive justice, arguing that considerations of what he calls ‘reciprocity’ among current citizens justify policies to minimize the risk of a negative fiscal impact from family migration (Lister, “Immigration, Association, and the Family,” 738–741). Caleb Yong says: “If the imperative to grant special immigration eligibility to certain dependent adults stem from a requirement to protect their human rights, however, then it should take priority over much weaker requirements of domestic distributive justice.” (Yong, “Caring Relationships and Family Migration Schemes,” 76).}

5.5.2 The Proposal

I propose that when a state is looking to impose a condition on family reunification, we can assess the legitimacy of that measure by considering whether it is proportionate. This assessment highlights the necessary balance between the interest of the right-holder and the interests of others, which may be in tension with respect to the extent of protection the right receives. It considers the worth of the proclaimed policy aim, and it gives the utmost respect to the individual’s interest. Applying proportionality to immigration policies such as language and civic tests, fees, and economic terms, I will demonstrate what a legitimate limitation is.

5.5.3 Current Policies

The jurisprudence of the European Court of Justice (ECJ) illuminates the usefulness of proportionality in guiding policy design and application. The role of the European Court of Justice is “ensuring EU law is interpreted and applied the same in every EU country; ensuring countries and EU institutions abide by EU law.”\footnote{E.U. European Union, “Court of Justice of the European Union: Overview,” https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en.} As two directives of the Union guarantee some individuals access to family reunification in Union States, the ECJ has considered a number of different state-imposed conditions on family reunification and has developed a principle of legitimacy in this area. Its jurisprudence thus provides a good case study for the application of proportionality to conditions on family reunification.\footnote{E.U. Council of the European Union, “Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,” Official Journal of the European Union, 2003, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF. My discussion will focus on directive 2003/86.}

The purpose of Directive 2003/86 is “to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States”
of the European Union. Under Article 4(1) of the Directive, the Member States are to authorise the entry and residence of the sponsor’s family members for the purposes of family reunification. The ECJ has held in the leading precedent of Chakroun that this provision imposes specific positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor’s family, without being left a margin of appreciation.

The Directive defines a right of third-country nationals, this is not a membership-based right, or a civil right, as I called it in chapter 3, where I defended a civil right account of the right to family reunification. But despite it being a right of non-nationals, the right set by the Directive is very strong as it is a right set in the Law of the Union, under the jurisdiction of the ECJ. Being a right in Union law, the right to family reunification of third-country nationals is taken seriously by the ECJ, and the requirement of proportionality is applied to any limitation on it. For this reason I believe that cases discussing limitations to this right provide an excellent example of appropriate use of proportionality. The results are exemplified in a number of leading cases.

The case C-153/14 K and A discussed the question of civic integration requirements. The Judgement from 9 July 2015 said

[The requirement to pass a civic integration examination at a basic level is capable of ensuring that the nationals of third countries acquire knowledge which is undeniably useful for establishing connections with the host Member State.]

134. ibid., Chapter II, Article 4:

1. The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:
   (a) the sponsor’s spouse;
   (b) the minor children of the sponsor and his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;
   (c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;
   (d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement.

The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married.

By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.

137. ibid., Para 54.
However, in any event, the principle of proportionality requires the conditions of application of such a requirement not to exceed what is necessary to achieve those aims. That would, in particular, be the case if the application of that requirement were systematically to prevent family reunification of a sponsor’s family members where, despite having failed the integration examination, they have demonstrated their willingness to pass the examination and they have made every effort to achieve that objective.\footnote{ibid., Para 57.}

The integration measures referred to in the first subparagraph of Article 7(2) of Directive 2003/86 must be aimed not at filtering those persons who will be able to exercise their right to family reunification, but at facilitating the integration of such persons within the Member States.\footnote{ibid., Para 64.}

Before closing, the ECJ also made a remark about expenses relating to civic integration examinations. With respect to these, the ECJ found that

in accordance with the principle of proportionality, the level at which those costs are determined must not aim, nor have the effect of, making family reunification impossible or excessively difficult if it is not to undermine the objective of Directive 2003/86 and render it redundant.\footnote{ibid., Para 56.}

The ECJ concluded that the Directive must be interpreted as meaning that Member States may require third country nationals to pass a civic integration examination such as the one at issue, provided that the application of such a requirement does not make it impossible or excessively difficult to exercise the right to family reunification.\footnote{ibid., Para 71.}

In case c-138/13 \textit{Dogan}, at issue were language requirements. The judgement from 10 July 2014\footnote{E.U. Second Chamber of the Court of Justice of the European Union, “Naime Dogan v. Bundesrepublik Deutschland, Case C-138/13, ECLI:EU:C:2014:2066,” (10 July 2014), \url{http://curia.europa.eu/juris/document/document.jsf?text=&docid=154828&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=524097}.} found that the imposition of more restrictive conditions on family reunification “is prohibited, unless it is justified by an overriding reason in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it.”\footnote{ibid., Para 37.} In the case at hand, the ECJ found that the Additional Protocol to the Directive must be interpreted as meaning to preclude a measure of national law, introduced after the entry into force of that Additional Protocol, which imposes on spouses who wish to enter the territory of that State for the purposes of family reunification the condition that they demonstrate beforehand that they have acquired basic knowledge of the official language of that Member State.\footnote{ibid., Para 39.}

In the case of c-508/10 \textit{Commission v Netherlands} the issue was fees attached to family reunification applications. In the Judgement of 26 April 2012\footnote{E.U. Second Chamber of the Court of Justice of the European Union, “European Commission v. Kingdom of the Netherlands, supported by Hellenic Republic, Case C-508/10, ECLI:EU:C:2012,” (26 April, 2012), \url{http://curia.europa.eu/juris/document/document.jsf?text=&docid=122161&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=524499}.} the ECJ declared that by applying excessive and
disproportionate administrative charges which are liable to create an obstacle to the exercise of the rights of third country nationals and their family members, the Kingdom of the Netherlands had failed to fulfil its obligations.

Finally, in the case of c-578/08 Chakroun, economic thresholds were discussed. The Judgement of 4 March 2010 ruled that the Directive on the right to family reunification must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance from the government.

Taken together, these cases of the ECJ elaborate on a theory of legitimate limitations on the right to family class immigration according to which legitimate limitations are those that impose some costs on families in the name of the public good, but do not result in family separation. I support this interpretation of the requirement of proportionality when it is applied in the context of family reunification.

My analysis of proportionality has so far concentrated on the model developed by the ECJ. This jurisprudence has provided me with one proportionality test applied consistently over time to different immigration conditions, so that its conclusions were fully developed. But before I close this survey of current policies exemplifying the use of proportionality as a guide to legitimacy, I want to mention one last group of examples for such policies. In some cases, states have internalized the requirement of proportionality in their immigration processes. For example, both Canada and the UK allow some applications for family reunification that do not meet the otherwise required minimum income if the sponsors can demonstrate financial viability through means other than income. In Canada they can be also be supported by co-sponsors, or even by demonstrating their ability despite not meeting formal criteria. The UK immigration system also internalizes the requirement of proportionality in its English knowledge condition to family reunification. This is a general requirement, but exempt from it are applicants 65 years or older, those who are unable to prove their knowledge because of a long-term physical or mental condition, or those who can show that there are exceptional circumstances which prevent them from meeting the requirement. These are examples of immigration rules themselves internalizing the requirement of proportionality. The exemption contained in them concedes that the individual harm of being denied reunification is greater than the harm to society at large that is caused by a number of individuals who will be admitted as immigrants without the proven ability. Another example of internalizing the proportionality requirement is the latest repeal of the Canadian “conditional permanent residence” status. The condition was adopted in October 25, 2012 in aim to deter family reunification application based on non-genuine relationships. (Canada. Citizenship and Immigration Canada, “Operational Bulletin 480 (Modified): Conditional Permanent Residence Measure for Spouses and Partners in Relationships of Two Years or Less Who Have no Children in Common”) See also VisaPlace, “Canada Eliminates Conditional Permanent Residence: Ending...
We find that proportionality is widely recognized as an appropriate measurement for legitimate limitations on rights at large, and on the right to family reunification in particular. Indeed, proportionality tests are widely acceptable globally, with some variations. As I will argue immediately, the theory of the consequences of proportionality in the area of family reunification that is reflected in ECJ jurisprudence described above correctly identifies what are legitimate limitations on the right.

5.5.4 The Advantages of Proportionality

Proportionality is a good measurement for legitimacy. It is commonly used and widely accepted and respected. It is thus uncontroversial and revolutionary as a policy, and consistent with other policies in liberal democratic states. Since it is widely used, it is also relatively well-understood and established. And in substantive terms, proportionality provides a balance between the state’s ability to pursue worthy goals and the rights of individuals, which is the goal of liberal policies.

5.6 Conclusion

In this chapter I discussed illegitimate and legitimate limitations on the right to bring in our foreign family members. I first argued that the definition of “family members” for the purposes of family reunification should be designed in light of the functional approach. I then argued against quotas on family-class immigration and the elsewhere approach, two policies that deny completely the right to family reunification. I then suggested that proportionality, which is the most commonly used test in liberal democracies for policies limiting individual rights, would be a good guide to assess which conditions and limitations on the right are legitimate. Economic or cultural conditions before or after reunification can be permissible if they either promote the interests at the basis of the right—namely, the care and sharing between family members—or if they promote other worthy social goals, are necessary for the achievement of those goals, and the personal harm they inflict is minimal.

Considering these four policy questions in this chapter, I have completed describing the right to bring in our foreign family members as I conceive of it. I have thus completed the conceptual assessment of family-class immigration I set out to perform in this thesis. I also suggested some solutions to a few of the most serious and common barriers facing families looking to reunite and exercise their family life in one state.

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Chapter 6

Conclusion

I chose to write this thesis looking for clarification on the nature of the claim of cross-border families. I focused on the question of legal rights. I sought to clarify the respective rights and obligations of individual residents and states of residency when the question of family life with foreign family members within the state of residency is concerned.

Developing a thoughtful and coherent argument about the rights and obligations of individuals and states in this context required me to answer a few key conceptual questions: what do we mean by “family life” to which one could have a right? Can we reasonably conceive of and desire a right to such family life in the cross-border context? How would such a right fit within our broader theory of immigration? And what would such a right mean in practice? I dedicated the chapters of this thesis to answering these four questions, in order, starting in Chapter 2. Having done so, I believe that I have laid the main conceptual foundations of my theory of the right to family life.

The arguments are laid out and I invite the reader to make their own evaluation of them. Before I close, though, I want to make one final submission in favour of my thesis, by way of considering some of its limitations and then nevertheless stating what I believe is its strongest merit.

I think a lot has been achieved, but even in terms of theoretical detail some important questions are nevertheless left unanswered. An important question upon which I hardly touch is that of the identity of the right holder. It is clear that the right holder may be either a citizen or a permanent resident of the state in question since my theory prohibits discriminating between the two for the purposes of family reunification. But my theory is so far silent on the possibility of right holders of other legal statuses. My arguments pertain to members of a polity, but I did not discuss how other sorts of claims to family unity may interact with the norm I am promoting. My theory is also so far silent on the question of the right holders’ age. In the common practice of family sponsorship only adults are eligible as sponsors. I have not discussed the implications of my argument with respect to this aspect of current policies. Both status and age are most contentious issues when immigration policies are concerned, so interesting and important arguments can result from a careful consideration of each of these questions.

Many of the most important questions this thesis touches upon require investigation using other methods. Of these, a question that could be picked up by socio-legal scholars is that of the possible contribution of family-class immigrants to their adoptive society in different contexts. The common view is that family-class immigrants are, as a group, less productive than economic migrants. As I mentioned at the beginning of this thesis, this assumption is now more and more put to the test. It would be
particularly interesting if family-class immigrants were found to present a potential unique contribution to a society, and very interesting even if it was found they present potential significant benefits.

And a question that may be most interesting to students of law or policy, who may find it disappointing that I did not discuss, is how to implement the reforms I just suggested in Chapter 5. This question is beyond the scope of my account, which was intended to be mainly conceptual, and to provide only a selected global overview of trends. But it is worthy of further investigation. Of course, in each jurisdiction the necessary policy changes will be different, as will be the means to achieve them.

These and many other questions are still left to explore with respect to family-class immigration, and I hope that they will be explored, by myself and by others. I hope so especially because I believe these questions will become more pressing - personally and politically - in the future. Family-class immigration is likely to grow in numbers as international mobility grows. As more people work, study, travel, invest, and interact internationally, more of us are likely to create meaningful relationship across international borders.

And it is exactly in this current and future context that I believe my theory is most attractive. As practices of family life are breaking established frameworks and international mobility is expanding, the effect is a significant challenge to the current immigration practices of liberal states. But liberal states are obliged to rise to the challenge, particularly in the ways I outline in Chapter 5. Liberal states would also, I predict, find it beneficial from a self-interested perspective to adopt the theory I suggest, because it provides them with clarity and stability. I am under the impression that the idea of a right to family-class immigration along the lines I suggested will gain more support as more and more birthright citizens will find themselves looking to bring in their foreign family members, a trend that is likely to expand. As a consequence, nation-states would have to adapt to the recognition of this specific case of a right to immigration.

In closing, maybe the most interesting thing about this thesis, and its greatest contribution, is the fact that it promotes a provocative conclusion by underwhelming and conservative measures and assumptions. My thesis promotes the conclusion that some foreigners should be allowed to immigrate into a particular state as beneficiaries of right-based entitlements. This notion irritates many who consider it radical and unfounded. Yet I have argued that it flows directly from our typical conservative understanding of our right to family life; to deny the right to family reunification would require radical revisions of our common understanding and practice concerning families. And while we liberals must accept this limitation on the state’s discretion to control its immigration, we can do so without undermining at all the idea of a defined community determining its own fate and without succumbing to the alternative of open borders in order to achieve an important goal such as family unity. Thus, this thesis has arrived at its ‘radical’ conclusion by means of a commitment to typical liberal values and traditional practices with respect to families and without need of extreme reforms like open borders. Whether one is conservative in one’s leanings or not, such conservatism or modesty in its assumptions should be counted as a strength of this argument because it makes the conclusion that states ought to recognize a right to family reunification that much harder for traditional opponents of this conclusion to reject.
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