EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF POLITICAL AND SOCIAL SCIENCES

EUI Working Paper **SPS** No. 99/3

The Domestic Legal Sources of Immigrant Rights: The United States, Germany, and the European Union

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Printed in Italy in June 1999
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That rights have legal sources seems to be a tautology, because in the modern legal state there are no rights unless they are legally codified and implemented. Regarding immigrants, however, the notion that rights have legal sources takes on substantive meaning. For citizens, the nominal owners of their state, many rights have social sources: they are grounded in conflict and the mobilization of parties or social movements. Seen through the mirror of immigrants, one suddenly realizes a fundamental presupposition of political sociology's epic stories of the disenfranchised (be they workers, women, or blacks) struggling for equal rights and inclusion: the formal citizenship of their protagonists. For immigrants, there is no such linkage between social mobilization and rights, because it presupposes legal membership in the polity. On the contrary, social mobilization surrounding immigrants is more likely to be directed against immigrants. The sources of immigrant rights lie elsewhere--not in the street or the political assembly room, but behind the closed doors of courtroom and state bureaucracy. The typical constellation of rights expansion for immigrants is not the popular drama of social movements confronting the state or political entrepreneurs competing for votes, but the quiet and largely unnoticed processing of the legal system, which often conflicts with the restriction-mindedness of popularly elected governments.

The extension of "citizenship rights for non-citizens" (Guiraudon 1998) marks a significant change in liberal postwar states. Earlier in the century, long-settled resident aliens in the United States could be deported or denied reentry because of their race, national origin, sexual or political orientations, and certain welfare benefits, the right to own land, and public sector jobs remained reserved to citizens only (Neuman, 1996). Prussia-Germany subjected its recruited seasonal migrant workers from Poland to a tightly supervised system of forced

rotation, as part of a nationalist "Prussian defensive policy" (*Preussische Abwehrpolitik)* against Poles that should prevent the permanent settlement of this undesired population (see Bade, 1984:462-471). Such policies would be difficult to conceive today. In the US, permanent resident aliens have come to enjoy most of the rights that citizens enjoy (with the exception of political rights), which has led a prominent legal observer to deplore the "devaluation of American citizenship" (Schuck 1989). In (West) Germany, the Turkish successors to the Polish migrant workers turned into the proverbial guests that stayed, protected by one of the world's most protective systems of alien rights.

How can we explain this astonishing expansion of immigrant rights? A prominent recent theory has argued that nation-states have become permeable to global human rights norms and discourses, which protect people as universal persons rather than as national citizens (Jacobson 1996; Soysal 1994). This theory is undeniably attractive, because it helps explain the convergence of similarly expansive schemes of immigrant rights across countries. But it gives an incomplete, and in important regards misleading, account of the origins and dynamics of immigrant rights in the countries considered here. First, the echo from Singapoor and China to "universal" human rights is that these are really "Western" human rights, which are deemed to have limited validity and application elsewhere. In fact, forced rotation and denial of elementary residence and family rights to labour migrants is disturbingly vital outside the Western hemisphere (see Weiner, 1995:80-83). This suggests that global human rights cannot be as "global" as proclaimed by the globalogists.

Secondly, even Germany, not now known to lie outside the West, is currently experimenting with second-generation guestworker schemes, whose legal provisions shall make sure that the recruited contract workers will not stay this time round (Rudolph 1996). This suggests that even in a Western coreland of human rights different legal regimes apply to different categories of migrants, each endowed with rather different sets of rights. Those migrants who have come to enjoy quasi-citizen rights are a rather limited and distinct group, who are either set apart from the start as legal immigrants (USA), or who acquired a similar status over time through the failure of the state to set clear time limits for

work and stay at an early point (as was the case with Germany's guestworkers). The reference to universal human rights, which indistinctly apply to all persons and groups, cannot explain the internal differentiation of immigrant rights even in those countries where these universal norms and discourses have originated.

Finally, globalogists have exaggerated the force of inter- or supranational regimes for legitimizing and diffusing human rights norms. In turn, they have underestimated, if not ignored throughout, the role of domestic legal orders and legitimizing principles for immigrant rights. As John Herz (1957) rightly observed, international law boils down to enshrining the principle of state sovereignty and deducing some of the consequences. The entry of the individual into the exclusive sphere of interstate relations, which occurred with the United Nations conventions on universal human rights protection, has remained declaratory and inconclusive (see L.Henkin 1990). The real constraints to state sovereignty are to be found in the domestic legal orders, particularly in constitutional law, which has been key to the development of immigrant rights.

In the following, I will compare the development of immigrant rights in the United States, Germany, and the European Union. In each case, I will differentiate between two sets of immigrant rights: alien rights proper and the right to citizenship. Why these cases, why these rights? Regarding case selection, the United States and Germany are the world's foremost immigrant-receiving countries. While similar in their liberal stateness, both countries have responded to postwar immigration in opposite ways: the United States has endorsed immigration as compatible with its recovered national self-description of "nation of immigrants"; (West) Germany has rejected immigration as incompatible with its new-found self-description of "not a country of immigration". These are extreme versions of the general coincidence of immigration and nation-building in the transoceanic new settler nations, and of the extraneousness of immigration to nation-building in Europe. If the United States and Germany ended up with similarly expansive schemes of immigrant rights, one must conclude that their opposite national self-descriptions cannot be responsible for this. In fact, the opposite cases of the US and Germany show that the weakening, if not absence, of nationalist semantics has been a

prerequisite for expansive immigrant rights in liberal postwar states. Non-nationalism, however, is not post-nationalism, because both states have incorporated their immigrants on the basis not of global norms or regimes, but of nationally distinct domestic legal orders.

Adding the European Union to this comparison seems odd. Unlike the United States or Germany, the European Union is not a state. Moreover, Germany is part of the European Union, and comparing the whole with one of its parts may appear nonsensical. These reservations notwithstanding, the comparison still makes sense. While its origins are functional, not territorial, the European Union is increasingly evolving into a state-like entity with an own currency, supremacy in expanding policy domains, and a membership as "citizenship". The Amsterdam Treaty has supranationalized the immigration function, and thus created the prospect of a "European" immigration policy. If the Union is serious about its proclaimed human-rights identity, its immigrant rights provisions will have be measured against the world's most advanced immigrant rights regimes--such as that of the United States. At the same time, the European Union is unlikely to evolve into a full-blown federal state, and better conceived of as a multi-tiered polity whose constitutive units will remain sovereign nation-states, not people. This implies that European immigrant rights have to be measured and evaluated in the context of the immigrant rights already instituted by the member states--such as Germany. Comparing the European Union with other federal states, such as Germany and the United States, has a long tradition.[1] While the federal control of immigration and immigrant policies is an increasingly contested issue, particularly in the United States (see Spiro 1994; Schuck 1998), it will not be the main focus here. Instead, the purpose is to point out some peculiarities of the European Union's treatment of immigrant rights in the light of some of the world's most elaborate immigrant rights regimes.

The comparison will proceed along two types of immigrant rights, which delineate two distinct trajectories of integrating immigrants: approximate immigrant to citizen status, or enable immigrants to become citizens. The *first* set of rights pertains to the residence, employment, and welfare interests of

immigrants (subsequently labelled 'alien rights').[2] The thrust of these rights is universalistic, that is, to approximate immigrant to citizenship status, and to remove discrimination on the basis of one's immigrant status. To the degree that immigrants enjoy these rights, their immigrant-ness becomes irrelevant and invisible. This has been the domain with the most dramatic rights expansion, from which some political sociologists have concluded the rise of a "postnational" alternative to citizenship. The *second* set of rights addresses the transition to citizenship. This aspect of immigrant rights has been sidestepped by "postnational" analysts (a notable exception is Bauboeck, 1994), because upgraded alien rights are said to have rendered obsolete the acquisition of citizenship. From such a perspective the recent pressure on exclusive citizenship regimes (particularly in Germany) is incomprehensible. Regarding the right to citizenship, which is counterbalanced by the solemn right of national self-determination, there has been initially more variety between exclusive and inclusive citizenship regimes. However, under the pressure of integrating later-generation immigrants this variety is shrinking, as exclusive regimes are undergoing a process of liberalization.[3]

Two questions will structure the following comparison. First, is there convergence across states and policy domains in the development of immigrant rights, or is there systematic variation? Second, is there a linear development of immigrant rights, or are these rights reversible?

(I) The United States

1. Alien rights. "Aliens", according to the Immigration and Naturalization Act, are "any person not a citizen or national of the United States." US immigration law further distinguishes between immigrant or resident aliens, who are permitted to permanent residence and expected to proceed to citizenship, and nonimmigrant aliens, who--like students, tourists, diplomats, or temporary workers--are admitted only for temporary periods and are expected to return to their countries of origin. This distinction is crucial, because different regimes of alien rights apply to both, with significant movements of rights expansion (and contraction)

limited to the category of resident aliens. One also has to consider that the easy access to citizenship in the US limits the practical relevance of more or less developed resident alien rights.

The rights of resident aliens, which will be my focus here, are shaped by two opposite legal-constitutional principles. One principle, which has been labelled the "plenary power" principle, endows the political branches of the federal government (presidency and Congress) with unconstrained, judicially non-reviewable authority over the entry, stay, exclusion, and naturalization of immigrant aliens--"Over no conceivable subject is the legislative power of Congress more complete", the Supreme Court first declared in 1909, reaffirming this view in numerous decisions late into this century (see Aleinikoff et al., 1995). A second, opposite principle, which one could call the "personhood" principle, puts resident aliens on a par with citizens as protected by a Constitution whose key provisions turn around "personhood", and are thus indifferent to formal citizenship status. Both the plenary power principle and the personhood principle as applied to aliens cannot be found explicitly in the Constitution; instead, they have been judicially constructed by courts and legal scholars. The development of alien rights is thus largely one of case law, which reflects changing views of the Constitution.

As opposite as they are, the plenary power and personhood principles first appeared almost simultaneously, in the 1880s, the germinating period of federal immigration law. "Plenary power" was infamously expounded in the Chinese Exclusion Case of 1889, in which the Supreme Court upheld the racially motivated exclusion of Chinese workers from the US, arguing that "(if Congress) considers the presence of foreigners of a different race in this country...to be dangerous to its peace and security,...its determination is conclusive upon the judiciary" (quoted in Schuck, 1984:14). "Personhood" as applied to aliens appeared first in *Yick Wo v. Hopkins* (1886), in which the same court argued that the equal protection clause of the 14th amendment was "not confined to the protection of citizens", but "universal in (its) application...to all persons within the territorial jurisdiction" (quoted in Bosniak, 1994:1098). While the two principles appeared almost simultaneously, plenary power prevailed

over personhood well into the 1960s, when under the influence of the civil rights revolution activist courts began to defend the rights of aliens more aggressively. But this reversal has remained incomplete, and an unrepealed plenary power principle has been the constitutional gateway to the massive federal restrictions of the welfare rights of immigrants in the late 1990s.

Reflecting its origins in the late 19th century world of imperialism and state nationalism, the plenary power doctrine depicts the alien as member of a competing state unit, and the federal government as entrusted with the defense of the national community against outside threats. In its expansive (yet judicially contested) reading, plenary power covers not only the entry and departure of the alien, but also her rights and obligations while on the territory of the United States. To be sure, plenary power can cut both ways: the federal government is free not to discriminate against resident aliens, for instance, in the provision of federal welfare programs, as it mostly did until the most recent welfare backlash; but it is also free to discriminate against aliens in the most blatant and capricious ways, because immigration law remains the only domain in public law that is not subject to judicial review. This has implied, until the Immigration Act of 1990 ruled them out statutorily, the exclusion and deportation of homosexuals (labelled as "psychopathic personalities") and of political radicals (most often communists). The only moderation of plenary power has occured regarding deportation procedures, in which aliens (via the countervailing 'personhood' principle) have come to enjoy constitutional 'due process' rights, and regarding 'exclusion' procedures against returning resident aliens, which are now processed under the more lenient deportation rules.[4] While the plenary power principle has never been officially rescinded by the Supreme Court, its legitimacy has been growing thin over time. Recent case law refrained from defending it positively, pointing instead to the accumulated weight of past practice (*stare decisis*), according to which, desirable as constitutional checks on federal immigration power may be, "the slate is not clean" and plenary power had become "firmly imbedded in the legislative and judicial tissues of our body politic" (quoted in Rubio-Marin, 1998:129).

Having been dormant for over eighty years, the "personhood" principle of

alien rights reappeared with a vengeance in the early 1970s. In *Graham v. Richardson* (1971), the Supreme Court invoked the equal protection clause of the 14th amendment to strike down state statutes that withheld welfare benefits from resident aliens. Seen from the vantage point of "personhood", resident aliens were not in the first aliens, that is, members of competing state units, but residents, that is, members of the societal community, who deserved equal treatment. As the Court argued in Graham, "aliens, like citizens, pay taxes and may be called into the armed forces...aliens may live within a state for many years, work in the state and contribute to the economic growth of the state" (quoted in Rubio-Marin, 1998:132). Furthermore, the court characterized aliens as "discrete and insular minority", which the state was not allowed to discriminate against. Following Graham, the Supreme Court and lower courts struck down most existing state restrictions against resident aliens regarding professional licenses, civil service employment, welfare programs, and scholarships.

However, Graham's turning of alienage into a suspect classification that states were not allowed to discriminate against was riddled with ambiguity. Looking at aliens through the minority lense, the Court was evidently influenced by the civil rights revolution of the time. Yet, if alienage classification was as suspect as race classification, it should follow that aliens had to be allowed to vote (to remedy their 'political powerlessness', which was offered in Graham as justification of their suspect class status); that nonimmigrant aliens and illegal aliens were even more than resident aliens an 'insular minority' entitled to constitutional protection; and that aliens had to be every bit a minority for the federal government as for state governments--which would derail plenary power. Later case law attests to the unwillingness of the Supreme Court to consider alienage such a "garden-variety suspect classification" (Rosberg, 1983:400). First, in *Sugarman v. Dougall* (1973), the Court introduced the so-called "political function exception", which reserved to citizens state jobs that were closely tied to the "formulation, execution, or review of broad public policy" (quoted in Note 1979:1079). Invoking this doctrine, subsequent court decisions upheld state statutes that made citizenship a condition for being a police officer, public school

teacher, or a deputy probation officer. From the point of view of Graham, which had made aliens a suspect class because of their political powerlessness, the political function exception was paradoxical, because it relegitimized the political exclusion of aliens. Secondly, in *De Canas v. Bica* (1976) and *Elkins v. Moreno* (1978) the Court affirmed that states could discriminate against illegal immigrants and nonimmigrant aliens, respectively, in upholding a California statute that outlawed the knowing employment of illegals (De Canas), and allowing the state of Maryland to charge higher college fees from nonimmigrant aliens (Elkins). Finally, in *Mathews v. Diaz* (1976), the Supreme Court reaffirmed that the "personhood" protection at the state level was not available at the federal level, where it was within the immigration (that is, 'plenary') power of the federal government to exclude resident aliens from Medicare benefits if it so wished.

An influential legal comment pointed out that in its Graham and post-Graham decisions the Court had relied on an "unarticulated theory of preemption" (Note 1979), which would obliterate the resort to the equal protection standard of judicial review and do away with the ambiguity of Graham's alienage as suspect classification theory. The federal preemption alternative to equal protection rests on the constitution's supremacy clause, which ensures the hierarchy of federal over state laws. This hierarchy is violated whenever states take positions on aliens that deviate from those of the federal government, and in which states arrogate to themselves immigration powers that are the exclusive domain of the federal government. The federal preemption standard was first applied in *Takahashi v. Fish and Game Commission* (1948), where the Supreme Court argued that California cannot deny fishing licenses to certain resident aliens, because the federal government had admitted resident aliens "on an equality of legal privileges" that states were not entitled to mess with. Preemption is consistent with Graham, because it had struck down alien restrictions at the state level that had no parallel at the federal level; and it was consistent with post-Graham, (some of) which simply applied existing federal restrictions to the state level.

The debate on preemption or equal protection as adequate standard of

review in alien cases is not merely academic, but has enormous practical consequences. In fair weather, when the federal government decides to be generous to aliens, preemption is an effective tool to prevent states from discriminating against them. However, in tempestuous times, when the federal government may switch to discrimination, preemption will force the states to do the same. This is undeniably the situation today, after the exclusion of aliens from most federal welfare programs, and it is an open question if the Supreme Court will soon allow the states to do the same.

Plyler v. Doe (1982) was still decided on equal protection grounds. In this most famous of all alien cases in the US, the Supreme Court invalidated a Texas statute that withheld a free public school education from the children of illegal immigrants. Protecting people the federal government wanted out by definition, Plyler is the apogee of constitutionally sanctioned alien rights, "the most powerful rejection to date of classical immigration law's notion of plenary national sovereignty over our borders", as one author put it darkly (Schuck, 1984:58). The Court rejected to consider illegal aliens a "suspect class" a la resident aliens in Graham, because it was dealing with people who had entered without the consent of the government. Subjecting the state policy to the more lenient legal test of "intermediate scrutiny", the Court still argued that the state interest in saving money and deterring illegal immigrants did not outweigh the withholding of a vital public function, education, from "innocent children" who could not be held responsible for the law-breaking of their parents. Before Plyler, illegal aliens had enjoyed formal due process rights under the Constitution, which, for instance, protected them in deportation proceedings; the novelty of Plyler was to extend to them substantive equal protection rights, which entitled them to a share of the state bounty.

However, against the fears of conservative commentators at the time, Plyler did not open up a new round of alien rights expansion. Rather, it was the high point after which any further movement had to be retreat. After Plyler, the fear of uncontrolled illegal immigration became a highly charged public issue, which was eagerly picked up by political entrepreneurs, especially in immigration-dense states such as California. Attacking alien rights, particularly

to social services, was seen as relieving states of fiscal pressure and deterring new immigration. In the dual context of plenary power and constitutionally sanctioned equal protection rights for aliens, an attack on alien rights had to occur in a two stage 'bottom-up top-down' movement: state pressure moving the immigration issue to national level, with Congress passing restrictive alienage legislation; and the Supreme Court taking Congress's restriction of alien rights as justification for overturning Plyler, and retroactively validating restrictive state laws on aliens. If there ever was such a 'strategy', it has paid off so far--with the exception of a final Supreme Court verdict, which is still awaited.

The kick-off in the political crusade against alien rights was Proposition 187, California's highly successful state initiative of November 1994 that barred illegal aliens from most state-provided services, including non-emergency health care and school education. An open violation of Plyler and intrusion into the federal immigration domain, Proposition 187 was immediately stalled in federal courts. However, the most conservative Congress in half a century, which was installed in the same November 1994 elections, proceeded quickly toward similar legislation at national level. The Personal Responsibility and Work Opportunity Reconciliation (Welfare Reform) Act of 1996 even broadens the anti-illegal immigrant impulse of Proposition 187 into a generic exclusion of aliens from virtually all federal cash assistance programs. At the same time, most public welfare responsibilities are devolved to the states, and the latter are either required or permitted to discriminate against aliens (legal and illegal) in their welfare laws (see Schuck, 1998:218-221). The federal offensive threatens to reverse the evolution of alien rights from Graham to Plyler, unless the Supreme Court finds it in violation of the Constitution.[5]

(2) Transition to Citizenship. The structural compromising of alien rights by plenary power, which has allowed the recent contraction of the welfare rights of aliens, must be seen in the context of a historically inclusive citizenship regime, which routinely absorbs aliens through lenient naturalization rules and hands out automatic citizenship by birth on the territory (jus soli). Accordingly, if the federal governments decides to get nasty toward aliens, it still leaves (most of) them the

option to become citizens fairly easily (after five years of legal residence), and it can never discriminate against second- or third-generation aliens in absence of such a thing. The contraction of alien rights has promptly spurred a historically unprecedented rush to citizenship, with new applications skyrocketing from an already high level of 543,353 in 1994 to a staggering 1,400.000 in 1997 (Aleinikoff, 1998:16). The rush to citizenship has, in turn, raised concerns about the "cheapening" of citizenship, as people are deemed to choose it for non-affective, "instrumental" reasons (see Note 1997), and there has been pressure for making citizenship more exclusive and more difficult to acquire. However, the legal and political space for such manoeuvers is exceedingly small, because jus soli citizenship enjoys constitutional status and there are few political incentives to alter citizenship rules from which a large part of the electorate itself has profited.[6] If this is the case, the price paid for the attempt to upgrade citizenship through downgrading alienship in the welfare reform act is the inevitable downgrading of citizenship itself, whereby "lawful residence", not "citizenship", is ironically reaffirmed as the dominant American membership model (Aleinikoff, 1998:50-54).

The dual pillars of the American citizenship regime are a constitutionally guaranteed citizenship jure soli and statutory as-of-right naturalization (if minimal residence and personal conditions are fulfilled). Both have been challenged in recent years for their overinclusiveness, but without success. While functional to the needs of an immigrant nation, jus soli citizenship in America is only incidentally linked to immigration. Instead, the colonialists simply prolonged the English feudal common law tradition, according to which those born in the king's dominion were subjects of the king. Jus soli became constitutionally enshrined in the Citizenship Clause of the 14th Amendment of 1868, which for the first time established a national citizenship (and its priority over state citizenship) in order to trump the racially exclusive citizenship schemes of some Southern states and enfranchise the descendants of black slaves throughout the Union: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The racially neutral and inclusive character of jus soli citizenship

survived even in times of government-sanctioned racial exclusivism. For instance, in *United States v. Wong Kim Ark* (1898), the Supreme Court ruled that children born to Chinese alien parents in the United States were U.S. citizens, even though their parents were not eligible to citizenship according to the racially exclusive naturalization laws of the time. Almost a century later, the jus soli rule became attacked anew for indistinctly handing out the precious good of citizenship to the US born children of illegal immigrant mothers, some of whom allegedly crossed the border from Mexico only to give birth on US territory and to derive rights from this accidental fact. Starting with the Governor of California, Pete Wilson, a number of Republican Congressmen have repeatedly suggested a Constitutional amendment that would exclude the US born children of illegal immigrants from birthright citizenship.

The intellectual ground for the attack on unqualified jus soli was laid by two liberal East Coast scholars, who argued that ascriptive jus soli citizenship had always been a "bastard concept" in the context of the American tradition of consent-based political community (Schuck and Smith, 1985). More precisely, Schuck and Smith interpreted the "jurisdiction requirement" of the Citizenship Clause in a consensual, non-geographical sense, according to which the framers of the 14th amendment had not intended to indistinctly include all persons randomly present on the territory--such as the US born children of the diplomatic corps of foreign nations or the self-governing Indian tribes, who were originally excluded from citizenship under the 14th amendment. According to this consensual reinterpretation of the Citizenship Clause, Congress was free to exclude the children of illegal immigrants from birthright citizenship, even without a constitutional amendment. And Congress should do so, in order to put American citizenship "on a firm foundation of freely-willed membership" (ibid., p.140). Schuck and Smith's proposal was unorthodox thinking, because liberal values were invoked to make citizenship less inclusive. However, as its numerous critics pointed out, consensual reasoning had also underlied the Supreme Court's infamous Dred Scott decision of 1857, according to which free blacks born in the United States could not be "citizens" because the framers of the Constitution had not considered them part of "the people of the United

States" at the time of the nation's founding, and which to overturn had been the whole point of the 14th amendment (Aleinikoff, 1998:8; Neuman, 1996:ch.9).

Among the flurry of restrictive citizenship and immigration proposals, which circulated in the Republican-dominated Congress of the mid-1990s, the one to narrow the jus soli rule never gained momentum. Considering that polls found a near-majority of Americans in favour of it, this may come as a surprise (Note, 1994:1026). However, as in all Western democracies, elite-crafted citizenship and immigration policies are more liberal and inclusive than the populist preferences of mass publics (see Freeman, 1995). Moreover, if ever political culture has constrained policy-making, the idea of inclusive, equal citizenship, for which the country had undergone a ferocious civil war in the mid-19th century, and which has helped to integrate the two massive immigration movements of the early and late 20th century, was too deeply entrenched to be compromised for a short-term political purpose.

Since a constitutional amendment would not be reviewable by the Supreme Court, its opponents could not rely on straightforward legal reasoning. Instead, they had to show that it conflicted with the basic moral values that undergirded the Constitution, and by implication, the American nation, which is entirely a creature of the Constitution. This strategy is self-consciously pursued in an influential note published in the *Harvard Law Review*, which argued that the proposed citizenship amendment violated the principle of "equality before the law", and thus "one of the foundations upon which American society is built" (Note, 1994:1028): "If the government chooses to grant citizenship based on situs of birth, to deny citizenship to a child born in the United States, when the only factor that distinguishes her from the next child in the maternity ward is that her mother entered the country unlawfully, would offend the principle of equality" (ibid., 1028). In addition to this moral objection, the opponents of amending the citizenship clause effectively raised a pragmatic objection: the denial of birthright citizenship would create a European-style "hereditary caste of exploitable denizens" (Neuman, 1996:166). The reference to Europe, especially Germany's creation of a "permanent class of the disadvantaged",[7] was a firm presence in the Congressional hearings over the proposed amendment, and a reform that

would make America more European could certainly not stir Congressional enthusiasm.

In contrast to the constitutionally anchored jus soli rule, the acquisition of citizenship through naturalization is ruled by simple statute, and it even counts as a prime function of the federal government's "plenary" immigration powers. Accordingly, in contrast to jus soli citizenship, which was not dictated by immigration concerns, the American naturalization laws had always been centrally influenced by immigration concerns. The generally low threshold to naturalization reflects the needs of a country peopled by immigrants, who are set on a trajectory to citizenship from the start. At the same time, the mantle of plenary power allowed US naturalization law to be tainted by racial exclusivism over long periods. The first federal naturalization law in the late 18th century stipulated that only "free white persons" could naturalize, a condition that was relaxed for blacks after the Civil War and for Asians after World War II, until the McCarran/Walter (Immigration and Nationality Act) of 1952 finally established racially neutral naturalization rules (Neuman, 1998:8). Under the current rules, naturalization is a statutory right after five years of legal permanent residence, 'good moral character' displayed throughout this period, the passing of English language and civic knowledge tests (which may be waived under certain conditions), and an oath expressing allegiance to the United States and renouncing all prior allegiances.

In response to the recent rush to citizenship and external political changes, the renunciation oath has become the subject of debate. In principle, the need to renounce allegiance to any "foreign prince, potentate, state, or sovereignty" (as is the awkward wording even today) means the rejection of double citizenship. In reality, however, the US has always tolerated double citizenship, also because it was forced to do so from early on, when the feudal-absolutist regimes of Europe kept their emigrating subjects in perpetual allegiance and did not recognize their adoption of US citizenship.[8] Over long periods, the toleration of double citizenship was facilitated by extremely tight laws on the loss of citizenship. Well into the second half of the 20th century, US citizens--naturalized and native-born--could lose their citizenship for naturalizing

in a foreign state, marrying a foreigner, or voting in a foreign election. Only in 1967, in its *Afroyim v. Rusk* decision, which overruled the plaintiff's expatriation for having voted in the Israeli elections, did the Supreme Court establish that Congress has no power to "rob a citizen of his citizenship", unless he or she "voluntarily relinquishe(s)" US citizenship (Spiro, 1997:1451).

Ever since the government has lost its expatriation powers, dual citizenship appears in a less sanguine light. But only an external event catalyzed a reconsideration of double citizenship. In 1998, Mexico introduced a constitutional amendment that allows its emigrants to keep their Mexican 'nationality' even after naturalizing abroad.[9] This reflects a general trend in immigrant-sending countries to relax their citizenship laws in the interest of retaining ties with their diasporas abroad.[10] In addition, Mexico's move is a direct response to California's Proposition 187, which it had fiercely critized, and after which the Mexican government took on the role of protector of its sizeable population north of the border. Mexico's citizenship reform, which is bound to create a large number of US-Mexican dual citizens in the near future, has given new urgency to the old suspicion that Mexican immigrants are not assimilating like the other immigrant groups, and that they are not sufficiently loyal to their new country even after acquiring US citizenship. More concretely, the Mexican reform has stirred calls to give teeth to the naturalization oath, whose renunciation component had so far never been enforced. However, even louder than the calls to tighten the oath are those to abolish it altogether for "postnational" reasons (e.g. Spiro 1997). Chances are that the moderate center will prevail, which proposes--like the 1990s Federal Commission for Immigration Reform--to "modernize" the wording of the renunciation oath, or--in recognition of postnational sensibilities--to moderate the "exclusive" loyalty requirement to a "primary" loyalty requirement (Aleinikoff, 1998:38f). That the advocates of exclusive citizenship have recently zeroed in on the naturalization oath, whose role in the larger citizenship scheme is rather marginal, testifies to the resilience of inclusive citizenship in the United States.

(II) Germany

1. Alien Rights. The German Alien Law defines as "alien" (*Auslaender*) "everyone who is not German according to Article 116(1) of the Basic Law." This points to a phenomenon unknown in the United States and most other Western countries, ethnic priority immigration. Article 116(1) defines as Germans not only the nominal holders of German citizenship, but--in combination with the Federal Expellee Law (*Bundesvertriebenengesetz*)--the descendants of German settlers in Eastern Europe and Russia, who are German not by citizenship but by ethnicity. On the assumption of being subject to persecution and discrimination by the former Communist regimes of the region, the ethnic Germans were the only foreign nationals which postwar Germany accepted as "immigrants", that is, as entrants set on a path for permanent settlement and citizenship. At the same time, these de facto immigrants, who in the 1990s were even subjected to numerical quotas and formal application procedures similar to those in classic immigration countries, were never officially considered as "immigrants"--rather, they were treated as "resettlers" (*Aussiedler*) who acted on their constitutional right to return to their country of origin.[11]

The rejection of the "immigration" label applied also, now even explicitly, to the other source of de facto immigration after World War II: the recruited labour migrants (*Gastarbeiter*) from Southern Europe. In response to this labour migration, the (West) German political elite even waged one of its few attempts at national self-description, to be "not a country of immigration". This notoriously misunderstood term, which "articulates not a social or demographic fact but a political-cultural norm" (Brubaker, 1992:174), still stands for the self-abdication of the political process to steer the incorporation of labour migrants. At the political level, the result was drift, a shying away from forcibly rotating labour migrants once they were no longer needed, but also refusing to accept the consequence of non-rotation: permanent settlement. The self-abdication of the political process is expressed in the fact that an austere and rudimentary Alien Law passed in 1965, which grants no rights whatsoever to the labour migrant and puts her at the mercy of a benign state, went unreformed for twenty-five years. If in this period the labour migrants achieved a secure permanent

resident status, akin to the legal immigrant status in the United States, we have to look to the legal process for an explanation.

Like in the United States, aliens in Germany enjoy extensive constitutional rights. In the absence of the political process giving clear signals toward either terminating or consolidating the presence of labour migrants in Germany, an aggressive Federal Constitutional Court stepped in to secure the residence and family rights of labour migrants, thus in effect crossing out the "not a country of immigration" label of the political elite. Two differences to the US case stand out. First, the German constitutionalization of alien rights started from a lower level--aliens admitted only for temporary work, not permanent settlement--and it moved toward creating a "resident alien" status whose existence could be taken for granted and was the starting-point for further rights expansion in the US. Secondly, there is no parallel in German constitutional law to the "plenary power" principle, which exempted the federal immigration powers in the US from constitutional constraints. In a conscious departure from the legal positivism of the Weimar constitution, and from the German state tradition more generally, the Basic Law establishes the ontological primacy of the individual over the state in all policy domains (see Kommers, 1997:41). This is expressed in the opening article of the Basic Law: "The dignity of the human being is untouchable. Its recognition and protection is the obligation of all statal power." The absence of a plenary power principle has allowed the Constitutional Court not just to enter the immigration domain, which remained largely closed to the US Supreme Court, but to actively work against and stall the state's (no-)immigration policy.

In contrast to the US constitution, the German Basic Law distinguishes more explicitly between universal human rights (*Jedermannrechte*) and rights reserved to Germans (*Deutschenrechte*). Among the *Deutschenrechte* are the right to free assembly and forming associations, free movement (*Freizuegigkeit*), and choice of profession (*Berufsfreiheit*)--the last two being crucial for a secure residence status. However, the Constitutional Court has established in its case law that, over time, aliens are due even the *Deutschenrechte*. The key to this is Article 2(1) of the Basic Law, which guarantees the "free development of

personality". The Court has expansively interpreted this article as a "residuary" fundamental right (*Auffanggrundrecht*), which guarantees long-settled aliens access to the *Deutschenrechte*. Interestingly, whereas in the US the constitutional incorporation of aliens occurred in the name of "equality", in Germany it occurred in the name of "freedom".

If the general freedom clause of the Basic Law is the "how" of constitutional protection for aliens, the question remains "when" it applies. If it applied indistinctly to all aliens who happen to put their feet on German territory, the German state would be a small world state, which it obviously is not. Here the Court, in line with constitutional scholarship, has argued that with the alien's increasing length of stay in the territory the degree of constitutional protection increases. The underlying idea, formulated by Gunther Schwerdtfeger (1980) as *Rechtsschicksal der Unentrinnbarkeit* (legal fate of inescapability), is that with the alien's increasing stay in Germany the return option becomes ever more fictional, so that she has to rely on the German state for existential protection. The Constitutional Court most succinctly applied this logic in its so-called Indian Case decision of 1978, which concerned the renewal of residence permits.[12] According to the Alien Law, residence permits were valid for only one year, after which the alien could ask for a renewal. Crucially, there was no legal difference between a first and a renewed permit, a renewal could be denied as if it were a first-time application. In practice, with each renewal the legal situation of the alien did not even not improve; it even worsened, because his continued residence could be seen by the residence-permit granting *Land* authority as contradicting the official "no immigration" policy of the federal government after the recruitment stop of 1973. In the Indian Case, the Constitutional Court reversed this logic, arguing that the routine renewal of residence permits in the past created a "reliance interest" on part of the alien in continued residence, according to the constitutional principle of *Vertrauensschutz* (protection of legitimate expectations), which the Court derived from Article 19 of the Basic Law (the so-called *Rechtsstaatsprinzip*). The Court famously added that this individual reliance interest outweighed the state's interest in implementing its no-immigration policy.

The Constitutional Court's Indian Case decision reveals two distinct features of constitutional alien rights in Germany. First, constitutional protection is incremental, it increases with the length of residence, until a threshold is reached that makes even the *Deutschenrechte* available to the alien. This differs from the logic of alien rights in the US, which started with constitutional equality as a general rule (at least at the subfederal level), and required special justification if differential treatment was introduced (see Rubio-Marin, 1998:185). Secondly, this incrementalism is conditional upon a lack of resolve on part of the state. Temporary guestworkers did not turn into permanent settlers because of the automatism of constitutional law; rather, constitutional law was activated only because the state had failed to be explicit about limits and deadlines. Accordingly, the Court argued in the Indian Case: "If the residence permit had been issued...with a clear indication of its...non-renewability, the plaintiff could not have relied on a renewal and derived claims from his integration (in German society)."[13] In other words, Germany's guestworker immigration was a historical accident; it could have been avoided if the state had shown more determination to stop it at an early stage.

This is why, in the early 1990s, Germany could embark on a second round of guestworker recruitment, this time with the countries of East-Central Europe (see Rudolph, 1996, 1998). These programs, which in 1996 accounted for ten percent of the 2.14 million legally employed foreigners in Germany, have a variety of motivations, such as resolving temporary labour shortages in certain sectors (agriculture, hotels and restaurants, and the construction industry), legalizing existing illegal employment patterns, and reducing migration pressure at the vulnerable eastern EU border. This time around, the individual work and residence permits, which are framed by bilateral agreements with the sending states, stipulate maximum periods that cannot be extended, with the threat of forced rotations; they preclude the possibility of family reunification; and they do not allow the 'upgrading' of the worker's legal status over time. To implement these provisions, the German state authorities have introduced a tight internal control system with frequent checks on worksites and substantial employer fines in case of violations of work contract conditions and illegal employment. If the

state maintains its resolve, there will be no Basic Law to the rescue of the new labour migrants from East-Central Europe.

Germany's two guestworker programs, both of which were processed under rather different legal regimes, should caution us against blanket statements about "alien rights", without specifying the distinct category or group of aliens in question. Matters are further complicated by the existence of "privileged" categories of foreigners, such as nationals of member states of the European Union, who are exempted from the Foreigner Law altogether and enjoy equal work and residence rights according to European Community law. Accordingly, guestworkers from Italy, Spain, or Greece never had to rely on constitutional law; they were already protected by EC law. The alien groups around which the system of constitutional rights protection has been built are all from non-EU states, most importantly Turkey and the former Yugoslavia, who together provided over half of the classic guestworkers in Germany. Constitutional law has helped them to avoid deportation, stabilize their residence, and reunify with their families,[14] and ultimately to enjoy equal civil and social rights.

Equally important, however, has been the development within the political elite of a moral compact with the guestworkers, who had been brought into the country and now could not be disposed of at will. The new Foreigner Law of 1990, which put into the form of statutory law the positions hammered out by Constitutional Court decisions before, also contains some extra-concessions that transcend the constitutional minumum--such as waiving a one-year waiting time for marriage immigration or granting the right of (re)return to second-generation guestworkers who had temporarily decided to return to their country of citizenship. This was perhaps part of a moral calculation, according to which being generous to the old guestworkers was the best way of being decidedly less generous to the new.

2. Transition to Citizenship. The expansion of alien rights in Germany occurred in the context of a historically exclusive citizenship regime, which is based on statutory citizenship by descent (jus sanguinis) and discretionary naturalization.

This was no sheer coincidence: expansive alien rights allowed to justify the long-term exclusion of foreigners from the citizenry. Accordingly, the Naturalization Rules of 1977 stated that the "personal interests" of the applicant could never be decisive, "also because resident foreigners already enjoy far-reaching rights and liberties according to the German legal order" (quoted in Hailbronner and Renner, 1991:626). But why keep foreigners out of the citizenry? The simple answer is (West) Germany's unity mandate. West Germany understood itself as a provisional state, which was to work toward "completing the unity and freedom of Germany in free self-determination", as the old Preamble of the Basic Law put it. An expression of this mandate was the legal fiction that the pre-war German Reich continued to exist, and with it an all-German citizenship according to the Wilhelminian *Reichs- und Staatsangehoerigkeitsgesetz* of 1913. Accordingly, the West German citizenship regime was exclusive toward foreigners, but inclusive toward the citizens of the GDR and the ethnic Germans in the other countries of the Soviet Empire.[15] There is certainly no *logical* connection between excluding foreigners and including East Germans and ethnic Germans. However, it was the *empirical* connection made by the political elites of pre-unity Germany, for whom meddling with citizenship law meant meddling with the legal bridge to national unity.

Contrary to some conservative legal scholars (e.g. Uhlitz 1986), the Basic Law nevertheless does not prescribe a nationalistic citizenship, but leaves the definition of citizenship to the political process. This is evident in Article 116.1 of the Basic Law, which defines as Germans the holders of German citizenship, and does not further specify how citizenship is to be determined. But the same article includes in its definition of Germans the expellees and refugees of German origins residing in the German Reich according to the borders of 1937, and their descendants. From the addendum 'and their descendants' some legal scholars have concluded that the Basic Law, at least indirectly, prescribes exclusive jus sanguinis citizenship (e.g., Ziemske, 1994:229). Considering that Article 116.1 was conceived of as only temporary device to cope with the consequences of the war, this has never been the dominant constitutional opinion. More widespread has been the view that the Basic Law's general

conception of the Federal Republic as a provisional, incomplete nation-state commanded its closure toward foreigners, because the inclusion of the latter might undermine the social impulse for unification through changing the texture of the citizenry: "Conceiving of the Federal Republic as a country of immigration with multiple national minorities would contradict the Basic Law's conception of a provisional state geared toward the recovery of national unity" (Hailbronner, 1983:2113).

Constitutionally prescribed or not, there has been a factual linkage between exclusive citizenship and the unresolved national question. Proof to this is that precisely since reunification there has been a steady trend toward more inclusive citizenship. Once citizenship was divested from the national question, it could be seen as a tool of immigrant integration. Here Germany only followed a general trend across Western European countries, which have eased the access to citizenship in recent years in order to better integrate second- and third-generation immigrants (see Hansen, 1998). The first step in this direction was the new Foreigner Law of 1990, which turned naturalization from the exception into the rule, lowered its costs significantly, and granted exceptions to the previously strict prohibition of double citizenship. A second step occurred with the Asylum Compromise of 1992, which turned "as a general rule" into "as of right" naturalization. This removed the two pillars of the old Naturalization Rules: absolute state discretion and cultural assimilation as precondition for citizenship. As a result of these changes, naturalization is now routinely available for long-settled foreigners. This shows in a dramatic increase of naturalization rates, the number of naturalizing Turks, for instance, increasing from about 2,000 in 1990 to more then 31,500 in 1995 (Freeman and Oegelman, 1998:776). Moreover, dual citizenship, though still shunned in official political discourse, is widely tolerated in administrative practice. About half of the discretionary naturalizations in 1993 entailed dual citizenship with the full knowledge of German state authorities. If one adds the effect of a new law in Turkey that allows its expatriated citizens to reaquire Turkish citizenship instantly, it is safe to assume that the vast majority of discretionary naturalizations in Germany today imply double citizenship (Koslowski,

1998:744). As a result of little noticed legislative and administrative changes (the latter particularly in 'progressive' states with a high concentration of foreigners)[16], the exclusive citizenship regime of the pre-unity period is no longer.

However, as Rogers Brubaker (1992) has rightly seen, the politics of citizenship is identity politics, in which pragmatic considerations are often subordinate to deeply held views about the collective self, the nation. In the United States, this helped preserve a historically inclusive citizenship regime despite massive pressures for more exclusive citizenship. In Germany, there is the opposite constellation of identity considerations working against more inclusive citizenship. From Germany's ethnocultural tradition of nationhood stems a special distrust of "divided loyalties" that would result from handing out citizenship more easily. A leading opponent of citizenship reform in the CDU articulates the traditional view: "Granting citizenship cannot be an instrument of integrating foreign residents. Instead, naturalization requires that the integration of the respective foreigner has already occurred. A foreigner who wants to acquire German citizenship must commit himself to our national community. Tolerating double citizenship would lead to the formation of permanent national minorities."[17] Ethnocultural concerns were readily available to block any furthergoing, political reform of citizenship law.

Despite the partial opening of citizenship through relaxed naturalization rules, by October 1998 there still were 7,3 million foreigners in Germany. Two-thirds of them had resided in the country for more than ten years, and thus were likely to stay; twenty percent were even born in Germany; and 100,000 new "foreign" births occurred each year (which is thirteen percent of all births).[18] Further aggravated by a xenophobic groundswell since the early 1990s and alarming signs of social despair and failed integration among young "foreigners" (see Heitmeyer et al., 1997), here was a clear problem that called for a solution. Because the space for administrative liberalization and small-step legislation had been exhausted by then, a furthergoing solution had to be political, and consist of a major overhaul of the outdated Wilhelminian citizenship law that locked out second- and third-generation immigrants through its jus sanguinis

provisions. This meant that the administrative and incremental mode of citizenship reform, which had dominated so far, had to give way to "big leap" legislation, which inevitably goes along with politicization and public scrutiny. A nominal majority in parliament for such legislation nevertheless existed already under the old conservative-liberal government; it was tried by repeated opposition bills, but could not be realized because of resistance from the Bavarian CSU and nationalistic sections in the CDU.

After the shattering defeat of the CDU/CSU in September 1998, this obstacle seemed gone. The new government of SPD and Greens promptly announced a new citizenship law. Hammered out as part of the coalition agreement, the reform proposal called for automatic jus soli citizenship if at least one parent was born in Germany or had lived there since the age of fourteen, and it would lower the residence minimum for as-of-right naturalization from fifteen to eight years.[19] Crucially, double citizenship was to be officially accepted. As the government stressed, this was no philosophical acceptance of double citizenship, but its pragmatic acceptance for the sake of immigrant integration. While a complete rupture with Germany's ethnocultural citizenship and nationhood tradition, the envisaged reform was in line with the practice of Germany's European neighbours, such as Belgium, France, the United Kingdom, Ireland, Italy, the Netherlands, and Spain, all of which tolerated double citizenship and had similar jus soli provisions (see Renner, 1993:23f). Moreover, the reform would only put into law what had already been domestic administrative practice, in which double citizenship was widely tolerated, not only regarding an increasing share of naturalizing foreigners, but regarding all naturalizing ethnic Germans and regarding children born either to binational parents in Germany or to German parents in jus soli countries. When double citizenship became depicted as a threat to the nation-state, there already were 2 million dual citizens in Germany. Double citizenship was even partially sanctioned by the Constitutional Court, which ruled in 1974 that the interest of the state in reducing multiple nationality was not strong enough to deny a child the nationalities of both of its parents.[20]

Despite the widespread de facto (and partial de jure) toleration of double

citizenship, the CDU/CSU opposition parties decided to object to its official acceptance through a major societal campaign. This broke an unwritten consensus among the political elites not only in Germany, but in all Western states, not to subject immigration-related issues to populist exploitation.[21] Since their votes in parliament were not enough to block the reform, the people had to be mobilized. Urged by the Bavarian CSU, whose chairman Edmund Stoiber deemed the reform "more dangerous" to Germany's domestic security than the terrorism of the Red Army Faction (RAF) in the 70s and 80s, the CDU agreed to mute its own liberal instincts and collect signatures against the "double passport" (*Doppelpass*, as the Red-Green reform proposal became labelled in public discourse). While admired in football, the *Doppelpass*[22] was decidedly less popular in politics. A poll in early January 1999 found 52 percent of respondents against it, and the surprising defeat of SPD and Greens in the state elections in Hesse in February 1999, which had been fought by the CDU on the citizenship issue, must be attributed to the mighty societal groundswell against double citizenship that was unleashed by the signature campaign. Within a month, one million signatures had been collected, half of them in the election state of Hesse (which amounts to one-twelth of the state population).[23] To avoid embarrassing fraternizing with the extremist right, one of whose leaders welcomed the signature campaign as "something taken from the pages of our newspaper, the *Nationale Zeitung*",[24] the CDU framed its campaign as one for "integration and tolerance".[25] This was at least a symbolic concession to the old liberal elite consensus on immigration, which the campaign itself had helped to destroy.

The anti-*Doppelpass* campaign demonstrates that societal mobilization surrounding immigrants is likely to be to their disadvantage. The first bill presented by the Interior Ministry in January 1999 stuck to the double citizenship toleration of the coalition agreement, but it already carried the signature of the incipient signature drive: naturalization was to be contingent upon a written declaration of the applicant that he or she was loyal to the Constitution, tested German language competence, no welfare dependency or unemployment, and the (near-)absence of a crime record.[26] This was remarkably tougher than the

naturalization conditions then in place--with the exception of a lower residence requirement and the toleration of double citizenship. Double citizenship became intolerable after the defeat of SPD and Greens in the Hesse elections, which removed their majority in the upper house of parliament, the Bundesrat. Now any reform of citizenship law had to be agreeable to the Liberal Party (FDP), in order to pass the Bundesrat hurdle. The FDP had long been a champion of citizenship reform, but it was less sanguine about double citizenship than the Greens, which had sofar dictated the government approach. Its 'option model' (*Optionsmodell*) suggested a provisional jus soli citizenship for second-generation immigrants until the age of 23, by which the immigrant had to choose between abandoning the foreign citizenship or losing the German citizenship. Moreover, double citizenship would not be available to naturalizing immigrants. This is the position eventually embraced by the government, and likely to become law in 1999.

The *Optionsmodell* formally sticks to the old principle of avoiding double citizenship, but it will factually increase the number of dual citizens in Germany. Since dual citizenship is inherently difficult to control, the reform is likely to be but a step in a furthergoing acceptance of dual citizenship in Germany. And once the smoke of campaigning has cleared, the rupture with Germany's ethnocultural citizenship tradition will stand out, as jus soli citizenship (which in a world of plural citizenship regimes always entails multiple citizenship) will have become the norm. Germany's citizenship reform shows that in liberal states there is convergence on inclusive citizenship, but that it is likely to happen despite of rather than because of societal mobilization. Most importantly, it shows that the combination of extensive alien rights and exclusive citizenship, which had characterized pre-unity (West) Germany, cannot be stable, because it skirts a fundamental dimension of immigrant integration: full membership in the nation-state.

(III) The European Union

1. Alien Rights. The European Union (EU) is not a state, but a treaty-based,

functional regime established by a number of European states to create and supervise a common economic market, that is, "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."[27] However, adding human beings to the list of free-movement entities helped unleash a dynamics that brought the EU to the brink of state-building, which is acknowledged in the Maastricht Treaty's creation of a EU "citizenship".[28] Human beings were originally conceived of as functionally specific factors of production ("workers", according to Article 48 of the European Community Treaty), but through having bodies, souls, and social needs attached to them they eventually matured into functionally diffuse "citizens", which in common understanding are state-constituting units. The spill-over from worker to citizen repeats at supranational level a dialectic that Karl Polanyi (1944) had identified in the national development of welfare capitalism. However, not class struggle, but a legal dynamics is responsible for this outcome. This dynamic consists of the transmutation of the European Community from treaty-based international organization into law-making sovereign in specified domains. A key element in this transmutation is the "Constitutionalization" of the European Community Treaty, which refers to the process in which the European Court of Justice (created as the guardian of European Community law) came to interpret the European Community Treaty as if it were the constitution of a federal state, conferring rights on individuals and trumping the national laws of the member states (see Weiler, 1991). This was a process fiercely resisted by the member states, and regarding the work- and settlement-oriented movement of people across borders (that is, "immigration") it showed a conflict constellation similar to the one in nation-states: courts defending the rights of immigrants, against the restrictionist leanings of governments.

However, there is one crucial difference between the legal empowerment of immigrants in Europe and in nation-states: the formal constitutions of nation-states guarantee elementary human rights irrespective of citizenship, which courts could use to protect (settled) aliens. In contrast, the informal constitution of Europe applies only to nationals of the member states, over whose definition

Europe also has no competence. The legal empowerment of immigrants in Europe is thus limited to exogenously defined "privileged" immigrants who are citizens of one of the member states of the European Union. In the earlier literature these privileged crossborder movers were referred to as "migrant workers", which one author characterized as "a legal status somewhere between immigrant or citizen" (Garth, 1986:89). The notion of migrant worker has in the meantime disappeared, which attests to the successful integration of internal crossborder movers into the fabric of Europe.

States may have created the European Community to further their economic and political interests; but their creation, like the fabled sorcerer's apprentice, in turn took on a life of its own that conflicted with the interests of its creators. In few domains is the clash between state interests and emergent supranational interests as visible as in that of free movement of workers, and in few domains has the victory of supranational over state interests been more marked. Hero in this play has been the European Court of Justice (ECJ), about which one of its former members remarked: "If it can be said to be a good thing that our Europe is not merely a Europe of commercial interests, it is the judges who must take much of the credit" (Mancini, 1992:67). In its case law, the ECJ first established "a hermeneutic monopoly" (Mancini) over the concept of worker and the rights attached to it, and then interpreted both as broadly as possible.

Articles 48 to 51 of the EEC Treaty, which establish the "freedom of movement for workers", do not define who is a worker. As the ECJ determined in *Hoekstra* (1964), "worker" had to be a Community term, because otherwise "each Member State (could) modify the meaning of the concept of 'migrant worker' and...eliminate at will the protection afforded by the Treaty to certain categories of persons" (quoted in Craig and DeBurca, 1995:662). In subsequent case law, the Court has used its hermeneutic monopoly in a very liberal way, defining as work every "effective and genuine economic activity" (*Levin* case of 1982), which included part-time work, work below the minimum wage, and unpaid work. In *Antonissen* (1989), the court ruled that the "freedom of movement for workers" even included the right to look for work in other member states. This was plainly against the meaning of Article 48, which allowed only

demand-induced migration, that is, free movement "to accept offers of employment already made". This wording was not accidental, but betrayed the intention of member states to reduce the migratory implications of the Community (see Romero, 1993). With *Antonissen*, the Court single-handedly turned demand- into supply-induced migration, thus increasing potential migration within the Community, in direct contradiction to state interests.

Not only did the ECJ interpret the notion of worker as broad as possible, it also defined the two remaining weapons of member states--the "public service" and "public interest" derogations of Article 48--as narrow as possible. Article 48(4) states that the free movement rights "shall not apply to employment in the public service." In dealing with this "public service" derogation, the Court followed the same strategy as above: establish that "public service" is a Community concept, and then interpret it in the "spirit" of the Community treaty, which is about eroding the barriers to the "free movement of goods, persons, services and capital". In the two *Commission v. Belgium* cases (1980 and 1982), whose importance to the member states is evidenced by the fact that Belgium was supported by the governments of the United Kingom, Germany, and France, the member states claimed an institutional interpretation of "public service", according to which the site of employment mattered. This would mean that states had the right--in the case of France and Belgium even the constitutional obligation--to restrict railway, hospital, or postal jobs to their nationals. The Court did not follow this reasoning, arguing that for the sake of the "unity and efficacy" of Community law "public service" had to be a Community concept, and then prescribing a narrower, functional understanding of this term as denoting the actual exercise of state authority, for instance, by policemen, soldiers, or tax assessors (see Craig and DeBurca, 1995:677).

The Court applied a similarly narrow interpretation to the "public interest" derogation, the second state defence against free movement rights, according to which the latter were "subject to limitations justified on grounds of public policy, public security or public health" (Art.48.3). In the early days, member states had used this derogation expansively to expel unwanted pocket thieves, prostitutes, members of religious sects, or trade-union activists. In successive

case law, the Court narrowed down the grounds for deportation to exceptional cases of individually proved "personal conduct" that threatened "the fundamental interests of society," which was a threshold very difficult to take by member state governments (*Boucherau* case of 1977, quoted in Mancini, 1992:76).

It is important to visualize the context of all of these Court decisions: the denial of residence permits or deportation orders against EU aliens by member states, which were invalidated by the Court's creative interpretation of "migrant worker". While the Court could not sever the functional nexus between "worker" and the entitlement to free movement, it made it close to meaningless.

ECJ activism thus destroyed the capacity of sovereign nation-states to control the conditions of entry and residence of a large class of non-citizens, which in each case by far exceeded the number of own citizens--this alone qualifies as a novelty in the history of the international state system. The enormity of this intervention is even magnified if one considers not only the scope, but the substance of the free movement right. Applying the general non-discrimination clause of the Community treaty (Article 6) to the free movement of workers, Article 48(2) prescribes "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment." This sounds harmless, and does not go much beyond the bilateral agreements that have framed the recruitment of guestworkers in postwar Europe. However, "judicial acrobatics" (Mancini) of the European Court of Justice have turned the non-discrimination guarantee into a massive, workplace-transcending encroachment on national education and welfare systems, which even dwarfs the EU-induced loss of state control over entry and residence.

The lack of a European social policy is proverbial and much-deplored (e.g., Streeck 1996). However, most authors have overlooked the "negative" social policy reforms forced upon member states by the imperative of unhindered labour mobility (see Leibfried and Pierson, 1995). Among other adaptive changes, welfare states have lost control over their beneficiaries, as they were forced by EU law to include EU aliens on equal terms. Of particular

importance for the "low politics" of ECJ-driven social policy coordination has been Regulation 1612/68, a secondary legislation that explicates substantive rights of workers and their families (who are not mentioned in the EEC Treaty). An extensive list of migrant rights already, it has been even more extensively interpreted by the Court. Article 12 of this regulation guarantees "equal access" for children of migrant workers to the host state's educational system. In *Michael S.* (1973), the Court ruled that the list of educational arrangements enumerated in the article was not exhaustive, and could cover also disability benefits--and this in contravention to a Belgian law that granted disability benefits only to those foreigners who had been diagnosed as disabled *after* their entry in Belgium. This rule amounted to an invitation for welfare shopping (see Garth, 1986:102). In *Casagrande* (1974), the Court determined that "equal access" to the educational system included the entitlement to state-paid educational grants for secondary school in Germany (which so far had been confined to nationals). This controversial rule construed a link between European free labour mobility and educational and cultural policy, over which the Community usually has no competence, and which in Germany is even the prerogative of the subfederal *Laender*.

But the most far-reaching provision for migrant workers and their families has been Article 7(2) of Regulation 1612/68, which states that migrant workers "shall enjoy the same social and tax advantages as national workers." In its case law, the ECJ detached the notion of social advantage from linkage with employment, so that it came to justify, for instance, the right to a minimum wage for the parent of a migrant worker, university grants for the benefit of a migrant worker's child, or reduced railway fares for large families (see Mancini, 1992:74). In *Reina* (1982), even an interest-free 'childbirth loan' issued by a German state bank to German nationals in order to boost the country's low birthrate was considered a "social advantage" within Article 7(2), so that it could not be withheld from an Italian couple living in Germany. This meant that the free mobility imperative incapacitated a member state's demographic policy, and its attempt to tie a however small benefit to citizenship. "Are there limits to the rights which may be claimed by a worker under Article 7(2)," two authors have

asked, apparently rhetorically (Craig and DeBurca, 1995:693). Because, short of the political right to vote in national elections, through the Court's liberal interpretation of this clause there are practically no limits to substantive rights accrueing from free movement.[29]

The friendly picture for EU aliens is counterpointed by a decidedly less friendly picture for non-EU aliens. These "immigrants" proper, who form the large majority of non-citizen residents in the EU,[30] are definitionally excluded from the reach of EU law. The free movement clauses of the Treaty (Articles 48 to 51) do not specify the nationality of "workers", so that it is possible to construe residence, rather than nationality, as the activating condition (see Plender, 1988:197). However, secondary legislation and Court of Justice rules have left no inch of a doubt that only member state nationals were coverered by these clauses.

The contradiction of expansive rights for third-state resident aliens at the member state level and their niggardly exclusion from the European project has been the target of endless polemics, but it still awaits a convincing scholarly explanation. Such an explanation would certainly identify the grounding of free movement rights in nationality rather than residence as a "political choice" by member states, who wished to minimize the migratory implications of an integrated Europe (O'Leary, 1992:66).[31] If one applies a state analogy to the EU, the exclusion of third-state nationals from free movement rights amounts to a state reserving civil and social rights to its citizens only, which is a deviation from the practice of liberal states to grant such rights also to its resident aliens. The successful inclusion of third-state nationals at member-state level notwithstanding, it is questionable if such a gross violation of liberal stateness by the EU can be stable over time.

The sharp distinction between privileged EU aliens and non-privileged third-state aliens shows that even at supranational level it is bounded quasi-citizen norms rather than unbounded human rights norms that have helped (or hindered!) the integration of immigrants. At the EU level, third-state nationals enjoy only indirect rights, which accrue from family ties to EU citizens or employment ties to EU service providers.[32] Secondly, third-state nationals have

rights flowing from international agreements, such as the "association treaties" between the EU and Turkey and a number of Maghreb countries. Finally, third-state nationals have resort to the non-EU, nationality-blind European Convention of Human Rights.[33] Taken together, these European sources of immigrant rights are inferior to (and sometimes imitative of) the protections that settled third-state aliens enjoy at the member state level (see Guiraudon, 1998b).

Since the mid-1970s, the European Commission (the executive organ of the European Union) has waged repeated initiatives to bring third-state nationals under the umbrella of Community law--to no avail (see Cholewinski, 1997:233-237). Control over external immigration has turned out to be one of the most jealously guarded prerogatives of member states. When the Commission, in 1985, wanted to bind the member states into a notification and consultation procedure regarding their external immigration and immigrant policies, the member states successfully appealed through the ECJ, and they added to the Single European Act of 1987 that "nothing in these provisions shall affect the right of Member States to...(control) immigration from third countries..." (quoted in Papademetriou, 1997:24). In the wake of the Maastricht Treaty, which invited the member states to at least "coordinate" their external immigration policies within the so-called Third Pillar, a second Commission attempt to launch a comphrehensive European approach to immigration was all but ignored (ibid., 83-88). The Amsterdam Treaty's move of the immigration function from the intergovernmental Third Pillar into the supranational First Pillar, however, will make a European policy on third-state nationals inevitable. And the sheer fact that borderless free movement will remain unavailable to member state nationals if third-state nationals continue to be controlled by states suggests upward pressure on the rights of the European Union's remaining "immigrants".

(2) Transition to Citizenship. Nationality is, next to the concept of worker, one of the two "connecting factors" that determine who may benefit from freedom of movement in Europe (Evans, 1991:191). It is an often noted "legal paradox" (O'Leary, 1993:353) that the Community has vindicated to itself the definition of

"worker", but has left the definition of "nationals" to the member states.[34] There is legal space for the European Court of Justice to apply to the domain of citizenship and nationality policy its doctrine of implied powers (see Weiler, 1991:2415-17), which had already helped it to encroach on national education and demographic policies in the name of pursuing the Common Market objective.[35] Political prudence not to attack an elementary and universally acknowledged function of state sovereignty in international law may have prevented it from doing so.[36] The state prerogative over the determination of nationality is acknowledged in the citizenship clause of the Maastricht Treaty, according to which citizenship of the Union derives from "holding the nationality of a Member State". To leave no space for ambiguity, the member states added to the Treaty a Declaration on Nationality, which affirms that the determination of member state nationality "shall be settled solely by reference to the national law of the member State concerned." And the Amsterdam Treaty seeks to forego an evolutive reading of the citizenship clause by stating that "citizenship of the Union shall complement and not replace national citizenship".

However, there has already been subtle pressure on member states' nationality laws by the European free movement right,[37] which is bound to increase over time.[38] Applying the free movement of goods analogy to the free movement of people, Europe's "people" solution of internal free movement governed by EU law and external access governed by national law is like removing internal tariff barriers without establishing an external tariff, and thus in direct contrast to Europe's "goods" solution in which both internal *and* external regulations were communitarized (see Weiler 1999:326). Leaving nationality a matter to be determined by member states, without reference to Community law, to a certain degree empties the Court's painstaking Communitarization of the concept of worker of "its meaning and purpose" (O'Leary, 1992:41), because states can offset their losses at the workers front through a restrictive handling of nationality, with discriminatory effects for people. Conversely, member states have no possibility to counteract an expansive nationality policy of a fellow member state, and they are forced to accept unilateral expansions of the Euro-citizenry potentially crowding their labour markets and education and welfare

systems. This has been the case in German unification, which with one strike increased the Euro-citizenry by some seventeen million people, and yet was accepted with remarkable equanimity by the fellow member states.[39] For one author the "inequalities resulting from differences in nationality laws render it politically essential and legally imperative for the Union to establish uniform conditions governing the acquisition or loss of the citizenship of Member States or to establish a real federal Union Citizneship, independent of the nationality of a Member State" (Closa, 1995:513).[40]

These legal pressures nothwithstanding, there are no signs that the European Union is moving toward a common nationality regime, not even toward a harmonization of member state nationality laws.[41] It must be pointed out that in the history of federal states there are precedents to the European constellation: before the German Reichs- und Staatsangehoerigkeitsgesetz of 1913 and before the American 14th Amendment of 1868, federal citizenship in both countries derived from subfederal state citizenship, over whose determination the federal governments had no authority. By the same token, a European Union citizenship that took precedence to state citizenship would mark the point at which the Union turned into a full-blown federal state with its own nationality to distribute. This is the outcome that all European states of today are set to avoid. The "legal paradox" of communitarized workers and still-national nationals is therefore none from a political point of view. Defining workers corresponds to the logic of a functional regime; defining nationals would turn a functional regime into a territorial state. This seems too high a hurdle to take for any legal automatism, even one as robust as that of the European Union.

Despite the absence of a European citizenship and nationality regime, there is still a European convergence of national regimes due to policy emulation.[42] While there is no vertical imposition of European norms, there is a horizontal diffusion of "adequate" European ways of dealing with citizenship and nationality questions. This constellation was evident in the recent German reform of citizenship law. On the one hand, there was a complete absence of perceived European Union constraints in this domain;[43] this was a purely

national debate to resolve a purely national immigration problem. On the other hand, there was a close scrutiny, popularized by the print media, of the considerably more liberal citizenship laws in neighbouring countries.[44] The horizontal influence of European norms was evident in Chancellor Schroeder's remark that a "modern" citizenship law would make Germany "adequate for Europe" (*europafaehig*).[45]

In substantive regard, the European convergence of citizenship and nationality norms revolves around a right to citizenship for second-generation immigrants, either at birth or at majority age, which is now granted by all member states of the EU except Austria, Luxemburg, and Greece (Hansen, 1998:760). In addition, the new Nationality Convention of the (non-EU) Council of Europe, which was introduced in 1996, departs from the old principle of strict avoidance of multiple nationality (enshrined in its 1963 predecessor) and suggests to the signing states to "allow" double citizenship resulting from birth or naturalization for the sake of better immigrant integration.[46] Considering that all ratifying states of the old Convention (except Norway) have in the meantime become members of the European Union, and that major non-EU immigrant-sending states like Turkey and Yugoslavia have never been part of the convention, this change of heart is not as astonishing as it seems, but reflective of the very integration of Europe.[47] Even with regard to its non-European immigrants, however, the major immigrant-receiving states, including France, the United Kingdom, Spain, Italy, and--most recently--Germany, tolerate double citizenship. Those who deplore the formal exclusion of non-EU immigrants from the European project (e.g., Kostakopoulou, 1998) should not forget that the European convergence on liberal citizenship and nationality norms has allowed them to become part of it much like the non-immigrant rest: through the national main road.

Conclusion

The preceding comparison demonstrated the central role of courts and domestic legal orders (especially constitutions) for the development of immigrant rights,

while suggesting to differentiate carefully according to the type of immigrant right, migrant group, and polity under investigation. It is time now to link the generalizing and particularizing strands of this analysis. The case of immigrant rights is part of a larger trend in postwar societies, in which activist courts have aggressively defended the rights of individuals against intrusive states. Next to policing the complex division of powers within an expanding state machinery, the protection of fundamental rights and liberties has been one justification for courts to take on the role of active policy-maker, and thus to intrude into a domain that had previously been reserved to parliament and the executive (Shapiro and Stone, 1994:414). A long-standing feature of American political life, the judicialization of politics is a novelty in Europe, where reference to the democratic deficit of the judiciary and a traditional view of the state as sole originator of rights, against whom individuals could not have rights, had previously kept courts and the legal system in low profile. The legal empowerment of immigrants, which we could observe in all three polities considered here, is thus part of a larger story of an expanding judicial domain and the proliferation of "rights" that goes along with it.

However, the picture of an adversarial relationship between courts as rights-defenders and executive states as rights-bashers, which was conveyed by this comparison, needs to be qualified. In functionally differentiated societies, legal systems are autonomous, and they operate according to system-specific codes and principles, which are different from those that govern the political system (see Luhmann, 1993). But courts are also dependent parts of political regimes, endowed with the tasks of conflict resolution and social control (see Shapiro, 1981). Immigrants--always vulnerable individuals in need of protection from vindictive states--are tailor-made objects for courts to assert (in important respects: citizenship-blind) individual rights against the whims of majoritarian governments. If one defines individual rights as "trumps" (R.Dworkin) over the preferences of the government-represented majority in society (see Waldron, 1991:364f), one could even argue that immigrants--by definition excluded from this majority--are the most dramatic test case of rights in general. Yet there is also a line, differently drawn in different polities and varying over time, that

prudent and self-limiting courts will not transgress. The German Constitutional Court has championed the rights of guestworkers, but in the context of a wavering government that only symbolically affirmed to preside over a "no immigration country" and that stepped back from rotating its unwanted migrants-as-settlers. By contrast, when the government was firm in its intention to close down unwanted asylum-seeking, the Court refused to get into its way, rubberstamping an unprecedented restriction of a fundamental right guaranteed by the Basic Law.[48] The American Supreme Court has mostly defended the rights of permanent resident aliens (legal immigrants) against state governments, which arrogated to themselves unconstitutional immigration powers. When it tackled the politically more sensitive case of illegal immigrants, in *Plyler v. Doe*, the Court clarified that its immigrant-friendly decision was premised on the absence of a countervailing federal policy. And the Court has never dared questioning the plenary power doctrine, which gives the federal government the upper-hand in all immigration matters. Finally, the European Court of Justice has single-handedly transformed migrant workers into Euro-citizens, which was not the least daring of its many factual state-building exercises. However, it has abstained from venturing the possibility that the "workers" or "persons" granted free movement rights by the European Community Treaty could be defined by residence rather than nationality. And the Court has not dared to bring the definition of nationality into the ambit of Community law, even though the legal possibility for this exists.

One critical variable for the readiness of courts to champion immigrant rights is the degree of political and societal conflict surrounding immigration. If conflict is low, Courts are likely to take more daring stances--and vice versa. This has been the case in Germany, where the Constitutional Court's crucial guestworker rules happened during the 1970s and early 1980s, which was--except a first national debate on mass asylum-seeking in 1980--a period of low conflict intensity. Similarly, the US Supreme Court's landmark rules on immigrant rights, culminating in *Plyler v. Doe* (1982), were issued at least a decade before a massive anti-immigrant movement would spread eastward from California. This resonates with Virginie Guiraudon's (1998) interesting findings, based on

the cases of Germany, the Netherlands and France, that episodes of rights expansion for immigrants were conditional upon keeping the public out, and containing the issue behind the "closed doors" of bureaucracy and judiciary. In her view, under conditions of low conflict, state executive and judiciary are even more like accomplices, rather than adversaries, in an "enlightened" treatment of immigrants.

Danger arises when the public becomes involved, and democratically accountable governments are pushed into defending the rights of "their" people--who are by definition not immigrants. These are moments of the potential reversal of immigrant rights. This paper touched on two examples of "high conflict" surrounding immigration: America's welfare reform, and Germany's (pending) citizenship reform. Both worked to the detriment of immigrants, and in both there was little judicial interference (at least so far). In the US case, the Republican-dominated Congress waned itself protected by its plenary power on immigration matters. One cannot know the future, but a conservative Supreme Court that in a string of recent decisions against affirmative action has proved susceptible to the current backlash against immigrants and minorities is unlikely to seize this opportunity to question the (however antique) plenary power doctrine. In the German case, the reach of constitutional law on citizenship matters is highly limited, giving the political lawmaker wide discretion. The debate surrounding the "option model", in which double citizenship is more restrictively handled than in the original reform proposal, still gives a flavour for the pervasive judicialization of politics: it was formulated and scrutinized beforehand according to its compatibility with the Basic Law, to make it withstand a possible Constitional Court intervention.[49] Interestingly, a Court verdict against the Option Model could have the opposite effect of throwing the government back to its first double citizenship proposal, which it had abandoned for political reasons.[50]

The involvement of courts in the development of immigrant rights differed not only according to the level of conflict, but also according to the type of immigrant right under consideration. In all three cases, the degree of judicial assertiveness was remarkably higher regarding alien rights than regarding the

acquisition of citizenship. This was most drastically expressed by the European Court of Justice's wholesale abstention from the domain of nationality law. As we saw in the German and US cases, alien rights are grounded in constitutions that guarantee certain elementary individual rights independently of citizenship status. Not to discriminate against settled aliens, who work and pay taxes like citizens, corresponds to a fundamental sense of justice that provides an easy ground for judicial intervention. The situation is different regarding the acquisition of citizenship. As Michael Walzer (1983:ch.2) has argued normatively (and as is universally recognized in international law and conventions), the distribution of membership is an expression of elementary national self-determination, and as such cannot be subject to considerations of justice. The discretion of national communities to determine the accession of new members is reflected in a general absence of constitutional provisions on citizenship--with the exception of the United States, whose slavery problem forced it to introduce a constitutional citizenship clause. Walzer added, however, that justice considerations did apply to people who can claim a "sense of place". An example are settled immigrants who--once admitted to permanent residence on the territory--could be excluded from the citizenry only at the cost of producing *metic*-like second-class citizens (ibid., p.56-61). Interestingly, the guestworker-receiving states of Western Europe have implicitly followed this reasoning, in lowering their citizenship hurdles for long-settled and later-generation immigrants. Yet these were political choices, motivated perhaps more by pragmatic order than by normative justice considerations; they were not the result of legal mandates, imposed by independent courts on unforthcoming governments, as was the pattern regarding alien rights.

Next to stressing the legal sources of immigrant rights, I also showed that a thoroughly transnational phenomenon, migration, has found a thoroughly national treatment--perhaps most extremely in the European Union case, which left non-EU migrants entirely outside its legal grid. This goes against the grain of a recent "postnational" approach that sees migrants protected by international human rights norms and discourses. A legal version of the postnational approach has been presented by David Jacobson (1996), who claims that

international human rights norms, as embodied in customary law, treaties, and conventions, have become the central legitimizing principle of Western states.[51] "Midwives" of the postnational state, according to Jacobson, are domestic courts, which are said to "pay increasing attention to international--indeed, transnational--laws and norms" (ibid., p.106). Unfortunately, Jacobson does not provide any empirical evidence for these bold propositions.[52] Not only is international law "soft" law that lacks implementation force; there also is no need for domestic courts in Western Europe and North America to invoke international norms, because the scope of protection provided by domestic constitutions is by far superior (see Guiraudon, 1998b).[53]

A more sociological version of the postnational approach comes from Yasemin Soysal (1994). Whereas Jacobson was at least concrete enough to zero in on one presumed carrier of international human rights norms (courts and international law), Soysal conceives of international human rights as a more diffuse and discursive "institutionalized script" (p.7) that shapes actor identities and provides states with clues for how to treat foreigners in their territory. She claims that on the basis of global human rights norms a "postnational model of membership" has come into existence, which has relativized the importance of traditional citizenship. As evidence for the effectiveness of global-level norms she adduces the fact that similar schemes of postnational membership can be found across (European) states. Not unlike Jacobson, Soysal sees states as mere transmission belts of global human rights norms.[54]

Because of its vagueness, the "discursive" version of the postnational approach is more difficult to counter. Its strongest point is certainly to offer a parsimonious explanation for the convergent trend of expansive alien rights across postwar states. A purely domestic approach fails in this respect, unless it incorporates diffusion and demonstration effects, whereby similar ideas and institutions find sedimentation in different societies. Yet this is no novelty resulting from "globalization". Reinhard Bendix has famously shown that systematic international borrowing and emulation via print-based "intellectual mobilization" dates back to the era of Reformation and overseas exploration: "Once the church was challenged, a king beheaded, or a parliament supreme,

once industrialization was initiated and the ideal of equality proclaimed, no country could remain unaffected. Everywhere people were made aware of events and 'advances' which served as reference points for the assessment of developments at home" (Bendix, 1978:265). States have never been monads, but mutually imitative of their ideas and institutions--after all they are all "nation states" displaying homologous principles and structures. However, discursive postnationalists go one step further in stating that "human rights" are not just an invention of one state spreading to other states, but an own reality existing outside and separate from states, meeting states as external constraints. Applied to immigrant rights, the onus of this approach is to show that the latter derive from this extra-state, "transnational" reality. This forces Soysal, much like Jacobson, into a mechanical listing of "explicit" international human rights codes and conventions (pp.145ff), conveying rather than demonstrating their effectiveness at domestic level. However, if my analysis is correct, the latter are plainly irrelevant: not international norms and conventions, but domestic constitutions have been the spring of immigrant rights.

What, then, is the role of more modestly conceived diffusion and demonstration effects in the development of immigrant rights? It depends. Regarding constitution-based alien rights, they are almost nil. The European Union, as we saw, does not know the very concept of (non-EU) alien rights. In the United States, the triggering factor for mobilizing the "personhood" clause of the Constitution has been the domestic civil rights revolution in the 1960s, which suggested a perception of aliens as race-analogous "discrete and insular minority" that should not be discriminated against. In Germany, the trauma of Nazism, where the state had carved out a "racial" group only to annihilate it, incapacitated the state to "rotate" unwanted guestworkers-turned-settlers, and emboldened the Constitutional Court to put life into the Basic Law's celebration of universal human rights that no state was allowed to mess with. In both cases, the legitimation (not just implementation) of expansive alien rights after World War II thus has exclusively domestic roots.[55] The temporal marker "after World War II" points to the only communality between both, the moral outlawing of all that smacked of ethnic, national, or racial discrimination after the West's victory

over a regime that had carried such discrimination to its murderous extreme. Regarding the acquisition of citizenship, which is less constitutionally constrained and thus grants more flexibility to the lawmaker, diffusion and demonstration effects are more readily visible. An exception is again the European Union, whose embryonic citizenship scheme differs so radically from conventional state citizenship that the very possibility of the "diffusion" of citizenship models does not arise. In the United States and Germany, diffusion worked in opposite directions. Regarding the United States, negative reference to the "European" exclusion of long-settled immgirants from the citizenry helped deflect a challenge to historically inclusive citizenship. In Germany, positive reference to the more inclusive citizenship in Western states increased the pressure on its anomalously exclusive citizenship.

Postnationalists have misjudged not only the locus of immigrant rights, but also their logic. In postnational reading, immigrant rights are universal human rights, which protect abstract "personhood" (Soysal) irrespective of an individual's communal boundedness and involvements. However, regarding migrants, the only such "personhood" right is probably the right of asylum. For all other migrants, a different, communitarian logic is at work: the scope of rights increases with the length of residence and the development of ties with the receiving society. This was most clearly expressed in the German legal doctrine of *Rechtsschicksal der Unentrinnbarkeit*, according to which over time even the constitutional citizen rights (except the right to vote) could not be denied to long-settled foreigners. Tempered by a stronger constitutional equality norm, a similar "affiliation model" (Motomura, 1998) has also undergirded the rights of legal permanent residents in the United States. It was formulated most explicitly in the Supreme Court's *Mathews v. Diaz* (1976) decision, which allowed the federal government to deny Medicare benefits to permanent residents who have been in the country for less than five years: "Congress may decide that as the alien's tie (with this country) grows stronger, so does the strength of his claim to an equal share of that munificence" (quoted in Motomura, 1998:205). This affiliation model is not without contradictions, because it reduces the incentive to naturalize, and thus devalues citizenship.[56] In any case, according to the logic of

affiliation and *Unentrinnbarkeit* immigrant rights are not abstract human rights but bounded proto-citizen rights that reflect the involvement of individuals in the rights-granting community.

The current revaluation of citizenship, which we could observe in the United States and Europe alike, points to a final shortcoming of the postnational approach. Postnationalists have slanted the role of formal state membership for immigrants, because they deem the latter enmeshed in a "transnational" reality, in which the local and the global have pincered the national. As the US experience demonstrates, the absence of political rights--which everywhere continue to be the privilege of citizens--makes immigrants defenseless victims of discriminatory public policies, in this case, it made them bear the brunt of the federal welfare cuts.[57] Regarding Europe, the absence of citizenship for otherwise perfectly integrated "postnational members" has been perceived by all, including the immigrants, not as the victory of a brave new order, but as a painful anomaly that is in need of correction. The pan-European trend of turning immigrants into citizens marks the ultimate verdict over the postnational approach to immigrant integration.

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1.... Next to the obvious literature (Cappelletti et al., 1986; Scharpf 1994; Leibfried and Pierson, 1995), see the interesting comparison of state resistance to federal authority in early America and the European Community, by Friedman Goldstein (1997).

2.... In T.H.Marshall's citizenship scheme, these rights correspond to civil and social citizenship rights.

3.... There is a *third* set of immigrant rights, which cannot be further discussed here. These are "multicultural" rights (see Kymlicka 1995). They address immigrants as ethnic minority, whose integrity and identity are to be protected from erosion and discrimination. The thrust of these rights is particularistic, as they set immigrants (qua minority) apart as a group. This is a diffuse and highly variegated domain of immigrant rights, which stretches from the United States' racial preference ('affirmative action') regime to Germany's complete aversion to categorize people according to ethnicity or race.

4.... 'Deportations' are directed against aliens (regardless of their legal status) within the territory of the US, so that constitutional 'due process' protection applies. 'Exclusions' are directed against entering aliens, who are considered outside the territory of the US, so that the Constitution does not apply. Until *Landon v. Plasencia* (1982) put an end to it, this meant that returning legal resident aliens enjoyed lesser constitutional protection than illegal aliens within the territory. The benchmark case is *Shaughnessy v. Mezei* (1953), where the Supreme Court upheld the permanent exclusion, without a hearing and on the basis of undisclosed information, of a permanent resident who had lived in the US for 25 years (see Motomura, 1990:558). In *Landon v. Plasencia*, the Supreme Court extended constitutional due process protection to a returning permanent resident, thus acknowledging that returning resident aliens had higher-level membership rights than first-time entrants.

5.... Permitting states to withhold certain benefits from noncitizens directly contradicts the Supreme Court verdict in Graham that "Congress does not have

the power to authorize the individual States to violate the Equal Protection Clause" (see Needelman, 1997:352, fn.18).

6.... The last point is made by Gerald Neuman (1998:34): "The relative stability of U.S. nationality law might itself be considered one of the significant effects of immigration, because politicians must take into account such categories of voters as naturalized immigrants, citizen relatives of immigrants, and ethnic allies of immigrants."

7.... Quoted from the statement of Peter Schuck before the Subcommittee on Immigration, Committee on the Judiciary, U.S. House of Representatives, 13 December 1995, Washington, D.C. (on file with author). Schuck, who had delivered the intellectual ammunition for the amendment supporters, opposed the amendment, because--in the absence of effective controls of illegal immigration--it would "transmogrify" an already large illegal population, and lead to "a much larger, multi-generational, indeed permanent, alien underclass" (ibid.).

8.... The UK, for instance, recognized US naturalization only in 1870.

9.... After its amendment in 1998, the Mexican constitution now distinguishes between "citizens" and "nationals", the difference between both being the right to vote, which is reserved to citizens.

10.... Another prominent example is Turkey.

11.... Germany is not the only country with ethnic priority immigration. Other prominent examples are Great Britain (until 1981), Greece, Russia, and Israel.

12.... Decision of 26 September 1978 (2 BvR 525/77).

13.... ibid., p.188.

14.... For a discussion of the Constitutional Court's three "classic" alien cases, dealing with deportation, residence, and family reunification, see Joppke (1999:ch.3).

15.... Here one must differentiate: East Germans were automatically German citizens according to the *Reichs- und Staatsangehoerigkeitsgesetz*; ethnic Germans in Eastern Europe and the Soviet Union had a statutory right to naturalize, which derived from Article 116(1) of the Basic Law.

16.... In German 'cooperative' federalism, the *Laender* are in charge of naturalizing foreigners. This accounts for huge variation in naturalization rates due to different recognition practices in 'conservative' states like Bavaria and 'progressive' states like Berlin.

17.... Erwin Marschewski (CDU), in: *Information Sheet of the CDU/CSU Bundestagsfraktion* 10/93, 30 April 1993, p.9.

18.... "Wer Deutscher werden will," Die Zeit, 8 October 1998, p.8.

19.... "Yes, Hosgeldiniz is the word," The Economist 31 October 1998, p.31f.

20.... This decision corrected an element of sex discrimination in the German

citizenship law, according to which only German fathers (but not mothers) in binational marriages could pass on German nationality to their legitimate children. Generally quoted for its declaration of dual nationality as an "evil" (the so-called Uebel-doctrine), the Constitutional Court's 1974 decision equally meant that the interest of the individual (in dual nationality) outweighed the countervailing interest of the state (in mono-nationality). See Kimminich (1995).

21.... Gary Freeman (1995) has called it the "anti-populist norm".

22.... *Doppelpass* means 'double passport', but also the 'double pass' in football.

23.... Migration News Sheet, March 1999, p.19.

24.... Gerhard Frey, leader of the right-wing Deutsche Volks-Union (DVU), quoted in Migration News Sheet, February 1999.

25.... "Integration and Tolerance" is the title of a position paper of the CDU/CSU parliamentary group. It rejects double citizenship, but supports state-supervised Muslim education in Germany's public schools (Frankfurter Allgemeine Zeitung, 21 January 1999, p.6).

26.... "Einbuergerungsbewerber muessen verfassungstreu sein," Frankfurter Allgemeine Zeitung 13 January 1999, p.1.

27.... Article 7a of the European Community Treaty (ECT).

28.... Originally reluctant to include free movement rights for workers, the founding states of the European Community were pushed in this direction by Italy, which sought a European solution to its domestic unemployment problem (see Romero, 1993).

29.... The violation of fundamental state interests by the ECJ decisions on migrant workers raises the general question why the member states did not resist. This is one of the most fascinating chapters in the history of de facto European state-building, which also sets the EC sharply apart from pre-reconstruction America (where subfederal states were much more prone to ignore or even explicitly reject federal Supreme Court rules; see Friedman Goldstein, 1997). One part of the answer is the "preliminary rulings" procedure according to Article 177 of the ECC Treaty, which enlisted the authority of national courts in the European Court's imposition of European over national law. See the interesting reflections by a participant (Mancini 1991).

30.... Of the approximately 13 million non-citizen residents in the EU, over eight millions are from third states, the rest being from other member states.

31.... Considering that only 5 million of more than 300 million member state citizens have chosen to reside in another member state, the migratory implications of granting free movement rights to the eight million third-state nationals in the EU are believed to be very small (see Muus, 1997).

32.... There are some exceptions, such as the equality of treatment for men and women prescribed in Article 119 of the EEC Treaty and a few Community directives on worker protection, which apply irrespective of nationality (Hailbronner and Polakiewicz, 1992:65).

33.... For overviews of the rights of third-state nationals in the EU, see Alexander (1992), Hailbronner and Polakiewicz (1992), and Peers (1996).

34.... For instance, Andrew Evans (1991) finds it "illogical to deny Member States the right unilaterally to define the... concept (of 'worker'), but leave them entirely free to determine those who may qualify for enjoyment of free movement through their definition of nationality."

35.... In the *Micheletti* case (1990), in which the ECJ affirmed the member states' exclusive competence in determining their nationals, the Court also stated in an *obiter dictum* that member states' nationality policy had to be "dans le respect du droit communautaire". The Court has never acted on this possibility, but it could in principle do so (see O'Leary, 1993:378-79).

36.... Article 1 of the 1930 Nationality Convention of The Hague states: "It is for each State to determine under its own law who are its nationals."

37.... See O'Leary's (1992) trenchant discussion of the ECJ case *Giagounidis v Stadt Reutlingen* (1991), in which a Greek national's free movement right trumped over his home state's passport authority.

38.... Nascimbene (1996:11) even thinks, somewhat optimistically, that "the subjective standard of nationality will gradually yield its place to the objective standard of residence or domicile."

39.... On their accession to the Community, West Germany and the United Kingdom issued declarations (added to the Treaty) that clarify their definitions of nationality for Community law purposes. In the UK case, the effect of the declaration was restrictive, because certain British nationals (from the colonies and independent territories) were excluded from free movement rights. In the German case, the effect was expansive, because the ethnic Germans and inhabitants of the former GDR were included.

40.... O'Leary (1993) has suggested a tiered concept of nationality, according to which the European Court of Justice "could... differentiate between nationality for municipal and Community purposes on the basis of a genuine link between the individual and the objectives and operation of Community law" (p.382).

41.... With the exception of Italy, the member states do not even offer a shortened or otherwise eased naturalization procedure to nationals of other member states. See Closa (1995:517f).

42.... The general causes of policy convergence are discussed by Bennett (1991).

43.... The only explicit European Union reference was made by a legal expert of the CDU, who argued--rather abstrusely--that the double citizenship envisioned by the first Red-Green reform proposal violated the "Community loyalty" (*Gemeinschaftstreue)* obligation of the Treaty, because it would impose new and unwanted migrant workers with free movement rights on the fellow member states (see Frankfurter Allgemeine Zeitung, 3 January 1999, p.4). One wonders why similar concerns were not raised concerning the more than twenty million

ethnic Germans imposed on the EU, before and after reunification.

44.... For instance, at the peak of the German citizenship debate in the winter of 1998/99 the (conservative but reform friendly) Frankfurter Allgemeine Zeitung was running a series about citizenship and nationality laws in other European countries. During the same period, the title page of the liberal weekly Die Zeit (11 February 1999) showed a photograph of the "multicultural" French football team winning the last World Cup, along with a lead article calling for a reformed German citizenship law "a la francais".

45.... Interview in Sueddeutsche Zeitung, op.cit.

46.... Articles 14 to 18 of the Council of Europe's Draft European Convention on Nationality (reprinted in Nascimbene, 1996:46).

47.... It is still worth mentioning that European states (including Germany) are increasingly embracing double citizenship, while the United States--traditionally tolerant of double citizenship--has recently become more critical of it, at least with respect to naturalization. This dissonance may be explained by the fact that in an age of increased international mobility the United States, with its constitutionally guaranteed, unconditional jus soli citizenship, has lesser possibilities than European states to control the allegiances of its new citizens, so that it has to concentrate on the few points of control available--such as the loyalty oath required from its naturalizating citizens.

48.... The Court's approval, in May 1996, of the so-called 'asylum compromise' between government and opposition, which had allowed a contraction of the Basic Law's asylum guarantee, has been widely interpreted as an unwillingness of the Court to undo by legal means a hard-won political solution of a major societal conflict--a "defeat of morality by reality," as one critic put it (Robert Leicht, "Adieu Asyl," Die Zeit 17 May 1996, p.1).

49.... Concerns concentrated on Article 16(1) of the Basic Law, according to which German citizenship "must not be taken away" (*darf nicht entzogen werden*) by the state. The conservative constitional lawyer Kay Hailbronner affirmed to the left-green government that the second-generation immigrant's voluntary choice, at majority age, between keeping her German or her second citizenship could not activate the constitutional prohibition of involuntary expatriation (see "'Optionsmodell nicht verfassungswidrig'", Frankfurter Allgemeine Zeitung 25 March 1999, p.7).

50.... This is perhaps why the parliamentary opposition of CDU and CSU has not (yet) realized its threat to bring the option model before the Constitutional Court (see "Unsinn abraeumen," Der Spiegel, No.14, 1999, p.41).

51.... "(I)n North America and Western Europe, the basis of state legitimacy is shifting from principles of sovereignty and national self-determination to international human rights" (Jacobson, 1996:2).

52.... Jacobson (1996) identifies only one US lower-court rule that invoked international law in an asylum case, and was quickly overturned by the court of appeals (pp.98-100). Regarding Western Europe, he does not identify a single

domestic court rule using international law in a migration case.

53.... By the same token, the impact of international human rights norms is more likely to be found in non-Western states with a thin or even absent liberal infrastructure (see Risse and Sikkink, 1997).

54.... Unlike Jacobson, however, Soysal (p.157) admits that the principle of national sovereignty remains a strong contender to that of universal human rights.

55.... This is in contrast to Soysal's claim (1994:143) that only the implementation of alien rights is domestic, whereas their legitimation is based on a "transnational order".

56.... This is why Motomura (1998) proposes an alternative "transition model", in which alien rights do not undercut the incentive to citizenship. However, this model is problematic too, because it justifies the current exclusion of legal immigrants from federal welfare (Tichenor, 1998).

57.... 40 percent of the projected federal welfare savings were achieved by excluding legal immigrants (see Freeman, 1998:15).