

# Immigration as a Democratic Challenge

*Citizenship and Inclusion  
in Germany and the United States*

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# Contents

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<i>Acknowledgements</i>	<i>page</i> viii
1 Introduction	I
2 A democratic challenge	20
3 Fair to whom?	42
4 Safeguarding liberal democracy from itself	60
5 Inclusion without consent	81
6 Keeping nationality relevant	99
7 The constitutional debate in the United States	130
8 The constitutional debate in Germany	186
9 Summary and final remarks	235
<i>Bibliography</i>	251
<i>Index</i>	261
<i>Index of Cases</i>	268

# 1 Introduction

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Postwar international labour migration to affluent and industrialized Western countries has generated some social realities that need to be questioned if the commitment of these societies to liberal democracy is to remain alive. Such a commitment currently ties membership in the polity to the enjoyment of equal political freedom. However, both in Western Europe and North America, increasing numbers of non-national residents, who have by now consolidated their residence, remain excluded from the sphere of civic equality, a sphere which has been reserved thus far for national citizens. This realm of civic equality currently sets the external boundaries to liberal democratic membership. Inclusion in the realm of civic equality refers to the sharing of a space in which political equality is preserved by the equal recognition of freedoms and rights to political participation, as well as of those other rights (e.g. civil and social) and duties recognized as relevant for that purpose. Clearly the causes, but also the degrees and kinds of exclusion of non-national residents differ largely from case to case. Generally, non-citizens are not totally excluded from the sphere of civic equality, as defined here. They enjoy many of the rights that nationals do. In spite of this, full equality is everywhere reserved for national citizens only. Although some voices have started celebrating the consolidation of a new post-national order, nowhere has nationality completely lost its importance as a source of claims of rights.

The exclusion of non-national residents from the sphere of civic equality in spite of their permanent coexistence with nationals provokes concerns about the legitimacy of the public authority and the laws that shape their lives in an increasingly pervasive manner. It is these concerns that I will mainly address. That such an exclusion has not been given great attention in modern studies on political justice may have to do with the fact that many of these studies start out from the image of closed societies, an image which appears to be less and less adequate to confront realities of mobile societies and which only more recent work addressing the moral and political issues raised by immigration in modern democracies has

started to question (Barbieri 1998; Kymlicka 1995; Schwartz 1995; Bauböck 1994a).

In Western Europe, a large proportion of the non-national residents today present were recruited as immigrants during the economic expansion of the late 1950s and '60s. They were initially perceived as guest-workers but instead have settled for good. Many of them have by now consolidated a somewhat satisfactory legal status with the recognition of almost the same civil and social rights that citizens have. They have access to the courts, and enjoy most social benefits and services as well as a legally protected and stable residential status (Hammar 1990a: 21).

However, access to some of the main avenues of political participation (e.g. voting rights in national elections or public office) is still generally closed to non-nationals (and sometimes to their descendants too) almost everywhere.<sup>1</sup> Also, no matter how well consolidated their residential status, non-nationals remain, to a greater or lesser extent, subject to deportation. The fact that access to national citizenship, either through naturalization or birthright, is made difficult in some countries, such as Germany, contributes to this 'democratic legitimacy gap' by allowing for the long-term coexistence of people with less than equal political rights. Although official labour recruitment and mobility outside the framework of the European Union has practically stopped in Western Europe, family reunification policies, the European economic and political integration process, and refugee influxes make it likely that the proportion of the population excluded from civic equality will remain a major issue for the foreseeable future.

If we shift our attention to North America, a traditional immigration region, we find that things look different. Although there have been some guestworker programmes to provide for unskilled agricultural labour (Bosniak 1994: 1076), as a general rule, labour migration there has not been understood as temporary in nature. From the moment they are admitted and given the status of immigrants, newcomers are usually set on the route to naturalization. Naturalization is generally granted on easy terms and as a matter of right. Moreover, access to nationality through birthright citizenship following the criterion of the place of birth (*ius soli*) as opposed to that of descent (*ius sanguinis*) has predominated in immigration countries, preventing the problem of the non-citizen second and third generations.

None the less, the fact that in some countries, like the United States, some groups of immigrants have proved less willing to naturalize as soon

<sup>1</sup> Exceptions to this rule include full voting rights for resident aliens in New Zealand and full voting rights for Irish and Commonwealth citizens in Britain.

as they have consolidated a fairly secure residential status and gained access to most of the social rights and benefits granted to citizens has also raised concern about non-citizen residents' exclusion from the sphere of civic equality. In the United States, until they naturalize, resident aliens do not achieve an equal political status, lacking the right to vote, the right to serve on federal and many state juries, and the right to run for certain high elected offices and to be appointed to some high appointed offices. Also, they are generally barred from federal employment and they have a lesser right to sponsor their family members for immigration. Last but not least, they remain vulnerable to deportation. Although it is commonly said that the deportation provisions are only few in number, in actuality there are more than one thousand different grounds upon which a foreigner could be removed from the United States. The reduction of state and federal social benefits not only to illegal immigrants but also to legal immigrants over the past few years in the USA also warns against celebrating too fast the loss of importance of national citizenship as a source of claims of rights (Schuck 1997).

Furthermore, mostly in North America, but increasingly in Europe as well, international labour migration is occurring through illegal paths. It seems that neither the official closing of borders in European countries to non-EU national labour, nor stricter immigration policies in the United States are likely to stop completely a labour migration which proves sensitive to economic factors. Clearly, illegal immigrants are also excluded from full membership in the democratic polity. This is not to say that they have no rights at all. Often they too enjoy some of the rights and guarantees that national citizens (or legal resident aliens) enjoy, such as the protection of the courts or public education. Still, in their case, it is not only the lack of political rights or of some of the social and civil rights generally granted to *legal* immigrants that excludes them from civic equality. Rather, their absolutely precarious residential and working status is the main reason why they are placed in a vulnerable and exploitable position and relegated to a socioeconomic sphere in which even the enjoyment of those rights and guarantees theoretically granted to them is often practically impossible.

All this results in an increase in politically vulnerable and disenfranchised communities of socially involved individuals who participate in the social and economic life of the communities in which they live in a myriad of ways. Permanent resident immigrants, both legal and illegal (the latter especially so if they are in great numbers and integrated in the economic forces of the host country), participate in the labour and housing markets and in the cultural life of the community. They pay taxes, bring up their families, send their children to state schools, and

often plan to stay permanently in countries which they seem to have more or less consciously accepted as the centre of their existence. Occasionally, they represent a high proportion or even a majority of the population of the local communities in which they live. And yet they are excluded from the political realm. As a result, civil and political society becomes split. It is this reality that threatens the democratic stability and legitimacy of some Western countries (Layton-Henry 1991; Hammar 1985a).

However, as we shall see, not everyone agrees in identifying what we could call the dichotomy between socioeconomic and political membership as a democratic concern, at least in the strict sense. For some critics, inclusion in the realm of civic equality requires citizenship, and the definition of the citizenry is something prior to and not essentially connected to the polity's commitment to a liberal democratic order. Often, the denounced exclusions are covered by traditional assumptions about the sovereignty of nation-states. According to these, nation-states are assumed to be independent political entities in the international political system. Apart from minimum standards set by general principles of international law and by general norms of human rights (which do not generally refer to the most politically sensitive areas anyway), states are supposed to have full power to decide on matters within their territory. This includes the question of whether or not foreign citizens should be admitted or, if they have been admitted into the territory, allowed to stay, and granted a more or less comprehensive legal status. Therefore, in principle, every state is entitled to pursue an immigration policy which is founded on its own interests, and hence, free to rule on the paths through which any alien, including immigrant workers, can gain access to the different degrees of membership. Immigration, citizenship and naturalization laws are thus generally referred to as expressions of such sovereign powers.<sup>2</sup> Part of the effort here will be dedicated to showing why this is not fully acceptable, and why it is increasingly important to link Western societies' commitment to liberal and democratic constitutional orders to the degree of inclusiveness of their citizenries. This seems to be especially relevant at a time in which the coexistence of national and non-national residents is becoming a more common reality, proving that some of the

<sup>2</sup> Typically, there are three hurdles at which immigrants (or potential immigrants) can be excluded from access to full membership within the state (Hammar 1990a: 12–18, 21): the first is the entry into the territory; the second is usually the acquisition of the legal status of permanent resident which allows the individual to enjoy residence and employment permits free of restrictions and to bring her family to live with her (Layton-Henry 1991: 113); and the last gate opens the path to citizenship through naturalization and hence, to the full enjoyment of rights and duties, including full political rights which are generally reserved for this stage.

assumptions of the traditional construction of the nation-state are increasingly outdated.

On the other extreme some critics would denounce the central concern of this book as already obsolete. Many have seen in the extension of most social and civil rights and even some political rights to resident aliens, which has been the general trend during recent decades, one of the most significant signs of the devaluation of national citizenship and of the progressive and overall decay of the nation-state construct. The reservation for citizens of voting rights in parliamentary elections is portrayed as the 'final bastion and expression of nationhood' (Layton-Henry 1990a: 16), which, more than anything else, retains a purely symbolic value (Jacobson 1996: 38; Soysal 1994: 131). The central role that the enjoyment of political rights and residential stability play in the traditional conception of democratic citizenship is thereby demeaned, and so is the need to guarantee these rights as a way of ensuring the non-reversibility of whatever other rights (e.g. social rights and benefits) may be recognized at any given moment in time. Also, those who speak about the complete devaluation of national citizenship often do not seem to take fully into account the increasingly important phenomenon of illegal immigration, and the legitimation concern that the related exclusions pose. The general precariousness that residential instability introduces into illegal immigrants' legal status is sometimes relegated to second place and the main focus is directed on to the fact that even illegal immigrants are now sometimes granted social benefits and basic human rights. This, they claim, confirms that nationality has already ceased to be a valid source of claims for the allocation of rights and duties in the modern world (Soysal 1994: 131–2).

Those who have instead regarded the splitting of the civil and the political societies as worrisome from a democratic point of view have suggested several paths to overcome it. One is to extend all of the rights citizens currently enjoy, including political rights, to resident aliens. Another is to encourage naturalization by liberalizing naturalization policies (Hammar 1990a). The possibility of granting resident aliens an automatic and unconditional second citizenship, which I will defend here, has generally been discarded. Still, the problem, in reality, is not so much one of choosing between competing alternatives, but rather one of growing aware of the situation and perceiving it as a democratic legitimacy concern. This is clear from the fact that those states which are not willing to encourage naturalization have been also most resistant to granting political rights to permanent resident aliens. Nevertheless, each of these paths raises interesting political issues that need to be discussed.

Also, thus far, the attention of the scholarly debate has largely concen-

trated on the exclusion and self-exclusion of legal permanent immigrants from the equal enjoyment of civil, social and political rights. Some references to illegal immigrants are occasionally made but, generally, only at the margins and without a deep exploration of the conceptual link binding the exclusions of legal and illegal. Yet setting the limits of what is democratically tolerable seems more important now than ever, as the general animosity towards those who stay in the country in contravention of the law increases and new measures against illegal labour migration are being taken, such as restricting illegal immigrants' access to social benefits and public services (Wihtol de Wenden 1990: 27). Some of these measures will presumably affect people who have been living in a country for years with their families and work there; people who have become a socially and economically active sector of the ordinary population. Should the societal integration of illegal immigrants be given any significant weight in pondering the legitimacy of the means to fight the phenomenon?

In this context, this book is meant as a contribution along the lines of those who have defended the need to overcome the democratic legitimacy gap posed by the splitting of civil and political society as a result of international labour migration. I will argue that all those who live on a permanent basis in a liberal democratic state ought to be considered members of that democracy and thus share in the sphere of civic equality with the equal recognition of rights and duties. Moreover, I will claim that, to the extent that the enjoyment of a full and equal set of rights and duties within the political community of the state remains attached to the recognition of the formal status of national citizenship, after a certain residence period permanent resident aliens, both legal and illegal, ought to be automatically, and thus unconditionally, recognized as citizens of the state, regardless of whether or not they already enjoy the status of national citizens in some other community, and hence, whether or not that second citizenship makes of them dual or multiple nationals.

In an effort to interrelate the political, philosophical and legal debates concerning immigration and the incorporation of immigrants to the host societies, I will then contrast these normative claims with the constitutional practice and scholarly debates in two Western countries, Germany and the United States, both of which have significant immigrant populations and are committed to constitutionally proclaimed liberal democracies. And the reader may ask: but why the *constitutional* debate? And why Germany and the USA?

It is generally accepted that a constitution is the part of the legal system that most clearly embodies the commitment of the polity to the foundational principles of power legitimation and so, in the cases I analyse, to a

liberal democratic order. Unlike statutes, constitutions are not simply the expression of the country's ordinary and changing political options. So, for instance, in the field that occupies us here, immigration and citizenship laws embody the main ordinary mechanisms for a community to decide on the composition of its society and citizenry, but constitutions actually set constraints on the range of political options from which the ordinary legislator can pick. They do so for the sake of the community's commitment to more general and lasting legitimation principles. On the other hand, constitutions do not remain static whether they undergo express reforms or not. Constitutions have to be interpreted and the changing social realities to which they apply are always a renovation stimulus in the process of constitutional interpretation. Those who have the last word in constitutional interpretation, the constitutional courts, more or less consciously and overtly bring in political and moral considerations whenever they interpret the constitution in the light of the changing social and political circumstances so as to keep the polity's foundational commitment to a liberal democratic order updated.

This explains my interest in exploring how the constitutional courts and scholars in the USA and Germany have been reacting to the consolidation of a permanent sector of non-citizens among the ordinary population living under the state jurisdiction and whether, and to what extent, they have perceived this phenomenon as challenging, as I claim it does, some of the traditional assumptions about the democratic state order. Moreover, since not only would-be immigrants but also resident aliens have been traditionally excluded from the ordinary political process, the constitutional realm is especially appropriate for the analysis of the way in which foundational principles of power legitimation can set limits to the range of exclusions. Thus, the questions I have asked myself have been: What do constitutions have to say about the consolidation of a non-national sector among the ordinary population of self-proclaimed liberal democratic states? Has this been seen as generating inconsistencies within the liberal democratic order which is constitutionally sanctioned? If so, how have the constitutional scholars suggested that we should compensate for such inconsistencies? What have the constitutional courts actually done? Have they forced the community to inclusion even against its own will as expressed in its immigration and naturalization policies? On what grounds?

Analysing the constitutional debate in Germany and the USA seemed therefore an ideal framework to study the basic adaptation of the legal order to the challenges of an increasing post-national order. In the discussion that follows, I will try to show that the norms and principles I defend have been recognized in American and German jurisprudence,

albeit in a tentative and truncated form, and that, with some significant exceptions, the courts in both countries are increasingly moving towards the position on inclusion that I defend. Just as important for the reader will be the realization that where scholars and the courts have been most resistant to inclusion they have more or less consciously rested on certain political and philosophical assumptions that I question here. The arguments that I use when discussing these assumptions theoretically could thus be used in an attempt to move towards relevant constitutional interpretations in both Germany and the USA.

### Overview

The book begins with an outline of the main normative claims. Chapter 2 constitutes the core of the positive argument in favour of the incorporation of immigrants into the political community. The argument involves two steps. First, I argue that any attempt to determine who should be included as citizens in a particular political community must include all those who are members of the society governed by that community. Second, I argue that long-term residents meet this test of ‘social membership’, even if they retain citizenship in another state. They are therefore entitled to full civil and political equality with native-born citizens.

Chapter 2 refers also to various mechanisms for achieving this goal. I begin by discussing the most common mechanisms which appear in the literature and suggest then a more novel approach which may at first sight strike many people as infeasible or indefensible. According to this approach, (a) permanent residents could be granted full inclusion ‘as aliens’ – that is, the right to vote and to permanent residence, as well as whatever other right may be in principle reserved for citizens only, could be granted to all long-term residents without granting them citizenship (which would then become a purely symbolic status which does not affect one’s rights or duties); or (b) permanent residents could be ‘automatically’ granted citizenship – that is, citizenship could be ascribed to all residents after a certain number of years, even to those who would not choose to opt for naturalization under a voluntary naturalization approach. Both of these mechanisms will, in different ways, ensure the automatic incorporation of permanent residents.

Some of the objections that these suggestions may encounter are discussed in chapters 3 and 4. Chapter 3 will explore the fairness objection against granting resident aliens the whole set of benefits of political membership. This objection rests on a view of the state as a mutual benefit society which requires a fair balance between the distribution of benefits and burdens. Many critics argue that including permanent resi-

dents as citizens upsets this balance, particularly if these permanent residents retain citizenship in their country of origin as well. Because of their link to the country of their nationality these permanent residents might enjoy certain ‘citizen-prerogatives’ not available to native-born citizens or they might be able to avoid certain ‘citizen-duties’ which native-born citizens cannot avoid. For these and other reasons, the link between resident aliens and their country of nationality is seen as an obstacle to their inclusion. I dispute the empirical accuracy and normative relevance of these claims, and argue that critics have vastly exaggerated the extent to which permanent residents would be in a privileged position *vis-à-vis* native-born citizens if they are granted full inclusion. Indeed, at the end of the chapter I argue that, rather than setting obstacles to full inclusion, fairness considerations may actually undermine the legitimacy of the exclusion of immigrants, questioning the possibility of having separate economic and political schemes of cooperation peacefully coexisting.

Chapter 4 instead explores the possibility that the degree of openness and inclusiveness which the claim to automatic incorporation implies might pose a threat to the absorptive capacity of liberal democracies, and thus damage liberal democratic institutions where they already have a foothold. This has to do with the fact that inclusion in my claim is achieved by nothing more than residence regardless of the conditions which are generally expressed in the laws on the access to the territory or on naturalization. Critics argue that preserving a certain degree of commonness and homogeneity to enable understanding, cohesion and solidarity is essential for the functioning of social and liberal democracies and recommend more selective inclusion. Yet here again, I dispute both the empirical accuracy of the assumptions on which this objection commonly rests, and the normative conclusions to which it is generally said to lead. I then turn the question around to explore the possibility that automatic inclusion would help solve, rather than aggravate, some of the tensions and strains that appear to threaten cohesion in increasingly heterogeneous countries with immigration.

Even those people who argue for the inclusion of legal immigrants show strong resistance to the incorporation of illegal immigrants who have entered the country without the polity’s consent. Chapter 5 will deal specifically with the issue of illegal immigrants, and will discuss the additional problems that arise when applying the claim of automatic incorporation to this group. My main argument is that while legal immigrants may indeed have valid grounds for expecting ‘faster’ incorporation, both legal and illegal immigrants share certain morally relevant commonalities which give them a compelling case for eventual inclusion.

The modalities of inclusion are addressed in chapter 6. In fact I will concentrate here on the more novel idea of automatic membership according to which permanent resident aliens should be automatically and unconditionally granted the status of citizens in the country of residence. This may appear to be an illiberal and freedom-restricting approach, especially when contrasted with the much more widely supported alternative of optional naturalization. However, I will defend this approach, exploring the conditions for its valid application, and discussing some specific objections that can be raised for the sake of either immigrants' or the general society's interests.

The discussion on the constitutional implementation of the normative claims comes next. Chapters 7 and 8 describe the debate on the constitutional status of resident aliens in the USA and Germany. Briefly, the question to be answered in both chapters is whether and to what extent sharing residence in the common geopolitical space of the state has implied equal constitutional protection for aliens and citizens, either directly (through the access of aliens to an equal status of rights regardless of nationality) or indirectly (through their access to national citizenship). The possible answers are that the constitution in each of these countries: (a) mandates equality for resident aliens (in the way that I have defended from a normative point of view); (b) allows equality for resident aliens; or (c) forbids equality. I will respond to this question by exploring court cases regarding the constitutional status of resident aliens (both legal and illegal), and their access to citizenship. I will try to show that while both the German and the US constitutions deny equality to resident aliens, there has been an increasing questioning of alienage as self-explanatory grounds for distinguishing between the constitutional status of citizens and aliens, as well as an increasing recognition of the importance of residence and societal integration in determining such a status.

### **The case-studies: United States and Germany**

In selecting the empirical cases to describe the constitutional implementation of the normative arguments, my basic aim when I started this project was to pick out countries with sufficient and relevant commonalities but also with significant and telling differences. Apart from having a contrasting point of reference for each of the countries analysed, I hoped that this would bring to the surface the whole set of complexities and difficulties of the issue. Yet at the same time, if, in spite of the initial differences, I could identify analogies in the legal responses of both countries to the concern regarding the incorporation of immigrants, these

analogies would probably support the validity of the conceptualization of the relevant problems in the theoretical chapters.

Germany and the United States seemed therefore good candidates. Among the essential commonalities is the fact that they are two of the Western countries with the largest immigrant populations and that both are thoroughly committed to a liberal democratic order sanctioned in their constitutions. Both of them offer relevant constitutional case law and doctrinal discussions, generally within the framework of political debates on related matters. All of this is clearly useful to determine to what extent, and through which legal instruments, the USA and Germany have read the long-term exclusion of resident aliens from the realm of civic equality as threatening the country's commitment to liberal democracy.

The relevant differences have to do with Germany's and the United States' specific immigration traditions and different conceptions of nationhood or citizenship. These deserve a few words here to set the constitutional discussion in its proper historical and cultural context. As regards Germany, the country's major experience with immigration started only with postwar labour recruitment. Recruited as guestworkers from 1945 to the mid-1970s from countries such as Italy, Greece, Turkey, Morocco, Portugal, Tunisia and Yugoslavia, these immigrants were initially seen as temporary workers who would eventually return to their home countries.

Immigration debates started to become most relevant when, following the oil crisis of the mid-seventies, Germany officially signalled the end of its labour recruitment policy which had lasted for over two decades. However, both political and moral constraints kept the political elite from forcing immigrants back to their home countries. As it became clear that the schemes introduced for voluntary repatriation were not successful, gradually, and not without hesitation and inconsistency, Germany officially came to accept first the need to allow for, and only later, also to encourage immigrants' social integration. Family reunification was essential to this process of settlement.

Although during the postwar period it became one of the largest immigrant-receiving countries in the world, Germany has never regarded itself as an 'immigration country' and still does not. Thus, the guest-worker immigration experience has always been described as a historical episode that was not to be repeated. And this may help to explain why there has never been an official and comprehensive immigration policy in Germany. The legal regime of aliens has reflected this conception of immigrants as 'temporary guests'. During the first years of guestworker immigration, old Nazi regulations established the legal framework for handling the presence of foreign workers in Germany, and only in 1965

was this regulation replaced by the Aliens Act (*Ausländergesetz*). However, even this statute lacked distinct residence permits and provisions for anything more than temporary stays on German territory (Joppke 1999a: 66). Until 1978 there was no residence status similar to USA legal permanent resident status. After 1978 the permanent residence status was created but only by administrative regulation. Also, the 1965 Aliens Act did not contemplate rules for family reunification. Detailed rules for reunifying foreign families were not instituted until 1981.

This explains why so many celebrated the 1990 Aliens Act (*Gesetz zur Neuregelung des Ausländerrechts*)<sup>3</sup> which covers in a systematic way all the aspects that had thus far been regulated through a variety of *ad hoc* administrative rules and policies which did not add up to a coherent whole. The new Aliens Act, which went into effect in January 1991, was supposed to replace executive discretion with respect to individual rights mainly by putting into the form of law the already existing administrative rules and legal constraints, many of which had been upheld by activist courts (Joppke 1999a: 84). It did not, however, entail a fundamental change in Germany's concept of its foreigner policy and still conceives the recruitment of guestworkers as a historical event, seeking to prevent the permanent immigration of non-EU nationals in the future (Franz 1990: 8).

The split between political and civil society generated by immigration was accentuated by the fact that the legal mechanisms of civic incorporation in Germany have traditionally been quite restrictively defined. The 1913 Nationality Act (*Reichs- und Staatsangehörigkeitsgesetz*), which is still in force, allows for the acquisition of German citizenship at birth using the criterion of descent only. This rejection of the criterion of the place of birth has allowed for the emergence of second and third generations which do not have German citizenship and are still commonly described as 'immigrants'. Also, under the 1965 Aliens Act, naturalization in Germany has traditionally been conceived as a discretionary act of the state in which process only public interest was taken into account and residence permits were granted rather discretionally and required periodical renewal for a long time before resident aliens could consolidate a secure residential status. Although, as reformed in 1990, the Aliens Act has amended this and provides now also for a naturalization which has lost part of its discretionary nature, the reform has not been sufficient to achieve the expected increase in naturalization rates.<sup>4</sup> This explains why

<sup>3</sup> BGBl. I 1354.

<sup>4</sup> Germany has traditionally had one of the lowest naturalization rates among European countries. Hammar gives an annual naturalization rate of 0.3 per cent for 1987 (Hammar 1990a: 77). According to a report by the Federal Government's Commissioner for

the possibility of facilitating naturalization even further and including some *ius soli* elements in the definition of ascriptive citizenship as a way to facilitate the integration of aliens has been on the political agenda over the past decade. Since the appointment of the new Social Democrat government in November 1998 the issue has again become most salient.

The resistance to accepting the immigration phenomenon as something more than a simple hazard of a concrete moment of Germany's economic development is often connected to a conception of nationhood which has been said to prevail in Germany. According to this, German nationalism (which preceded the political organization of the German nation-state, and thus was not initially identified with any specific state or with the idea of citizenship) is rooted in the concept of the people as an organic ethno-cultural entity marked by a common language. The state, then, is the political representation of the *Volk* (the people) or the nation (Jacobson 1996: 22–4; Brubaker 1992: 1–6). Also, as in all European nations, large-scale immigration came after the nation-building experience in Germany, so that immigration has not become part of Germany's national self-definition (Joppke 1999a). And yet, immigrants' proportionately higher birthrates, Germany's persistently restrictive regulation on access to citizenship, the still significant immigration flow (especially through asylum policy and family reunification), and, more recently, the increasing rates of illegal immigration are (together with the European integration process) important reasons to believe that the phenomenon of a non-national population has become a permanent German reality.

This ethno-cultural concept of nationhood was probably reinforced by the outcome of World War II (Joppke 1999a: 63). Thus, in contrast with its attitude of not welcoming immigrants, after the war the Federal Republic defined itself as an incomplete nation-state and committed itself to both rebuilding the broken national unity and to hosting all Germans in the communist diaspora (*ibid.*). Telling in this regard is the fact that the Federal Republic always saw East Germans as sharing a common German citizenship with West Germans; that it committed itself constitutionally to the reunification of Germany; and that it has viewed as Germans, and not as 'immigrants', the many millions of ethnic Germans who have migrated to West Germany from Poland, the Soviet Union, Romania and other formerly German-occupied areas since World War II. This has all found constitutional coverture. Apart from providing for the reacquisition of German citizenship by former Germans and their

Foreigners' Affairs on the Situation of Foreigners in the Federal Republic of Germany in 1993, we find that the percentage has increased to 0.5 per cent in 1991 (cf. Neuman 1994: 237, 274, ns. 118 and 119). Notice however that naturalization rates in Germany have started to increase significantly over the past few years (Joppke 1999a: 205).

descendants who had been deprived of it during the Nazi regime due to political, racial or religious reasons, when defining who are ‘Germans’ within the meaning of the constitution, it makes a distinction between German nationals or citizens (*Staatsangehörige*) on the one hand, and people of German stock (*Volkszugehörige*), also known as ‘Status-Germans’, on the other. Apart from those who possess German nationality (which used to include both East and West Germans), the constitution (German Basic Law) of 1949 recognizes as German those who ‘have been admitted to the territory of the German *Reich* within the frontiers of 31 December 1937 as a refugee or expellee of German stock or as a spouse or descendant thereof’.<sup>5</sup>

In principle, one could expect the significance of this constitutional provision to be rather limited. Included among the transitional clauses of the Basic Law, it was intended to give a provisional solution to the problem of a postwar German state hosting, among its population, a large number of persons of German ancestry with some Eastern European nationality, who had been expelled from their countries or had fled as a result of measures of retaliation or dispossession directed against them as people of German stock. In actuality, the implemented legislation has served to facilitate the incorporation of ethnic Germans and their descendants into the body politic. However, since 1990 Germany has passed legislation (*Aussiedleraufnahmegesetz* in 1990 and *Kriegsfolgenbereinigungsgesetz* in 1992) which conceives of this kind of immigration as a late consequence of World War II, restricts the numbers of ethnic Germans who can resettle in Germany by quotas, limits ethnic Germans’ rights (including their access to German citizenship) and, more importantly, sets an end to future ethnic German immigration: after 2010 ethnic Germans born later than December 1992 will no longer be entitled to ask independently for admission to Germany (Münz and Ulrich 1997: 71–2). Not surprisingly, some have seen this phasing out of the privileged category of ethnic Germans as an opportunity for Germany to transform its ethnic-priority into a general immigration policy (Joppke 1999a: 96). However, in general, it seems that the constitutional reflection of Germany’s incomplete nation-stateness and the problem of the ethnic German diaspora in the East have allowed the perpetuation of the ethno-cultural tradition, which was nominally delegitimized by Nazism and World War II.

In contrast to this is the US experience where immigration has traditionally been welcomed and perceived as integral to the formation of the country. The notion of American citizenship also came from a different

<sup>5</sup> See Art 116.1 of the German Basic Law.

setting. The American Revolution, it has often been claimed, sought to fashion a nation legitimated through the aggregate of the individual citizens' consent rather than the passive and imputed allegiance of subjects to the Crown. There was a basic coincidence of the political and the national revolution: the political identity (broadly expressed in the Constitution) was central to the American identity. Identity was not so much a function of one's bloodline (with the significant exceptions of black and native Americans) as a function of ideas, of ideology. An alien was one who rejected the premises underlying American nationhood (Jacobson 1996).

This concept of citizenship has made the line between citizens and aliens more permeable in the USA. Entry into the country has historically been relatively easy. And with some significant exceptions, naturalization was easily available to all whites who fulfilled the residency requirement and took an oath of loyalty. Also, from the beginning, aliens admitted as immigrants knew they had been granted the status of permanent residents. The underlying belief was that almost anybody could be assimilated into American society and that the USA was essentially a nation of immigrants. However, as Joppke points out, 'next to the liberal tradition of a nation defined by an abstract political creed and immigration, there has also been an illiberal tradition of alleged "Americanism" which has hypostatized an ethnic core of protestant Anglo-Saxonism which had to be protected from external dilution' (1999a: 23).

Prior to the late nineteenth century, immigration into the United States was unregulated. After that, various laws were passed excluding certain categories of immigrants (lunatics, idiots, anarchists, Chinese) and starting from 1921 a system of ethnically discriminatory quotas was used which favoured Northern European immigrants for the sake of racial homogeneity and Anglo-Saxon superiority. The system was only fully repealed in 1965, through an Immigration Reform statute which put an end to the national-origins system, opening for the first time the door to large-scale immigration from Asia and Latin America.

In 1952 the Immigration and Nationality Act, known as the McCarran-Walter Act (still in force though with a great deal of modification), revised, codified, and repealed nearly all existing immigration law. Enacted at the height of the cold war, it contained ideological and security provisions mainly to protect the USA from communism. These ideological concerns weakened in 1980, as the Refugee Act of that year shows, and became marginal in the Immigration Act of 1990. This latter Act reaffirms the principles of the 1965 Immigration Act which, for the first time, made the holding of professional and high skills and family ties with the country of central importance in immigration matters.

It has been noticed that, in contrast to European restrictionism after the first oil crisis, USA immigration policies have remained quite liberal and expansive (Joppke 1999a: 29). Indeed, in 1965 the USA embarked on a course of liberalization which resulted in the greatest increase in mass immigration since the beginning of the twentieth century (*ibid.*: 54). At the same time, the country's immigration slots have been insufficient to cope with immigration pressure and American public opinion has turned increasingly restrictionist in recent years. From the mid-1970s onwards the problem of illegal immigration became important.

Since the turn of the twentieth century Mexicans have migrated north to the United States to work on railroads and in agriculture, and restrictions were practically unenforced until the time of the Depression. The diversion of labour to the World War II effort created an urgent need for labour and in 1942 brought about the Bracero arrangement for the recruitment of Mexicans as temporary agricultural workers which was to last for twenty-two years. This programme allowed other Mexicans to learn about work opportunities in the United States and hence gave a strong impetus to illegal immigration, especially after it was suspended in 1964. Although already in the mid-eighties there was the pervasive sense that the United States had lost 'control of its border', the first measures to fight seriously against it came in 1986 when Congress passed the Immigration Reform and Control Act (IRCA).

The early but limited success of IRCA was followed by reports of an upswing in illegal migration and by mid-1992 it had become evident that IRCA was not deterring undocumented aliens. In the end, it legalized the status of about three million undocumented immigrants while failing to stop the inflow of new illegal immigrants. Together with the geographical conditions of the country and the institutional limitations of the American government, the existence of lobbying groups, particularly civil rights groups, ethnic and business interest groups, is essential in an explanation of why the effectiveness of attempts to legislate and implement laws has been so low (Jacobson 1996: 43, 69).

As we will see, the control of illegal immigration has been central to the new anti-immigration movement which has spread eastward from California, expressing the frustration of those states which are most severely affected by illegal immigration and putting pressure on the Federal Government to assume responsibility in the matter. The recent adoption of legal measures to increase the control of illegal immigration and set limits to legal and illegal immigrants' access to social benefits has to be seen as an expression of this new restrictionist spirit, much of which has been spurred by illegal immigration (Joppke 1999a: 55).

### **Some preliminary remarks**

It is important to observe that the book does not purport to indicate the global attitude that Western liberal democracies should have towards current immigration pressure from neighbouring and less well-off countries. Although I concentrate almost entirely on domestic inclusion, in a world in which economic resources and political stability are unequally distributed, one can hardly defend the claim that the commitment to egalitarian liberalism allows states to face only their moral obligations to those who are already within their jurisdiction. Rather, the delimitation of the subject rests on the two following assumptions. The first assumption is that the case of permanent resident aliens presents both legal and moral specificities which justify its specific treatment here. The second and more important assumption is that, in spite of appearances, no obvious correlation exists between domestic and external 'inclusive attitudes'. In other words, there is no concrete evidence that the inclusion of settled immigrants necessarily has to be at the expense of a more rigid attitude to protecting the state against the outside world.

Also, my discussion will not refer to all of the forms in which economic migration currently takes place. Economic migration is increasingly adopting new and more mobile forms, and settlers, which are my main concern here, are only one type of migrant. Together with them, one can find not only 'sojourners' – migrants who return to their country of origin after a relatively short period of time – but also daily commuters who legally or illegally cross the border on an almost daily basis to work, and people who go back and forth for shorter or longer periods of time every year and, thus, can hardly be said to have any single country as the centre of their economic and personal development.

Admittedly, these forms of migration present specific problems and pose some interesting challenges to some of the assumptions which have been commonly made on economic migration thus far. Yet these new modalities, which an interrelated and well-connected world has prompted, have come as an addition to, and not to replace the settlement model. And it is likely that this will continue to be so in the future. Leaving aside a cosmopolitan elite, I believe that people are generally inclined to set down roots in specific residential habitats (in which they make long-term investments) and to rely on specific institutional, social and cultural frameworks to lead a meaningful existence.

It is important to stress that this study does not contemplate either, more than collaterally, the moral and/or legal specificities of some qualified groups of resident aliens, such as political refugees or aliens enjoying a special status which derives from some supra-national process

of regional integration. This distinction is most relevant for the German case, as political refugees have traditionally enjoyed a special constitutional status under the German Constitution. Also, a significant proportion of Germany's non-national population is formed by citizens of other Member States of the European Union who enjoy a privileged status of rights and freedoms. Nevertheless, most of the issues that will be raised here can also be of general interest for these groups of aliens. Whatever their more specific constitutional and legal status, political refugees and EU Member States' nationals can also share in the condition of being a permanently settled alien population with their economic and social existence rooted in the country of residence and yet excluded from the realm of civic equality.

I should also warn the reader that the book does not present a theory of constitutional interpretation which specifies what should be the importance of political philosophy for constitutional adjudication. There is a long tradition of authors, to which I subscribe, contending that political philosophy does play a role in constitutional interpretation whether constitutional scholars or courts are willing to accept it or not. Moral and political reasoning should therefore help us, from a normative point of view, in our attempt to read constitutions in their best light.<sup>6</sup> But here this thesis is not specifically addressed. The normative discussion takes place first and the case-studies that follow describe the actual constitutional experiences of the USA and Germany. The description tests whether there has been progress in the advanced position on inclusion and whether or not inclusion has proceeded on the moral and political grounds that I defend or on competing grounds. To the extent that inclusion has not been constitutionally sanctioned it also identifies and conceptualizes from a theoretical point of view the remaining obstacles. Those who believe in the relevance of political philosophy in constitutional interpretation will therefore find material here to strengthen and exemplify their thesis. Those who share the conviction that our liberal democracies need to become more inclusive will find here arguments as to how constitutions can be interpreted in their best light so as to respond to the new democratic challenge posed by the ordinary and permanent coexistence of citizens and non-citizens.

The main characters of the book, people who are settled in countries without being citizens or nationals there, will be called many different

<sup>6</sup> See, for example, Dworkin 1986; Alexy 1989; Habermas 1992; Rawls 1993; Nino 1993; Dyzenhaus 1993.

names.<sup>7</sup> These include ‘legal and illegal immigrants and aliens’, ‘resident immigrants’, ‘permanent resident aliens’, ‘undocumented aliens’, ‘resident aliens’ and ‘non-citizen and non-national residents’. This results partly from adopting the different terminologies in common use in the disciplines of social and political science and law. It also has to do with the different perceptions of the people I am concerned with in Germany (where they are more commonly referred to as aliens or foreigners) and in the USA (where they are generally referred to as immigrants). Finally, it derives from an attempt to avoid the link between these people and any of the predefined set of features and/or purposes which the use of any of the above mentioned labels commonly triggers.<sup>8</sup>

<sup>7</sup> The terms ‘citizenship’ and ‘nationality’ I will use interchangeably, meaning the legal relationship recognizing the membership of individuals to different states of the international community, although I am aware that, for that purpose, the former is more commonly used in the USA and the latter in Europe. Admittedly, the term nationality in the German context is often used to express more than the simple holding of a German passport. Thus, as we know, many read into it the membership of a national community with a distinctive character shaped by linguistic, cultural, historical or even ethnic commonalities. I will use more specific terms or expressions to refer to this more substantive meaning of nationality.

<sup>8</sup> I am aware of the pejorative resonance of some of the terms referred to here. Thus, as Raskin rightly notes, the word ‘alien’ has pejorative if not extraterrestrial connotations. At the same time, as he points out, the term possesses a legal significance which makes it difficult to replace (Raskin 1993: 1393 n. 11). Much more pejorative may be the use of the term ‘illegal alien’ since it tends to convey the idea of aliens as outlaws and to criminalize their personalities. Often, it is not even clear what the term legally means, there being many ways and many reasons for which an alien can be in a country without a clearly defined legal status. Here, I will use it to refer to all those who are in a country in contravention of its immigration laws. I hope that using the terms ‘alien’ and ‘illegal alien’, while arguing for the right to equality of the affected individuals, might help to advance the questioning of the stereotypes to which such terms are often attached.