

**Who Are “We the People”?:
The Legal Response to Twentieth-Century Migration in Germany and the United States**

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I. Introduction

The history of the twentieth century tells the story of globalization, of the ever-increasing movement of persons and cultures across borders. The stories of how two nations, the United States and Germany, have responded to the challenges of migration illuminate their differing histories and cultures.¹ Disparate laws and policies reveal dramatically different national identities and different approaches to determining who belongs within the political community. U.S. laws and policies illustrate a territorial view of membership, reflecting the United States' history as a land of immigration. Simply stated, those living in America are part of the American community, provided they assimilate quickly into mainstream culture. In contrast, German laws and policies reveal an ethnocentric view of membership, reflecting the nation's history as an ethnically defined state. As German officials have often insisted, Germany is not a land of immigration, at least not historically.

The immigration story in both nations reflects cultural attitudes about membership, particularly about the barriers, or boundaries, to membership. Specifically, this paper focuses on two primary barriers to membership in the political community: the physical barrier embodied in admissions laws and policies, and the political barrier embodied in citizenship and naturalization laws. The first part of this paper focuses on the history of immigration admissions in the United States and Germany, highlighting migration flows and the political responses to increased migration. This section discusses the United States' history as a land of immigration followed by

1. I use the term “migration” for two reasons. First, it connotes both immigration and emigration and reflects the porous nature of borders in today's world. Second, migration better reflects German law and policy, which does not recognize immigration as a domestic issue.

Germany's post-war history as a *de facto* land of immigration. The second section of this paper focuses on the political barrier to membership—in the form of citizenship laws—in the national communities of the United States and Germany. The third section discusses two legal examples of the nations' differing beliefs about who belongs to the political community and about the meaning of democracy. The final section briefly discusses recent trends in both countries to fortify their physical borders.

II. History of Migration in the United States and Germany

A. United States

The history of the United States is a history of immigration; the metaphor of the great melting pot reflects a population rich in diversity and varied ethnic ancestry. The United States has received more immigrants than all other immigrant-receiving nations combined.² Indeed, from 1820 to 1930, the United States received 38 million immigrants, while other nations, such as Canada, Argentina, Brazil, Australia, New Zealand, and South Africa, only received a combined total of 24 million.³ Over 20 million people have migrated to the United States since the close of World War II.⁴ In short, the United States is undoubtedly a “land of immigration.” The following historical overview highlights the legal response to migration beginning with the incipient stages of federal restrictions and regulation of immigration admissions. The history of U.S. immigration generally reflects the heterogeneous composition of U.S. society, as well as an underlying ideology of pluralism. With the advent of federal regulation, however, the laws reflect a desire to control who and how many could immigrate. The debate over immigrant admissions continues to be the central concern of law and policy makers today.

2. See Reed Ueda, *An Immigration Country of Assimilative Pluralism: Immigrant Reception and Absorption in American History*, in *MIGRATION PAST, MIGRATION FUTURE* 39, 40 (Klaus J. Bade & Myron Weiner eds., 1997); see also Table 1.

1. The Door Begins to Close: Early Restrictions, 1875-1929

During the first century of the United States' history, the government placed few restrictions on immigration, adhering essentially to an open door policy; indeed, in 1864, Congress passed legislation encouraging immigration.⁵ The 1864 Republican Party platform, which Abraham Lincoln helped compose, proclaimed a liberal immigration policy: "Foreign immigration which in the past has added so much to the wealth, resources, and increase of power to this nation—the asylum of all oppressed nations—should be fostered and encouraged by a liberal and just policy."⁶ Immigration, however, did not require encouragement; during the 1840s and 1850s, immigrant numbers reached unprecedented proportions. During the 1850s, the United States received 2.6 million immigrants, comprising 8.3 percent of the total population according to the 1860 Census.⁷

The tide began to shift in 1875 with the United States Supreme Court's decision in *Henderson v. Mayor of New York*,⁸ in which the Court ruled state laws restricting immigration unconstitutional. This decision marked the beginning of centralized, federal regulation of immigration laws. At this same time, growing public concern coupled with the interests of labor organizations placed considerable pressure on Congress to enact restrictions. Anti-immigration sentiment focused on specific groups of immigrants and on perceived moral depravity in some classes of immigrants. Hence, the earliest restriction legislation passed in 1875 sought to

3. See Ueda, *supra* note 2, at 40.

4. See *id.*

5. See IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 1 (4th ed. 1994). One brief exception to this general open door policy should be noted: the Alien & Sedition Laws of 1798 gave the President the power to deport any alien he believed was dangerous. These laws, however, expired after two years because of their unpopularity. See *id.*

6. See Ueda, *supra* note 2, at 42.

7. See LOUIS DESIPIO & RODOLFO O. DE LA GARZA, MAKING AMERICANS, REMAKING AMERICA: IMMIGRATION & IMMIGRANT POLICY 29 (1998). The vast majority of these immigrants came from Germany and Ireland.

8. 92 U.S. 259 (1875).

exclude criminals and prostitutes.⁹ In 1891, Congress added to the list of “undesirables,” including people likely to become public charges, people with contagious diseases, and polygamists.¹⁰

During this period of early restriction (the 1870s through the 1920s), the immigrant population grew more diversified as people responded to the need for industrial labor in the United States.¹¹ Despite the need for labor, labor organizations, primarily composed of non-Asians in California, began pressuring Congress to pass laws limiting the immigration of Chinese workers. Congress responded to the concern that the immigration of Chinese contract laborers amounted to a new form of slavery established to enrich Chinese-Americans.¹² In 1882, Congress passed the Chinese Exclusion Act¹³, prohibiting the immigration of Chinese laborers.¹⁴ In 1885, Congress extended the contract labor law¹⁵ to include all nationalities in an attempt to deter contract labor, which potentially threatened the labor market. Contract labor survived, however¹⁶, and continues to supply short-term agricultural labor today.¹⁷

In response to growing public anxiety over increasing numbers of immigrants, the

9. See DESIPIO & DE LA GARZA, *supra* note 7, at 37. The exclusion of single women seems the true motivation behind this law. In practice, however, this restriction was inconsistently applied and deterred few immigrants.

10. See Ueda, *supra* note 2, at 43.

11. See DESIPIO & DE LA GARZA, *supra* note 7, at 33-34. In general, Southern and Eastern Europeans began to outnumber the Northern and Western Europeans (German and Irish immigrants of the mid-nineteenth century) during this period. See *id.* at 32.

12. See *id.* at 37; Ueda, *supra* note 2, at 42. While the slavery argument provided a convenient rationale, racism undoubtedly motivated these laws. See Kevin R. Johnson, *Race, the Immigration Laws and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness* 73 IND. L.J. 1111 (1998). Indeed, the Court’s reference to “obnoxious Chinese” in *Fong Yue Ting v. United States*, 149 U.S. 698, 743 (1893), reveals its racist ideology.

13. 22 Stat. 58, ch. 126.

14. See DESIPIO & DE LA GARZA, *supra* note 7, at 37-38. The Court upheld the constitutionality of the Act in the infamous Chinese Exclusion Case, holding the exclusion of foreigners to be a sovereign power of the government as authorized by the Constitution and in international law. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889). The Court continues to defer to the government’s “plenary” power over matters of admission, exclusion and deportation.

15. Alien Contract Labor Laws of 1885, ch. 164, 23 Stat. 332.

16. See *infra* Part II.A.2.

17. See DESIPIO & DE LA GARZA, *supra* note 7, at 38; see also *infra* Part II.A.2.

Dillingham Commission was established in 1907 to study immigration policy.¹⁸ This growing public concern and the Commission's findings inspired the restrictive legislation of 1917,¹⁹ 1921²⁰ and 1924,²¹ the strictest and arguably most draconian immigration laws in the United States' history. These laws drastically limited the number of immigrants from nations, primarily in Southern and Eastern Europe, from which increasing numbers of immigrants had come since the late nineteenth century. The 1917 Act established a literacy requirement and officially excluded all immigrants from Asian nations except Japan.²² Following World War I, the 1921 Act enacted a National Origin Quota System, responding to the popular fear that Southern and Eastern Europeans would flood the United States.²³ Under this system, immigrants of one nationality could not exceed three percent of the foreign-born population of that nationality in the United States. By using the numbers from the 1890 census, Congress effectively excluded large numbers of Southern and Eastern Europeans and encouraged greater numbers of immigrants from Northern and Western Europe.²⁴ Congress also imposed the first national ceiling on immigration admissions and required immigrants to have a U.S. visa upon entry.²⁵

The 1924 Act further reduced the annual ceiling on admissions and established a more formal national origins system, which continued to favor Northern and Western European countries.²⁶ The Act also barred all Asians from entering the United States, as well as from

18. See KURZBAN, *supra* note 5, at 3. During this time, over one million people, mostly from Southern and Eastern Europe, were immigrating to the United States each year.

19. Act of February 5, 1917, ch. 29, 39 Stat. 874.

20. Quota Act of 1921, ch. 8, 42 Stat. 5.

21. Quota Act of 1924, ch. 190, 43 Stat. 153.

22. See KURZBAN, *supra* note 5, at 3.

23. See *id.*

24. See *id.*; see also DESIPIO & DE LA GARZA, *supra* note 7, at 40. Significantly, the quota did not include the Western Hemisphere; immigrants from the Americas, including Mexico, were not restricted provided they were literate and not likely to be public charges.

25. See KURZBAN, *supra* note 5, at 3.

26. See Ueda, *supra* note 2, at 45. The annual ceiling shrank to 150,000. Northern and Western European countries were allotted 82% of the ceiling; Southern and Eastern European countries received only 16%, leaving 2% for the rest of the world. No quotas, however, applied to the Western Hemisphere.

naturalizing should they already reside in the United States. In addition, the Quota Acts established the preference system that is still in place today: parents, spouses and unmarried children receive first priority in immigrating to the United States.²⁷ The underlying policy of these Acts was to ensure a population that would easily assimilate into modern American society, thereby placating public concern.²⁸ The effect of this period was profound. First, in specifying who could and could not immigrate, Congress created a new category: the undocumented alien. Second, in establishing federal laws and policies on immigration, Congress essentially cultivated immigration as a source of public concern, laying the foundation for the ongoing policy debate throughout this century.²⁹

2. Immigration after World War II and the Immigration and Nationality Act of 1965

Despite the labor restrictions of the 1920s, U.S. policy ensured that the backdoor remained open for the migration of cheap labor from Mexico.³⁰ In fact, beginning in 1943, Congress systematically managed contract labor from Mexico through the Bracero (temporary farm worker) Program through which the United States admitted 4.7 million agricultural laborers on temporary work contracts.³¹ Under pressure from the agricultural industry, the government continued the program until 1965. When concern would surface, the Immigration and Naturalization Service (INS) would simply legalize undocumented workers, namely those who had entered illegally and those who had stayed beyond their authorized time periods. This helped control the public concern over illegal immigration, which had resurfaced in the 1950s.³²

In addition to the agricultural lobby for more workers, Congress encountered pressure

27. See DESIPIO & DE LA GARZA, *supra* note 7, at 40.

28. See Ueda, *supra* note 2, at 45.

29. See DESIPIO & DE LA GARZA, *supra* note 7, at 41.

30. See *id.* at 38.

31. See Ueda, *supra* note 2, at 46.

32. See DESIPIO & DE LA GARZA, *supra* note 7, at 44.

from other groups. Legal permanent residents and newly naturalized citizens lobbied to continue family preferences.³³ Public opinion often revealed fear of undocumented immigration.³⁴ The general political climate also drew attention to immigration policies. After World War II, the United States sought to strengthen its image as a democratic world leader through domestic policies committed to the equal and fair treatment of people of all races and ethnicities, an objective that culminated in the civil reforms of the 1960s. In short, immigration became a national policy issue.

The prevailing ideology of democracy and egalitarianism inspired significant reforms: the tide began to shift once again and U.S. immigration law underwent substantial reform. In 1943, Congress finally repealed the discriminatory Chinese Exclusion Act and, in 1952, abolished all racial restrictions on naturalization.³⁵ In 1965, Congress enacted the Immigration and Nationality Act, repealing the national origins system established by the Quota Acts.³⁶ Under the new act, quotas were established by equal visa allotments allowing 20,000 immigrants per country with family preferences comprising 80 percent of the overall cap.³⁷ The admissions cap was permeable, however, because refugees and immediate family members (spouses, minor children and parents) were not included.³⁸

The liberal provisions of the Immigration and Nationality Act greatly altered the ethnic and class composition of the immigrant population. Immigration increased from nations in Asia, the Caribbean, Latin America, the Middle East and Africa—nations from which few immigrants

33. *See supra*, note 27 and accompanying text.

34. *See id.* at 41.

35. *See* KURZBAN, *supra* note 5, at 4. The 1952 Act contained various procedural provisions governing admission, exclusion and deportation, which established the basic structure of immigration law today. 8 U.S.C. §§ 1101-1524 (1952).

36. *See* KURZBAN, *supra* note 5, at 4.

37. *See* Ueda, *supra* note 2, at 47. The Western Hemisphere was subject to a regional limit of 120,000 rather than per-country caps until 1976 when Congress passed legislation subjecting all countries to the same admissions cap of 20,000. *See* DESIPIO & DE LA GARZA, *supra* note 7, at 28.

had come in the past.³⁹ In addition, the liberal refugee policy allowed admissions in excess of the quota allotments. From 1945 to 1990, the United States became the world's leader in refugee admissions, granting one in every seven immigrants refugee status.⁴⁰ Refugees are admitted according to the discretion of the U.S. Attorney General, and refugee admissions often conflict with the purposes behind legislative regulation of immigration.⁴¹ For example, in opposing communism, the United States has admitted large numbers of refugees from communist states, such as refugees from Cuba in the 1960s, 1970s and 1980s and refugees from Vietnam in the 1970s.⁴² The influx of large, homogenous groups of immigrants created assimilation problems resulting in tension with U.S.-born populations—the problem immigration law seeks to prevent.⁴³

Generally, however, in the period immediately following the 1965 Act, an admissions policy prevailed in which, as one commentator has said, “values of expansion and diversity prevailed over those of restriction and homogeneity.”⁴⁴ As public concern over undocumented immigration began to resurface in the 1970s and continued to grow in the 1980s, Congress passed the Immigration Reform and Control Act of 1986,⁴⁵ which granted legal permanent residence to some undocumented aliens and created sanctions for employers hiring unauthorized aliens.⁴⁶ The legalization of undocumented aliens would not be enough to satisfy the public as concern over illegal immigration mounted into the 1990s. The contemporary response to what

38. See DESIPIO & DE LA GARZA, *supra* note 7, at 42.

39. See Ueda, *supra* note 2, at 47-48.

40. See *id.* at 47.

41. See DESIPIO & DE LA GARZA, *supra* note 7, at 43.

42. See *id.*; see also 8 U.S.C.A. § 1103(a) (1999).

43. See DESIPIO & DE LA GARZA, *supra* note 7, at 43.

44. Peter H. Schuck, *The Politics of Rapid Legal Change: Immigration Policy in the 1980s*, 6 *STUD. IN AMER. POL. DEV.* 37, 92 (1992).

45. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (current version at 8 U.S.C. § 1101 (2000)).

46. See DESIPIO & DE LA GARZA, *supra* note 7, at 43.

has been perceived as a migration crisis is the subject of the final section of this paper.

B. Germany

“The fact that aliens stay here for a long time or permanently does not mean that the Federal Republic of Germany has become an ‘immigration country.’”

—Federal Minister of the Interior, January 1991⁴⁷

Between 1950 and 1994, Germany’s population grew by 13.1 million people; two-thirds of this increase is a consequence of the positive net migration balance of more than eight million people during these years.⁴⁸ Despite the noticeably substantial effect of migration, political leaders have repeatedly insisted that Germany is *kein Einwanderungsland*, that is, not a land of immigration.⁴⁹ In fact, Germany is indeed a land of immigration, if not legally, then culturally. Since World War II, mass migration movements have shaped Germany’s society, specifically its population and economy, more than any other Western industrialized nation.⁵⁰ These post-war movements can be divided into three fairly distinct groups: the migration of foreign “guest workers” in response to growing labor needs; the repatriation of ethnic Germans following the War and the fall of the Soviet Union; and the migration of people, mostly from Eastern Europe, seeking asylum. The reality of *de facto* immigration in a “nonimmigrant” state has created considerable tension and violent manifestations of xenophobia.⁵¹ In contrast to the United

47. SARAH COLLINSON, EUROPE AND INTERNATIONAL MIGRATION 54 (1994) (quoting Survey of Policy and Law Regarding Aliens in the Federal Republic of Germany (Bonn, January 1991)).

48. See Rainer Münz & Ralf Ulrich, *Changing Patterns of Immigration to Germany, 1945—1995: Ethnic Origins, Demographic Structure, Future Prospects*, in MIGRATION PAST, MIGRATION FUTURE 65, 66 (Klaus J. Bade & Myron Weiner eds. 1997). The “positive net migration balance” includes foreigners who have stayed in Germany for extended periods of time and excludes those who have returned to their home countries or otherwise left Germany. See *id.*

49. See Anne Marie Seibel, *Deutschland ist doch ein Einwanderungsland Geworden: Proposals to Address Germany’s Status as a “Land of Immigration,”* 30 VAND. J. TRANSNAT’L L. 905, 920 (1997). Recent political leaders have changed their rhetoric slightly to acknowledge the reality of foreign residents, remarking that Germany is a “land open to the world,” but resisting any reference to immigration. See *id.* at 920 n.90.

50. See Klaus J. Bade, *From Emigration to Immigration: The German Experience in the Nineteenth and Twentieth Centuries*, in MIGRATION PAST, MIGRATION FUTURE 1, 28 (Klaus J. Bade & Myron Weiner eds. 1997).

51. See *infra* Part V.B.

States, Germany is an ethnically defined nation: those that cannot claim a German heritage may visit but should not remain.

1. The Guest Workers and Their Families: 1955-1989

After struggling through the immediate post-war years, Germany's economy began to boom in the 1950s, resulting in a demand for labor that could no longer be satisfied by the existing population.⁵² Germany's "economic miracle" was the catalyst for several years of formal recruitment of foreign labor by the West German government.⁵³ The German-Italian Treaty of 1955 marked the beginning of a large migration movement responsible for the largest number of foreign residents today. Germany soon contracted with other countries for the recruitment of foreign labor, forming agreements with Spain and Greece in 1960, with Turkey in 1961, and with other countries in subsequent years.⁵⁴ As Germany's need for labor increased in the 1960s, it increased its recruitment efforts, receiving its one-millionth foreign worker in 1964 with open arms.⁵⁵ By 1973, 2.6 million guest workers resided in West Germany, comprising twelve percent of the employed population.⁵⁶

Like the Bracero Program initiated by the U.S. government, the purpose of the recruitment of foreign workers was not the fostering of immigration but of temporary labor. Only those who could work were recruited. Although wages were negotiated by trade unions, they were nonetheless low and the work was undesirable, consisting of jobs most Germans were unwilling to perform.⁵⁷ Moreover, unlike the U.S. government's general distaste for contract

52. See Münz & Ulrich, *supra* note 48, at 77. I intend "Germany" prior to the fall of the Berlin Wall and reunification of West and East Germany to mean West Germany. Migration movements had the most substantial effects on West Germany.

53. See *id.* at 78.

54. See *id.*

55. See *id.* at 79.

56. See *id.* The international oil crisis of 1973 and a domestic economic recession ended Germany's recruitment program. See Seibel, *supra* note 49, at 911.

57. See Münz & Ulrich, *supra* note 48, at 79.

labor evidenced by its mass legalization efforts,⁵⁸ Germany did not naturalize its foreign laborers. In fact, residence permits only lasted one year until the government relaxed renewal restrictions in 1971 in response to widespread criticism.⁵⁹

Although the recruitment program ended in 1973, the laborers remaining in Germany soon sent for their families.⁶⁰ Because of family reunification and subsequent births, the number of foreign dependents has tripled since 1973.⁶¹ One estimate indicates that nearly fifty percent of all births in Frankfurt are to families of foreign workers.⁶² Although the government encouraged remigration, these workers and their families clearly have little desire to return home now.⁶³ Foreign workers constitute between fifteen and twenty percent of Germany's urban work force.⁶⁴ Furthermore, foreign workers and their families make up the largest minority group in Germany.⁶⁵

2. The Second Wave: 1988-1991

a. Ethnic Germans: The Mass Homecoming

After World War II, Germans living in East Central Europe and former eastern parts of the Reich were expelled and forced to resettle.⁶⁶ By the early 1950s, 12 million of these Germans, or *Vertriebene* ("expellees"), had resettled in West and East Germany.⁶⁷ Between 1950 and 1987, the migration, or homecoming, of ethnic Germans was greatly slowed by

58. See *supra*, note 25 and accompanying text.

59. See *id.* at 79, 82. In 1971, foreign workers who had worked in Germany for five years could claim valid work permits for five more years. See *id.* at 82.

60. See *id.* at 82-83. New regulations do continue to allow some contract labor and special work permits. Also, citizens of the European Union (EU), as well as the European Economic Area (EEA), may now live and work in any country within the EU and EEA.

61. See Seibel, *supra* note 49, at 912.

62. See *id.*

63. See Münz & Ulrich, *supra* note 48, at 82-84.

64. See Seibel, *supra* note 49, at 912-13.

65. See *id.* at 912.

66. See Münz & Ulrich, *supra* note 48, at 68-70.

67. See *id.* at 69. Ethnic Germans who were expelled (*Vertriebene*) were victims of ethnic cleansing after the war. Since 1950, ethnic Germans immigrated by choice (*Aussiedler*) under bilateral agreements between West Germany

immigration restrictions imposed by Soviet socialist countries.⁶⁸ But in the late 1980s, when the Iron Curtain fell, ethnic Germans were free to migrate home to Germany.⁶⁹ Between 1950 and 1988, the number of ethnic Germans, or *Aussiedler* (“transferees”) had averaged 37,000 per year.⁷⁰ In 1988, that figure nearly tripled; and in 1990, 397,000 *Aussiedler* immigrated to Germany.⁷¹ From 1988 to 1994, a grand total of 1.9 million ethnic Germans immigrated to Germany.⁷²

The immigration of ethnic Germans has generated much debate in recent years. Article 116 of the German Basic Law (Germany’s constitution, or *Grundgesetz*) defines Germans in part as those “admitted to the territory of the German Reich within the frontiers of December 31, 1937 as a refugee or expellee of German ethnic origin (*Volkszugehörigkeit*) or as the spouse or descendant of such a person.”⁷³ Later statutory law provides that ethnicity be based on proclamation of German nationality and on evidence, such as language, heritage and culture.⁷⁴ Some *Aussiedler*, who have immigrated from Eastern Europe and the former Soviet Union in recent years, came from German communities established as early as the thirteenth century, but because they could prove some German heritage, they had virtually unqualified rights to immigrate and become German citizens.⁷⁵ The legislature recently enacted some restrictions on the admission of ethnic Germans, but they nevertheless continue to be the most privileged group of foreign residents.⁷⁶

and Soviet socialist countries. This difference explains the reason for the *Vertriebene/Aussiedler* distinction. *See id.*

68. *See id.* at 69-70.

69. *See id.* at 71.

70. *See id.* at 70.

71. *See id.* at 71.

72. *See id.*

73. GG (*Grundgesetz* (German federal constitution)), art. 116; *see also* Seibel, *supra* note 49, at 916. Article 116 was drafted as a humanitarian response to the persecution and expulsion of Germans by East European countries following the war. *See id.* at 917-18.

74. *See id.* at 916-17.

75. *See id.* at 917.

76. *See id.*

b. Asylum Seekers: Germany Bears the Burden for Europe⁷⁷

Until July 1, 1993, Germany's asylum laws were the most liberal in Western Europe. Article 16 of the Basic Law simply stated: "Politically persecuted persons enjoy the right to asylum."⁷⁸ Like the provisions regarding ethnic Germans, this liberal provision was drafted in 1949 in response to wartime circumstances, specifically to the acceptance by other nations of Germans politically persecuted under the Nazi regime.⁷⁹ After the war, Article 16 granted asylum applicants an automatic right to asylum provided they could prove persecution.⁸⁰

The liberal asylum laws did not inspire controversy until recent years. Around 1981, after the military coup in Turkey and the implementation of martial law in Poland, the number of asylum applicants increased substantially, prompting the government to enact administrative restrictions.⁸¹ Consequently, Turkish and Polish citizens had to apply for visas. Numbers again rose in the mid-1980s and reached an historical peak in the early 1990s as a result of war and ethnic cleansing in former Yugoslavia, particularly in Croatia and Bosnia, but also in Serbian Voyvodina and Kosovo.⁸² In 1992, the annual figure of persons granted asylum reached 438,191.⁸³ In 1994, more than 1.7 million refugees and asylum seekers resided in Germany, according to the German Ministry of the Interior.⁸⁴ According to the European Consultation on Refugees and Exiles, between 1984 and 1990, Germany processed nearly 700,000 asylum

77. German asylum law has engendered much debate. For further discussion, see the following sources: Heinz-Jürgen Axt, *The Impact of German Policy on Refugee Flows from Former Yugoslavia*, in *MIGRANTS, REFUGEES, & FOREIGN POLICY* (Rainer Münz & Myron Weiner eds., 1997); Judith Hippler Bello et al., *German Law of Political Asylum*, 91 *AM. J. INT'L L.* 355 (1997); Steven Edward Grubb, Comment, *Dealing with the Hate: The Changing Face of German Asylum Law*, 12 *DICK. J. INT'L L.* 497 (1994); *REFUGEES & THE ASYLUM DILEMMA IN THE WEST* (Gil Loescher ed. 1992).

78. See Seibel, *supra* note 49, at 913.

79. See *id.* at 913-14.

80. Asylum claims are also governed by the Aliens Act of 1965 (*Auslandergesetz*), often referred to as the "foreigners' laws." See Gerald L. Neuman, *Immigration and Judicial Review in the Federal Republic of Germany*, 23 *N.Y.U. J. INT'L L. & POL.* 35, 41 (1990) [hereinafter *Immigration and Judicial Review*].

81. See Münz & Ulrich, *supra* note 48, at 85.

82. See *id.* at 86.

83. See Seibel, *supra* note 49, at 914.

applications—more applications than all the other western European countries combined.⁸⁵

Approximately two out of three applicants stayed in Germany; and although many applicants were never granted asylum, they are tolerated for political and humanitarian reasons.⁸⁶ Germany has recently amended its asylum law in an attempt to reduce the number of asylees.⁸⁷ The country's recent response to this mass migration is the focus of the final section of this paper.

III. Citizenship Laws: Defining Membership

Physical, or territorial, boundaries are not the only boundaries nations employ in determining who will and will not belong. States also use political boundaries, such as citizenship, to shape and define the national community. Hence, while some may migrate across physical borders, they may never cross the political boundaries.⁸⁸ The following section analyzes U.S. and German citizenship and naturalization laws, exploring how these laws reflect underlying political policies and cultural values. A discussion of citizenship laws, however, is only one means by which to analyze membership; for example, others have explored membership in immigration states by focusing on the political and legal rights of aliens, or noncitizens, in comparison with citizens.⁸⁹ A discussion of the rights of aliens within their

84. See Münz & Ulrich, *supra* note 48, at 88.

85. See Philip Rudge, *The Asylum Dilemma--Crisis in the Modern World: A European Perspective*, in REFUGEES AND THE ASYLUM DILEMMA IN THE WEST 93, 95-96 (Gil Loescher ed. 1992); see also Chart 1.

86. See Münz & Ulrich, *supra* note 48, at 88.

87. See *infra* Part V.B.

88. See Sarah V. Wayland, *Citizenship and Incorporation: How Nation-States Respond to the Challenges of Migration*, 20 FLETCHER F. WORLD AFF. 35, 38 (1996).

89. For example, the analysis of constitutional jurisprudence illuminates the liberty rights afforded citizens and noncitizens as well as the role of judicial review in immigration law. See generally *Immigration and Judicial Review*, *supra* note 80. Because the Federal Constitutional Court (*Bundesverfassungsgericht*) is young, its immigration jurisprudence seems far more consistent than the U.S. Supreme Court's immigration jurisprudence, which traces its origins to the Chinese Exclusion Case and racial discrimination in the late nineteenth century. See *supra* Part II.A.1; see also Rainer Arnold, *The German Constitutional Court and Its Jurisprudence in 1996*, 11 TUL. EUR. & CIV. L.F. 85 (1996). For discussion of the rights of noncitizens and citizens in Germany and the United States, see William Rogers Brubaker, *Membership Without Citizenship: The Economic and Social Rights of Noncitizens*, in IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 145 (William Rogers Brubaker ed. 1989); DAVID P. CONRADT, *THE GERMAN POLITY* 69-81 (3d ed. 1986) (discussing rights of minorities, including guest workers and refugees); Mark J. Miller, *Political Participation and Representation of Noncitizens*, in IMMIGRATION AND POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 129 (William Rogers

respective communities is, however, outside the scope of this paper. Instead, the following section focuses on laws that reflect the divergent policies of U.S. and German citizenship. As such, rather than *evaluating* citizenship, the analysis primarily examines who has *access* to citizenship.⁹⁰

A. The Attribution of Citizenship at Birth

Two principles determine different states' approaches to the attribution of citizenship: *jus soli* and *jus sanguinis*. Strictly defined, *jus soli* grants citizenship to all those born within the state's territory, while *jus sanguinis* confers citizenship only on those descended from earlier citizens.⁹¹ In other words, *jus soli*, translated "law of the soil," determines citizenship by physical place or territory; *jus sanguinis*, translated "law of the blood," determines citizenship according to bloodlines, or ethnic origin. If applied without exception, both principles create arbitrary results, leading most states to adopt policies reflecting a combination of the two principles.⁹² The difference in U.S. and German citizenship laws, however, reflects their divergent foundations: the United States is founded on the principle of *jus soli* while Germany is founded on the principle of *jus sanguinis*.

The principle of *jus soli* is crystallized as a legal right under the Fourteenth Amendment to the U.S. Constitution: ". . . all persons born or naturalized in the United States . . . are citizens of the United States."⁹³ Early case law demonstrates a strong belief in this philosophy of

Brubaker ed. 1989); Michael Scapelanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 724-38 (1996).

90. William Rogers Brubaker has noted the distinction between debates addressing *access* to citizenship and debates addressing the *value*, or legal significance of citizenship. Value debates note that citizenship is devalued, or decreases in legal significance, when noncitizens possess many of the rights citizens possess. See William Rogers Brubaker, *Citizenship and Naturalization: Policies and Politics*, in IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 99, 121 (William Rogers Brubaker ed. 1989) [hereinafter *Citizenship and Naturalization*]; see also Peter H. Schuck, *The Devaluation of American Citizenship*, in CITIZENS, STRANGERS AND IN-BETWEENS 163 (Peter H. Schuck ed. 1998).

91. See *Citizenship and Naturalization*, *supra* note 90, at 102.

92. See *id.*

93. U.S. CONST. amend. IV.

membership. In *United States v. Ark*,⁹⁴ the United States Supreme Court held that a child born to Chinese parents within the United States is a citizen and, therefore, not subject to the Chinese Exclusion Act. Hence, the territorial understanding of citizenship was strong enough to stem the tide of public opinion and discrimination (at least in this case). As a land of immigration, the U.S. population was composed of various ethnic groups. Furthermore, underlying policies of assimilation helped blur ethnic lines and define an American as someone who resided in America.⁹⁵ As such, the physical boundary to membership, rather than the political boundary, has been the main focus of U.S. law and public scrutiny.

In stark contrast to the United States, Germany follows the principle of *jus sanguinis*. Because Germany historically has been a land of emigration, rather than immigration, German citizenship law is not even a century old.⁹⁶ In 1913, prompted by the desire to prevent foreign workers from attaining citizenship, the German government drafted a statute, which continues to serve as the basis of Germany's citizenship law.⁹⁷ The statute grants citizenship under three circumstances: birth to a parent of German citizenship, adoption by a parent with German citizenship, or naturalization by the individual.⁹⁸ The codification of the *jus sanguinis* principle reflects a deeply rooted ethnic identity, defining who is German and who belongs in the German community. After World War II, this conception of the German polity helped bolster hope in reunification and in the acceptance of Germans expelled from Eastern Europe.

B. The Acquisition of Citizenship: Naturalization Laws

1. U.S. Naturalization as Expectation, Right and a Policy of Assimilation

U.S. Citizenship may be obtained, not only by birth, but by acquisition as well. In

94. 169 U.S. 649 (1898).

95. U.S. law, however, did not recognize African-Americans as citizens because slaves were not considered part of the political body. *See Dred Scott v. Sandford*, 60 U.S. 393 (1856).

96. *See Seibel, supra* note 49, at 922.

addition to granting citizenship to children of U.S. citizens living abroad, U.S. law allows legal permanent residents to acquire citizenship by naturalization petition.⁹⁹ In fact, naturalization is the expected end of legal residency. In granting Congress the power to “establish an uniform Rule of Naturalization,” the drafters of the Constitution announced the nation’s expectation that those migrating to the United States would eventually naturalize.¹⁰⁰ Today, the expectation of naturalization remains strong. In 1996, a record-breaking year, more than one-million resident aliens were naturalized.¹⁰¹ The large numbers of naturalization petitions reflect, not only the expectations of the U.S. government, but also the expectations of the immigrant population. In 1979, a study of Mexican immigrants revealed that 70 percent of the group that had immigrated six years earlier intended to acquire U.S. citizenship.¹⁰²

Reflecting this expectation, U.S. naturalization law may be characterized as an as-of-right system, rather than a discretionary system.¹⁰³ Responding to mass immigration, naturalization law and policy sanctions a *right* to citizenship for those who meet minimum eligibility requirements. In the nation’s incipient years, federal naturalization laws reflected historical prejudices; single women, for example, could not petition for naturalization.¹⁰⁴ By the 1950s, however, U.S. law prohibited excluding applicants based on social, ethnic or religious reasons.¹⁰⁵ Now, after legally residing in the United States for five years, a legal permanent resident of “good moral character” may naturalize provided she can demonstrate both an ability to speak,

97. The statute is called the *Reichs- und Staatsangehörigkeitsgesetz*. *See id.*

98. *See id.*

99. *See* 8 U.S.C. § 1427 (2000).

100. U.S. CONST. art. I, § 8.

101. *See* Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 14 (1997) (noting the 1996 petition numbers were more than twice the 1995 numbers); *see also* Table 1.

102. *See Citizenship and Naturalization*, *supra* note 90, at 120.

103. *See id.* at 109.

104. *See* DESIPIO & DE LA GARZA, *supra* note 7, at 68-70.

105. *See id.*

read and write English, and knowledge of basic civic facts and principles.¹⁰⁶

Moreover, naturalization has played a major role in the United States' policy of assimilation. As discussed above, the INS routinely naturalized migrant farm workers in the 1950s and 1960s when public concern escalated.¹⁰⁷ Certainly, one means by which to placate public concern over large numbers of undocumented aliens is simply to legalize them, thereby incorporating them as acceptable members of the polity. The Immigration Reform and Control Act of 1986 contained substantial amnesty provisions, legalizing several categories of illegal aliens, including agricultural and other workers and Cubans and Haitians.¹⁰⁸ The government legalized all applicants for amnesty, which totaled 2.67 million people.¹⁰⁹ Any alien illegally living in the United States since January 1, 1982 could apply for temporary legal status, which could ultimately become permanent legal status and citizenship.¹¹⁰

Providing access to citizenship, however, does not guarantee aliens that will naturalize; they may not choose to do so.¹¹¹ The 1996 reforms in immigration and welfare law, however, have increased the value of citizenship and have prompted a sharp increase in naturalization applications, making access to citizenship far more important as a practical matter.¹¹² Because of the newly created disparity in economic and social rights between citizens and resident aliens, citizenship promises to be an even stronger marker of membership in the American community. Crossing the political boundary, in addition to the physical boundary, is therefore becoming

106. See 8 U.S.C. § 1427.

107. See *supra* Part II.A.2.

108. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.).

109. See Peter H. Schuck, *The Immigration System Today*, in *CITIZENS, STRANGERS, AND IN-BETWEENS* 3, 13 (Peter H. Schuck ed. 1998).

110. See *id.*

111. Desire to naturalize falls more within the value of citizenship debate than the access debate and is, therefore, outside the scope of this discussion.

112. See *infra* Part V.A.

more important because resident aliens now have a much greater incentive to naturalize.¹¹³

2. German Naturalization Laws: Ethnic Privilege, Discretion and Segregation

Germany's naturalization figures are much lower than those of other European nations. In 1986, Germany's naturalization rate (the percentage of foreign residents who naturalized that year) was only 0.3 percent, equaling one-tenth of the United States' rate and only one-fifteenth of Sweden's rate.¹¹⁴ Significantly, although seventy percent of the foreign population at this time was composed of foreign guest workers and their descendants, only 0.2 percent of this group sought naturalization.¹¹⁵ Not surprisingly, fifty percent of those naturalized between 1973 and 1984 were ethnic Germans.¹¹⁶

Germany, throughout most of its history, has struggled to gain and maintain political unity.¹¹⁷ Partly as a consequence of this history, the German perception of nationhood is based on ethnic and cultural factors. Despite efforts by the West German government to recognize a citizenship separate from East Germany, a strong collective belief in a single, transnational German citizenship prevailed throughout Germany's political division following World War II. Citizenship law recognized Germans as a homogenous community sharing the same ethnicity, culture and language.¹¹⁸ The preamble to Germany's Basic Law captures and legally empowers this belief: "The entire *German* people is called on to achieve in free self-determination the unity and freedom of Germany."¹¹⁹

References to Germans or the German people, rather than German citizens, resonate

113. Unfortunately, the same overburdened system must process increasing numbers of naturalization petitions. See *infra* note 163 and accompanying text.

114. Sweden also follows the principle of *jus sanguinis*. See Seibel, *supra* note 49, at 923; see also Table 3.

115. See *id.*

116. See *id.*

117. Germany was legally reunited October 3, 1990. Joint elections were held in December.

118. See Kay Hailbronner, *Citizenship and Nationhood in Germany*, in IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 67, 74 (William Rogers Brubaker ed. 1989).

throughout the Basic Law. As might be expected, these references include not only Germans living in Germany but ethnic Germans living abroad as well; in fact, Article 116(1) of the Basic Law explicitly incorporates ethnic Germans into the political community.¹²⁰ Indeed, if ethnic Germans reside in Germany, they are not classified as foreigners. Rather, they enjoy a special classification as status-Deutsche (“status Germans”) and have a legal right to citizenship if they fulfill minimum criteria.¹²¹ Even if ethnic German residents choose not to naturalize, they nonetheless enjoy most of the rights and privileges of citizenship, including economic and political rights. For example, ethnic Germans may reside in Germany without permits, may work and travel freely, and may vote as citizens. They also automatically receive German passports and have the right to housing and social assistance.¹²²

With the exception of ethnic Germans, Germany’s naturalization system is based on a discretionary model, in contrast to the as-of-right system in the United States.¹²³ Federal regulations, which supplement the 1913 naturalization statute, contain vague standards that provide for naturalization as a matter of administrative discretion, not individual right.¹²⁴ Even if the naturalization standards are met, the state does not have to grant citizenship. Conferral of citizenship must be in the public interest because, according to the regulations, Germany “is not a country of immigration [and] does not strive to increase the number of its citizens through naturalization.”¹²⁵ Indeed, the highest administrative court emphasized naturalization as “an

119. GG, preamble, *reprinted in* MAIN PRINCIPLES OF THE GERMAN BASIC LAW (Christian Starck ed. 1983).

120. GG, art. 116 (1). While the constitutional language is sufficiently broad to cover Germans living abroad, a German would need to reside in Germany to participate politically.

121. *See* Seibel, *supra* note 49, at 923 n.112. Indeed, the requirements were so minimal that the West German government permitted errors on applications, even allowing applicants to cite the wrong nationality (Polish, for example, rather than German). *See id.* at 923 n.113. The legislature did pass laws in 1990 and 1992 making ethnic German immigration less lenient and restricting the number accepted each year to 220,000, but ethnic Germans continue to enjoy substantially more rights and privileges than other immigrant groups. *See id.* at 924.

122. *See id.* (noting some of these rights are slightly restricted by the new laws).

123. *See Citizenship and Naturalization, supra* note 90, at 109-111.

124. *See* Seibel, *supra* note 49, at 925.

125. *See Citizenship and Naturalization, supra* note 90, at 111.

exception that comes into consideration only in individual cases, in which it seems to be in the interest of the state.”¹²⁶

While 1990 revisions to Germany’s Foreigners Laws (*Auslandergesetz*) lessened the amount of discretion granted to government officials, the revisions did not create a *right* to citizenship.¹²⁷ Although the new standards are more clearly defined, they continue to be mere guidelines given government discretion. Under the new laws, a foreign resident *may* be naturalized if, after living in Germany for eight years, he or she is between sixteen and twenty-three years old; has attended school in Germany for six years; has no serious criminal record; and has relinquished any former citizenship. In order to facilitate the naturalization of second-generation foreign residents, an alien who has resided in Germany for more than fifteen years and who applied prior to December 31, 1995 may be naturalized if he or she lacks a serious criminal record, is self-supporting, relinquishes former citizenship and pays a reduced fee. Adherence to *jus sanguinis* in determining citizenship by birth (ascriptive citizenship) and use of administrative discretion continue, ensuring that naturalization remains an exception to the rule. Indeed, conservative federal officials continue to insist that Germany is not a land of immigration, and integration of foreigners into the German community remains controversial.¹²⁸

Furthermore, the possibility of encouraging naturalization is not even an issue in current immigration debates in Germany. Debates revolve around controlling admission into Germany and furthering the “integration” of foreigners currently living in Germany through education and

126. *See id.* The court continued, stating governmental officials must consider “not only the personal suitability of the applicant but also whether his naturalization is desirable from general political, economic, and cultural points of view.” *See id.*

127. Figures suggest, however, that the revisions have increased the naturalization rate slightly. In 1993, 29,000 foreigners were naturalized under the new provisions. Since 1990, the naturalization rate has increased from 0.4% to 1.0%. *See* Table 3.

128. *See* Thomas P. Spieker, *Despite 7 Million Aliens, Germany Says it Has No Immigrants*, DEUTSCHE PRESSE-AGENTUR, Sept. 29, 1996.

permanent residency statuses, not naturalization.¹²⁹ Foreigners are not even defined as immigrants; according to one report, a top-level government guideline articulates the policy that foreigners are welcome to visit Germany but not to settle permanently.¹³⁰ Germany's naturalization policy, therefore, shares little with U.S. policy. Membership in the German political community is hardly welcomed, ensuring the continued segregation, rather than assimilation, of foreign residents.

Low naturalization rates, however, may also reflect a lack of desire among foreigners to seek citizenship. In contrast to the Mexican immigrants intending to seek U.S. citizenship discussed above, a 1985 survey revealed that only 7.5 percent of Turks, 6.9 percent of Yugoslavs, and 4.4 percent of Italians intended to pursue German citizenship.¹³¹ Foreign residents enjoy many rights without citizenship, including political rights, such as the right of political speech, the right to associate freely, and the right of assembly.¹³² Given these privileges and Germany's policy discouraging naturalization, many foreigners do not seek naturalization. Moreover, many refugees and asylees intend to return home when conditions in their countries of origin change and they no longer fear persecution.¹³³ Lastly, many foreigners do not want to relinquish their former citizenship.¹³⁴ Unlike U.S. law, German law generally prohibits dual or plural citizenship.

C. A Note on Plural Citizenship

129. *See id.*

130. *See id.* *But see Parliament Debates German Immigration Law*, DEUTSCHE PRESSE-AGENTUR, Dec. 3, 1998. Chancellor Gerhard Schroeder's Social Democratic Party planned to introduce a bill that would grant *jus soli* citizenship to all children, simplify the naturalization process for foreigners and allow dual citizenship. The proposed plan, however, did not have the support of any of the other four parties in the Bundestag and, therefore, has virtually no chance of becoming law. *See id.*

131. *See Hailbronner, supra* note 118, at 76. Over two million Turkish nationals, the largest foreign group, live in Germany. *See Kohl's CDU Against Immigration, Dual Nationality*, DEUTSCHE PRESSE-AGENTUR, Apr. 21, 1997.

132. *See Hailbronner, supra* note 118, at 76.

133. *See id.*

134. *See id.*

The idea of dual or plural citizenship has generated considerable debate among politicians and scholars.¹³⁵ In the United States, a resident applying for naturalization does not have to be released from his or her previous citizenship. In the oath of allegiance, however, the naturalized citizen must “renounce and abjure all allegiance and fidelity to support any . . . state . . . of which [he or she has] heretofore been a subject or citizen.”¹³⁶ Hence, the U.S. government does not formally recognize other citizenship, but other nations may choose not to accept the oath’s renunciation as an abdication of citizenship.¹³⁷ A nation, such as Germany, which follows the principle of *jus sanguinis*, could therefore continue to recognize a naturalized U.S. citizen as a German citizen because the citizen’s ethnicity remains constant.

Germany has been criticized for restricting plural citizenship.¹³⁸ In truth, however, one-third of all German naturalizations result in dual citizenship because German law makes an exception for “applicants who have had the majority of their schooling in Germany, who have reached the age of conscription, and whose state of origin will not permit them to renounce their previous citizenship without having accomplished their military service.”¹³⁹ As a consequence of this rarely cited provision, most male second-generation Turkish and Greek residents may acquire German citizenship without relinquishing former citizenship.¹⁴⁰ As a practical matter, the underlying principle of *jus sanguinis* makes further incorporation of plural citizenship into German law nearly impossible.¹⁴¹ In short, the historical policies and approaches to immigration have determined the place of plural citizenship in both Germany and the United States.

IV. Legal Manifestations of Attitudes About Who Belongs: Temporary Protection and

135. See *Citizenship and Naturalization*, *supra* note 90, at 116. See generally Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411 (1997).

136. See DESIPIO & DE LA GARZA, *supra* note 7, at 72.

137. See *Citizenship and Naturalization*, *supra* note 90, at 116.

138. See Seibel, *supra* note 49, at 935-42 (recommending Germany adopt more liberal policies on dual citizenship).

139. See *Citizenship and Naturalization*, *supra* note 90, at 116.

140. See *id.*

141. See *Citizenship and Naturalization*, *supra* note 90, at 116-17.

Alien Suffrage

A. Temporary Protected Status: Differing Definitions of Temporary

The idea of temporary protection in the United States originated in the 1950s. Historically, the executive branch has used temporary protection to further its political objectives, accepting, for example, persons from perceived communist nations during the Cold War.¹⁴² Under the Immigration Act of 1990, the U.S. Attorney General received the authority to grant temporary protected status (of eighteen months) to nationals of certain countries from regions in political or environmental turmoil.¹⁴³ Temporary Protected Status (TPS) is available, however, only to aliens residing in the United States; whether to allow large numbers of refugees into the United States for humanitarian reasons continues to be governed by the President's general discretionary power.¹⁴⁴

The "temporary" aspect of TPS, however, is questionable. During the 1980s, the Attorney General granted TPS to some Central American refugees living in the United States.¹⁴⁵ Despite the short period allowed by the TPS provisions, most of the refugees remained for extended periods of time.¹⁴⁶ In 1997, Congress granted many of them, including all Nicaraguans and Cubans, automatic permanent residency.¹⁴⁷ Thus far, TPS has frequently led to permanent residency rather than temporary refuge.¹⁴⁸ Interestingly, Congress's sweeping grant of TPS in 1997 followed closely behind the 1996 reforms, which many Americans believed contained

142. *See infra* note 110.

143. Pub. L. 101-649, 104 Stat. 4978 (1990) (codified in scattered sections of 8 U.S.C.).

144. *See* Colleen V. Thouez, *New Directions in Refugee Protection*, 22 FLETCHER F. WORLD AFF. 89, 100 (1998).

145. *See id.* at 99. Temporary protection was denied persons from El Salvador and Guatemala because the U.S. government, namely the Reagan administration, supported the governments of these nations. The only other large group of Central Americans were from Nicaragua, which was under a perceived communist regime. *See* Ari Weitzhandler, Comment, *Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens*, 64 U. COLO. L. REV. 249 (1993).

146. *See* Thouez, *supra* note 144, at 100.

147. *See id.*

148. *See id.* at 99-101.

draconian solutions to the refugee problem.¹⁴⁹ Clearly, public pressure played a central role in the use of TPS by Congress to ease the deportation envisioned by the 1996 reforms.¹⁵⁰

In contrast, Germany's use of TPS is a recent reaction to the stream of asylum seekers and refugees from Eastern Europe discussed in the first section of this paper. Germany's early recognition of Croatia and Slovenia as independent states after the eruption of the Yugoslavian Civil War in 1991 may have prompted the refusal by other European states to share the burden. In the end, Germany received 350,000 of the 380,000 Bosnian refugees who migrated to Western Europe.¹⁵¹ With public concern over liberal asylum laws mounting, the German government gained support for the admission of these refugees through special TPS laws, which allowed for refuge only until the Bosnian conflict was resolved.¹⁵²

Accordingly, the German government initiated the expulsion of Bosnian refugees in the fall of 1996 pursuant to the 1995 Dayton Peace Accords, which provided for their repatriation.¹⁵³ But international pressure, including pressure from the United Nations High Commissioner for Refugees, slowed the repatriation process, resulting in the return of only 60,000 refugees.¹⁵⁴ In response to international sentiment that repatriation be voluntary, German officials argued the war had ended and refugees should be required to return and help rebuild their country, as Germans were required to do following World War II.¹⁵⁵ Moreover, officials argued that they had assured the German people that TPS would indeed be temporary.¹⁵⁶ Germany's federal interior minister, Manfred Kanther, proclaimed: "Taking in civil war victims is not a hidden form

149. *See id.* at 100-01. The fact that conservatives in Congress strongly supported this large conferral of permanent residency reveals the strength of public opinion. *See id.*

150. *See id.* at 99 n.65.

151. *See id.* at 98.

152. *See id.* at 99.

142. *See id.* at 98.

154. *See Germany to Slowly Begin Expelling 320,000 Bosnian Refugees*, DEUTSCHE PRESSE-AGENTUR, Sept. 30, 1996.

155. *See Thouez, supra* note 144, at 99.

of immigration.”¹⁵⁷

TPS clearly illustrates how seemingly similar legal provisions can be justified by drastically different policies and implemented in divergent ways. In both the United States and Germany, public opinion and cultural values combined with international pressures to shape the government’s policies. While German culture will not tolerate “hidden immigration,” even for humanitarian reasons, U.S. culture is receptive to mass naturalizations and generally suspicious of overly stringent immigration laws. Germans understand foreign residents as visitors, while Americans understand foreign residents as potential members of the community, provided they integrate relatively quickly into society.

B. Alien Suffrage: Similar Results Based on Different Understandings of Democracy

The right to vote is perhaps the most prized privilege of membership in a democratic nation. Those who possess the right have a recognized voice in their communities. Currently, alien suffrage does not exist in either the United States or Germany, but the history of alien suffrage in the two countries reveals differing democratic ideals and divergent understandings of who belongs in the political community.

Article I of the U.S. Constitution requires that members of the House of Representatives be elected by “the People of the several States.”¹⁵⁸ Defining who the “people” are can be difficult. As a matter of constitutional law, alien suffrage is wholly discretionary and is therefore neither required nor prohibited by the Constitution.¹⁵⁹ In fact, several nineteenth-century pioneer territories, as well as resulting states, allowed resident aliens to vote.¹⁶⁰ Between 1890 and 1928,

156. *See id.*

157. *See Germany to Slowly Begin Expelling, supra* note 154.

158. U.S. CONST., art. 1.

159. *See* Gerald L. Neuman, “*We are the People*”: *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT’L L. 259, 292 (1992).

160. *See id.* at 299-300.

however, all alien suffrage disappeared as the frontier closed and immigration laws became more restrictive in response to factors discussed above.¹⁶¹ Nonetheless, given America's history as a nation founded on immigration, participation by aliens in the political process does not automatically violate traditional democratic principles. Indeed, as previously discussed, U.S. culture and policy revolve around a territorial definition of membership. Alien suffrage, therefore, is theoretically constitutional and is even permitted in a few local communities.¹⁶²

Conversely, the Federal Constitutional Court of Germany has concluded that alien suffrage would violate democratic principles of popular sovereignty as expressed in the Basic Law.¹⁶³ The Court held that two state statutes, which allowed certain foreign residents to vote, violated the constitutional mandate that “[a]ll state authority emanates from the people,” as well as other similar provisions.¹⁶⁴ As noted earlier, “the people” refers to the *German* people, including citizens of Germany and ethnic Germans. The Basic Law's implicit definition of democracy clearly contradicts the U.S. definition of democracy in that it *automatically* excludes a substantial number of people from participation in the political process,¹⁶⁵ whereas the U.S. Constitution's definition of “the people” is much more ambiguous. In fact, unlike the U.S. Constitution, the German Basic Law precludes alien suffrage at local levels as well.¹⁶⁶ Thus, although alien suffrage generally does not exist in either nation, the German rationale differs dramatically from American justifications.

V. Controlling the Borders: Fortifying the Physical Barrier to Membership

A. United States: Legal Status Emerges as a Marker of Membership

161. *See id.*

162. Residency figures prominently in the U.S. Supreme Court's discussions of the “political community.” *See id.* at 314 (discussing *Dunn v. Blumstein*, 405 U.S. 330 (1972)).

163. *See id.* at 284-85.

164. GG, art. 20(2).

165. Although they are few, naturalized citizens (of non-German heritage) are citizens and entitled to all the concomitant rights.

In November 1994, Californians voted for the controversial Proposition 187, a measure intended to exclude undocumented aliens from receiving state social services, health care and education.¹⁶⁷ Although the measure has generated much controversy, in reality, these laws will have little, if any, practical effect. Even if Proposition 187 survives the maelstrom of constitutional challenges, the complications inherent in its implementation will limit its effectiveness. The significance of Proposition 187 is not its passage but its message: popular concern, and even resentment, is rising. Americans are concerned that illegal immigration threatens their economy by robbing them of their jobs and overburdening public assistance programs.¹⁶⁸ Whether these concerns are justifiable is not germane to this discussion;¹⁶⁹ rather, the relevant issue is the legal response to this growing public concern.

Largely in response to Proposition 187 and other evidence of public concern over illegal immigration, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act in 1996.¹⁷⁰ The Act contains the most severe reforms in recent memory intended to control the migration of illegal aliens. Notable provisions include: the requirement that INS officials exclude aliens lacking proper documentation at the border without judicial review, restrictions on a deported alien's ability to re-enter the country legally, substantial increases in border patrol,

166. See GG, art. 28 (containing "homogeneity principle" that requires the incorporation of Basic Law at all levels).

167. See Peter H. Schuck, *The Message of Proposition 187: Facing Up to Illegal Immigration*, in *CITIZENS, STRANGERS, AND IN-BETWEENS* 149 (Peter H. Schuck ed. 1998).

168. See Frank D. Bean et al., *The Changing Demography of U.S. Immigration Flows*, in *MIGRATION PAST, MIGRATION FUTURE* 121 (Klaus J. Bade & Myron Weiner eds. 1997) (analyzing the history of U.S. migration and arguing anti-immigrant sentiment is generated by economic anxieties).

169. In fact, public concern is localized in areas with the highest number of undocumented aliens, such as California (containing about 40% of the overall undocumented population). See INS Statistics, (visited Aug. 1, 2000) <<http://www.ins.usdog.gov/stats/illegalalien/index.html>>. The 5 million undocumented aliens in the United States (as of October 1996) comprise only 1.9% of the total population and arguably help bolster the economy by taking low-wage, unskilled jobs that Americans will not do. See *id.*

170. Pub. L. No. 104-204, 110 Stat. 3009. The reforms have generated much scholarship. See, e.g., Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 *CREIGHTON L. REV.* 741 (1998).

and severe restrictions on claims of asylum.¹⁷¹ With these reforms, U.S. policy departed to some extent from its historical focus. Rather than naturalizing large numbers of illegal aliens as the INS had done in the past, the government chose to reduce the number of aliens entering illegally at the border.

As part of the 1996 immigration and welfare reform bills, Congress also restricted legal aliens' access to public assistance programs.¹⁷² Consequently, new legal permanent residents have lost eligibility for some federal benefits, and states now have substantial discretion in determining eligibility for some programs, such as Medicaid and Temporary Aid to Needy Families.¹⁷³ While such reforms seem patently harsh, they are less so in the overall context: Congress cut benefits to millions of U.S. citizens as well in 1996.¹⁷⁴ As noted above, these reforms are relevant to a discussion of citizenship law because they have greatly enhanced the value of citizenship, prompting record numbers of legal residents to seek naturalization.¹⁷⁵ Thus, citizenship now plays a larger role in determining who belongs in the American political community.

Although these 1996 reforms are often cited as evidence of growing anti-immigrant fervor, the picture is far more complex.¹⁷⁶ In this same year, Congress rejected proposals to

171. See *id.*; see also Paul Glastris, *Writing Murphy's Law: The New Immigration Bill May be Too Tough for Our Own Good*, U.S. NEWS & WORLD REPORT, Oct. 7, 1996, at 30; Peter H. Schuck, *Reform Continues: 1990-1998*, in CITIZENS, STRANGERS AND IN-BETWEENS 138, 144 (Peter H. Schuck ed. 1998) [hereinafter *Reform Continues*].

172. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (to be codified at 8 U.S.C. §§ 1601-45).

173. See Michael J. Sheridan, *The Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens From Becoming Public Charges*, 31 CREIGHTON L. REV. 741 (1998); see also DESIPIO & DE LA GARZA, *supra* note 7, at 87.

174. See *Reform Continues*, *supra* note 171, at 143.

175. See Glastris, *supra* note 171, at 32 (noting record numbers of applicants for citizenship in 1996, more than twice the numbers in 1995). Unfortunately, the increase has added to the considerable backlog of applications. Qualified applicants can expect to wait two to four years for naturalization. See Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 208-09 (1998).

176. See *Reform Continues*, *supra* note 171, at 140.

decrease legal immigration.¹⁷⁷ In addition, the United States admitted the largest, most ethnically diverse group of new immigrants since 1914 and legalized, through a grant of amnesty, over 400,000 illegal aliens from Central America.¹⁷⁸ U.S. immigration law has always sought to “keep the peace” by balancing public anxiety with pro-immigration ideals. When one immigrant group, such as the illegal aliens in California, becomes too large to quickly assimilate into American culture, the government responds legally and politically in order to facilitate integration.

B. Germany: Amended Laws and Unchanged Policies

The recent surge of asylum seekers in Germany, combined with the reunification of East and West Germany in 1990, has contributed to an uncertain, tumultuous political and social environment. Right-wing extremist groups have surfaced as ethnosocial tensions have mounted. In response to isolated, but violent, attacks on foreign residents and growing public concern, Germany amended its asylum provision in 1993.¹⁷⁹ Under the amended Statute of Procedure, an applicant no longer has an automatic right to asylum if he or she has arrived in Germany via a “safe third country.”¹⁸⁰ All the countries that surround Germany have been deemed safe countries, so asylum seekers must arrive by water, air or some other creative means.¹⁸¹ The new laws also provide for expedited rejection of applicants from countries believed to have no

177. *See id.*

178. *See id.*

179. *See* Seibel, *supra* note 49, at 914-16. The amendments were also prompted by the signing of two international asylum conventions by members of the European Community. Signed in 1990, both conventions contain provisions regulating review of asylum applications. *See* Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen and the German Asylum Amendment*, VA. J. INT’L L. 503, 506-09 (1993) [hereinafter *Buffer Zones*]. For further discussion of international refugee law, see Joan Fitzpatrick, *Is the 1951 Convention Relating to the Status of Refugees Obsolete?*, in IMMIGRATION ADMISSIONS 205 (Kay Hailbronner et al. eds., 1997); Rainer Hofmann, *Refugee Definition*, in IMMIGRATION ADMISSIONS 227 (Kay Hailbronner et al. eds., 1997); Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, in CITIZENS, STRANGERS AND IN-BETWEENS 282 (Peter H. Schuck ed. 1998).

180. *See* Seibel, *supra* note 49, at 914-16.

181. *See* Münz & Ulrich, *supra* note 48, at 89.

persecution.¹⁸² As discussed above, since 1993, temporary protection without examination of the particular case is possible under certain circumstances.¹⁸³

Statistics indicate that the new provisions have achieved the desired results. In contrast to the 438,191 applicants for asylum in 1992, only 127,200 people qualified for initial application in 1994.¹⁸⁴ In 1998, Germany reported only 98,644 applicants and granted asylum to only four percent of these applicants.¹⁸⁵ Although the rejected applicants were required to leave, some, of course, stayed but live today in constant fear of expulsion. In part, the numbers have decreased because Germany's neighbors, particularly the Netherlands and East Central European countries, are now shouldering more of the burden.¹⁸⁶ In addition, because of the increased governmental regulation of the asylum process, the statistics may only accurately reflect the number of *legal* asylum seekers.

Moreover, Germany's 1993 reforms may be fueling the public debate, just as the U.S. regulations of the 1920s introduced immigration as a political issue. Indeed, the strict procedures have generated substantial criticism. Asylum seekers who arrive at the Frankfurt airport from a "safe third country" or without passports are detained at the airport while their applications are reviewed.¹⁸⁷ One news story, dated January 1999, reported that approximately 150 asylum seekers were being detained in poor accommodations for up to six months, monitored by prison-like security that prevents escape and tracks movement.¹⁸⁸ In addition, stricter asylum laws have

182. In 1996, the Federal Constitutional Court held the asylum amendments constitutional, a predictable result because the Court has never held an amendment unconstitutional. *See Buffer Zones, supra* note 179, at 526.

183. *See supra* Part IV.A.

184. *See Münz & Ulrich, supra* note 48, at 90.

185. *See Less Than 100,000 Asylum Seekers in Germany Last Year*, DEUTSCHE PRESSE-AGENTUR, Jan., 8, 1999. Not surprisingly, many of the applicants (34,979) were from Yugoslavia, primarily from Kosovo.

186. *See id.*

187. *See Germany Urged to Improve "Shabby Calling Card" for Refugees*, DEUTSCHE PRESSE-AGENTUR, Jan. 16, 1999.

188. *See id.*

created an illegal immigration problem.¹⁸⁹ Many now live in fear of deportation.¹⁹⁰ One refugee advocacy group estimated that 3 to 4.5 million illegal aliens currently reside in Germany.¹⁹¹

Like the United States, Germany has responded to growing public anxiety over the presence of foreigners. Germany, however, continues to adhere to a tacitly segregationist policy: foreigners are visitors, not permanent residents or potential citizens. On a positive note, foreigners have enjoyed considerable cultural autonomy in Germany because they are not considered part of the German political community and are therefore tolerated as temporary guests.¹⁹² But recent violence and growing xenophobia foreshadow a troubled future, especially in eastern Germany where neo-Nazi extremism is mounting.¹⁹³ Moreover, reports forecasting a potential downward trend in Germany's economy raise concerns about continued future violence directed toward the country's 7.3 million foreign residents.¹⁹⁴ Germany's history as an ethnic nation, as well as foreign residents' desire for cultural autonomy, prevents the adoption of integration policies like those of the United States. Indeed, encouraging naturalization and legalization would likely inspire public anger.

VI. Conclusion

The comparison of U.S. and German immigration law is a valuable exercise for essentially two reasons. First, in exploring the history and culture behind the laws, we understand how and why the laws have developed the way they have; we delve beneath the surface and gain insight into their true meaning and motivation. The laws reflect deeply rooted

189. See Katharina Henrich, *Illegal Immigrants Live in Fear of Expulsion*, DEUTSCHE PRESSE-AGENTUR, Dec. 11, 1998.

190. See *id.* Many illegal aliens are asylum seekers who remain after their applications have been rejected.

191. See *id.*

192. See COLLINSON, *supra* note 47, at 100.

193. See, e.g., Clive Freeman, *Asylum Seeker Bleeds to Death Trying to Flee Neo-Nazis*, DEUTSCHE PRESSE-AGENTUR, Feb. 15, 1999. Unemployment in eastern Germany since reunification has inspired much of this violence. Young Germans often blame foreigners for taking jobs from Germans.

194. See William Drozdiak, "The Moment of Truth," WASHINGTON POST NATIONAL WEEKLY ED., Mar. 29, 1999

histories and cultural values that should guide policy makers in making recommendations for future legal development. In searching for a solution to Germany's migration problem, we should resist the temptation to blindly borrow law and policies from immigration countries, such as the United States. In light of Germany's history as an ethnically defined nation, policies encouraging naturalization and assimilation may yield detrimental results. Germany, however, can learn from the United States' immigration history; it can avoid adopting discriminatory laws and can resist hasty and capricious decisions in response to public opinion.

Furthermore, this comparative analysis contains a second lesson: predicting the future of immigration law would be futile. U.S. law seems almost schizophrenic, reflecting the nation's own historical struggle to determine who belongs. U.S. policies seek to reconcile the nation's immigrant foundation with public opinion and concerns about an inefficient, overburdened INS. A fine line exists between respecting diversity and promoting assimilation, and U.S. law will continue to reflect that struggle.

In contrast, unless the German government recognizes immigration as a domestic issue, further significant development is unlikely. While Germany seems most concerned about the migration of asylum applicants, this issue may dissipate in the future. Many asylum applicants have only temporary protection status and will choose to return home or will be deported. In addition, because the recent conflict in Yugoslavia has garnered international support and cooperation, Germany will not likely continue to bear the brunt of the refugee burden. The more pressing issue is one of integration. Germany needs to recognize its recent history as a *de facto* land of immigration with an ethnically diverse population.

(noting German economy contracted by 1.6% in the fourth quarter last year).

TABLE 1

Total and Foreign-born U.S. Population: 1900-1990, 1994-1997
(Number in Thousands)

| Year | Total U.S. Population | Foreign-born Total | Foreign-born Percent* |
|-------------|------------------------------|---------------------------|------------------------------|
| 1997 | 266,792 | 25,779 | 9.6% |
| 1996 | 264,314 | 24,557 | 9.2% |
| 1995 | 262,105 | 22,989 | 8.8% |
| 1994 | 259,753 | 22,568 | 8.7% |
| 1990 | 248,710 | 19,767 | 7.9% |
| 1980 | 226,546 | 14,080 | 6.2% |
| 1970 | 203,210 | 9,619 | 4.7% |
| 1960 | 179,326 | 9,738 | 5.4% |
| 1950 | 150,845 | 10,431 | 6.9% |
| 1940 | 132,165 | 11,657 | 8.8% |
| 1930 | 123,203 | 14,283 | 11.6% |
| 1920 | 106,022 | 14,020 | 13.2% |
| 1910 | 92,229 | 13,630 | 14.8% |
| 1900 | 76,212 | 10,445 | 13.7% |

* Percentages are rounded up to the nearest tenth.

Sources: United States Census Bureau, United States Immigration & Naturalization Service. Statistics for years from 1994 to 1997 are derived from data in Table 2. Other statistics (for years from 1900 to 1990) are available at <http://www.ins.usdoj.gov/stats/308.html>.

TABLE 2

**U.S. Population Statistics Based on Citizenship and Naturalization
(Numbers in Thousands)**

| Year | Total Population | Native-born Citizens | Naturalized Citizens | Noncitizens¹ | Total Number of Naturalized Citizens as Percentage of Foreign-born Population³ | Naturalized Citizens as Percentage of Total Population |
|-------------|-------------------------|-----------------------------|-----------------------------|--------------------------------|--|---|
| 1994 | 259,753 | 237,184 | 6,975 | 15,593 | 30.9% | 2.7% |
| 1995 | 262,105 | 239,115 | 7,098 | 15,891 | 30.9% | 2.7% |
| 1996 | 264,314 | 239,757 | 7,904 | 16,653 ² | 32.2% | 3.0% |
| 1997 | 266,792 | 241,014 | 9,043 | 16,736 | 35.1% | 3.4% |

¹ Includes legal immigrants, undocumented aliens and temporary residents.

² As of April 1996, 10.5 million legal permanent residents resided in the United States. Approximately 5.8 million were eligible for citizenship, as well as an additional 687,000 children should their parents naturalize. This same year, the INS estimated about five million undocumented aliens were living in the United States. Temporary residents account for the remaining noncitizen population.

³ Foreign-born population is the total number of naturalized citizens plus noncitizens. The percentage reflects the total number of naturalized citizens, not the number naturalizing in that particular year.

All percentages are rounded to the nearest tenth.

Source: United States Census Bureau. Data compiled from various tables, *available at* <http://www.census.gov/population/socdemo/foreign>.

TABLE 3

| Naturalization of Ethnic Germans and Foreigners*, 1974-1993 | | | |
|---|--|---|--|
| Year | Ethnic Germans (Aussiedler) Absolute numbers | Foreigners ¹ Absolute numbers | Foreigners ¹ Naturalization Rate: as percentage of foreign population ² |
| 1975 | 14,198 | 10,727 | 0.3 |
| 1976 | 16,347 | 13,134 | 0.3 |
| 1977 | 18,097 | 13,535 | 0.3 |
| 1978 | 18,635 | 14,075 | 0.4 |
| 1979 | 19,780 | 15,172 | 0.4 |
| 1980 | 22,034 | 14,969 | 0.3 |
| 1981 | 22,235 | 13,643 | 0.3 |
| 1982 | 26,014 | 13,266 | 0.3 |
| 1983 | 25,151 | 14,334 | 0.3 |
| 1984 | 23,351 | 14,695 | 0.3 |
| 1985 | 21,019 | 13,894 | 0.3 |
| 1986 | 22,616 | 14,030 | 0.3 |
| 1987 | 23,781 | 14,029 | 0.3 |
| 1988 | 30,123 | 16,660 | 0.4 |
| 1989 | 50,794 | 17,742 | 0.4 |
| 1990 | 81,140 | 20,237 | 0.4 |
| 1991 | 114,335 | 27,295 | 0.5 |
| 1992 | 142,862 | 37,042 | 0.6 |
| 1993 | 154,493 | 74,058 | 1.0 |

¹ "Foreigners" includes both guest workers and asylum seekers.

² Percentages reflect the number of foreigners naturalizing in each particular year.

Note: Total population figures are not available for all years. At the end of 1994, the total population was 81.5 million, and the foreign population was 7.1 million (or 9% of the total population).

Source: Rainer Münz & Ralf Ulrich, *Changing Patterns of Immigration to Germany, 1945-1995*, in *MIGRATION PAST, MIGRATION FUTURE* 65, 101 (Klaus J. Bade & Myron Weiner eds. 1997).

Chart 1

