Toward Post-National Membership?
Tensions and Transformation in German and EU Citizenship
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I. INTRODUCTION

We are in a time of transition, or at least uncertainty, with regard to the status and future of our contemporary conceptions of community, membership, and belonging. The recent explosion of global discussions, both scholarly and political, about immigration, multiculturalism, and the role of universal human rights norms in constraining state action, are a testament to the unsettled and contested nature of our traditional conceptual frameworks in light of the rapid developments of the post-war era.

Very much at the intersection of such concerns has been the long-running debate over post-national citizenship, which has focused on perceived transformations in the meaning and significance of citizenship rights and status in relation to nationality, the state and emerging transnational forces. Beginning with Yasemin Soysal’s influential and provocative The Limits of Citizenship, proponents of the post-nationalist position have argued that we have witnessed and are continuing witness to a fundamental transformation in the nature of citizenship.1 Pointing to a

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© 2014 Journal of International Law and International Relations
Vol 10, pages 4-30. ISSN: 1712-2988.
diverse set of phenomena such as globalization, the expansion and entrenchment of extensive migrants’ rights decoupled from national citizenship, and the growing power of human rights norms to shape state behavior and policy, they have sought to examine shifts in the forms of identity, rights, and status, that have traditionally been associated with national membership, while also problematizing the substance, location, and category of citizenship as traditionally understood. At their most bold, these scholars question “the assumption that national citizenship is central to membership in a polity” and argue that our contemporary world is characterized by the diminished importance—and inevitable irrelevance—of the nation state and national citizenship, alongside the rise of a “broadened, post-national constellation of membership.” Moreover, they argue that states are experiencing a “weakening of sovereign control” as globalization challenges the competencies of the nation state and human rights discourse further inscribes normative bounds on the exercise of sovereignty with regard to immigration and the status of non-citizen residents.

In response, a number of trenchant critiques have challenged the claims of post-nationalists on both empirical and conceptual grounds. These critics have argued for the persisting centrality of national citizenship to full membership in a state, called into question the significance of international norms by pointing to the role of domestic dynamics, and suggested that post-nationalist theorists irresponsibly, if unwittingly, glorify what is at most a derivative legal status, amounting to little more than a tribute to second class citizenship. Simply put, given the continued preeminence of the nation state, any “citizenship” outside of national citizenship is not worthy of the name and talk of the declining importance of national membership is at best


2 See Bosniak, supra note 1 at 17-36; Jacobson, supra note 1 at 18-41; Soysal, supra note 1 at 137-67.

3 Soysal, supra note 1 at 3, 164.

4 Jacobson, supra note 1 at 9.

unrealistic and, at worst, dangerous.

This long-running debate over the nature of contemporary articulations of citizenship has taken on increasing practical significance, especially in the European context. There, the unfolding implications of the European Union, growing doubts about the integrationist policies of several member states, and attempts of domestic governments to shore up the meaning of national “membership” all suggest a series of further potential transformations and shifts in state policy. Such phenomena clearly imbricates with the significance of citizenship and point to the need to clarify the relationship of citizenship status, rights, and identity to both the domestic and international sphere.

Against this backdrop of scholarly discussions and emerging policy responses, this article seeks to address the salience of the post-nationalist position for understanding contemporary practices of membership in Europe and more broadly, using the context of Germany to examine two developing, though seemingly diverging, regimes of non-citizen resident rights. I begin by explaining the importance of the German case for assessing transformations of citizenship and membership beyond the national. From here I move to a conceptual clarification of the post-nationalist position in order to show the emphasis placed on the “emergence of locations for citizenship outside the confines of the nation state.” Following recent scholarship, I suggest that the central aspects of the post-national position can be distinguished as two sets of separate claims. First, post-nationalists assert that the modes of identity, bundles of rights, and status traditionally accorded through national membership are becoming decoupled from citizenship, nationhood, and the nation state. Second, post-nationalists make important claims about the sources and forces at play in the generation of these new forms of membership—in particular, they suggest that the growing prominence of transnational and international human rights norms are responsible for these transformations.

My goal in this article is to assess the first claim advanced by post-nationalists in light of recent developments in German domestic citizenship law and the continued evolution of European Union citizenship status. I argue that taking these features into account leads to an ambivalent, though provocative, perspective on the emergence of post-nationalist trends. It is clear that questions of nationality remain central to the status of Germany’s ‘non-European’ migrant population. Even in the wake of a substantive liberalization of German citizenship law, the dynamics surrounding Germany’s third-country migrant populations seemingly point toward the continued importance of the national, both in the ways membership is conceived in German political discourse, as exemplified in continued opposition to dual nationality, and in the ambivalent response of migrants themselves to the current naturalization reforms. Yet, alongside this re-

6 Sassen, Losing Control? Sovereignty in an Age of Globalization, supra note 1 at 304.
7 I adapt this from Hansen, “The Poverty of Postnationalism,” supra note 5.
inscription of the national, recent transformations in European Union Citizenship and their concomitant implications within Germany do point to the belated emergence of an, albeit narrowly accessible, post-national form of membership.8

I conclude by suggesting that even as post-nationalist trends are emerging as a reality, we ought to remain far from optimistic about the normative implications of such developments and recognize that we may be witnessing the contingent coexistence of multiple regimes of membership. The incipient post-national status instantiated in Germany within the context of the EU is highly selective, and while generating a class of rather privileged and protected transnational citizens, exists alongside the continued political exclusion of the majority of Germany’s non-European migrants. Thus, lacking the protection of a robust supranational authority, the position of third-country nationals within Germany remains substantively precarious.

II. GERMAN MEMBERSHIP REGIMES: A CRUCIAL CASE

Contemporary Germany provides an ideal case for assessing the robustness of arguments regarding the emergence of post-national citizenship, as well as the significance of such potential transformations. As of 2008, Germany possessed the largest population of foreign citizens of the 27 EU member states, with 7.25 million persons comprising 8.8 per cent of its total population.9 Therefore, in matters of sheer scale and prominence among fellow EU states, Germany is a pivotal test for assessing the relationship of nationality and citizenship rights. Moreover, of its non-nationals, Germany hosts the greatest number of both non-national EU-citizens and third-country nationals of all member states at 2.5 and 4.7 million, respectively.10 Attending to the features of the still unfolding status of European Union Citizenship is particularly important, given that post-nationalists frequently cite EU citizenship as the most elaborate legal enactment of post-national membership.11 Moreover, as a result of historically restrictive naturalization policies and relatively high levels of immigration, Germany’s population of

8 Here I bracket the latter aspect of the post-nationalist position. In other (forthcoming) work I explore the impact of transnational and international liberal democratic and human rights norms in driving transformations in membership. There I argue that the post-nationalist claim that transnational and international legal norms are increasingly constraining and shaping the behaviour of states has been vindicated, at least in a qualified sense. As post-nationalists are more than willing to acknowledge, the effects of such norms ‘tend to instantiate inside the national’ and yet the there is an undeniable transnational influence on the contours of citizenship policy and immigration, as exhibited both by German domestic dynamics and by a general European convergence toward upholding liberal democratic and human rights norms. See Sassen, Territory, Authority, Rights: from Medieval to Global Assemblages, supra note 1 at 305.
10 Ibid.
11 Soysal, supra note 1 at 147-48.
third-country nationals far exceeds those of other member states, comprising 45 per cent of the EU total. Thus the contemporary position of Germany ought to provide a telling framework for determining the salience of nationality in the provision of membership rights and the status between EU-citizens and third-country residents.

In addition to current dynamics that highlight its central importance in assessing transformations in citizenship, further historical reasons suggest that Germany is a meaningful context for appraising claims regarding the growing potential and meaning of forms of post-national status, rights, and identity. In particular, Germany’s past history of restrictive approaches toward naturalization and nationality, followed by a relatively recent transformation of such policies, point to the significance of Germany as a site for the emergence of post-national trends. Rogers Brubaker’s 1992 path-breaking study of immigration and nationalism influentially characterized Germany as exemplifying an ethno-cultural and differentialist conception of nationhood and citizenship, one grounded in “habits of national self-understanding that were deeply rooted in the national past.” According to Brubaker, Germany’s restrictive approach to both citizenship and naturalization have been fundamentally related to conceptions of descent and ethno-cultural membership, as embodied most definitively by the central place of *jus sanguinis* in German nationality law. While the continued validity of such an ideal-type characterization of contemporary Germany is upset by the rapid sequences of reforms that German citizenship and nationality law has undergone in the past 20 years, Germany’s long prior history of approaching national belonging in narrow terms makes it an important case study for examining the claims of the post-nationalist hypothesis. In particular, it suggests a context in which the interaction between a historically restrictive approach toward naturalization and the growing salience of liberal democratic and human rights norms may have paradoxically led to the emergence of robust civil and social membership rights dissociated from national belonging. Moreover, the German case has

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14 *Jus sanguinis* and *jus soli* are principles of nationality law underlying birthright claims to nationality or citizenship. The former, from the Latin for right of blood, ties the acquisition of citizenship or nationality to decent, dictating that citizenship is inherited from one or both parents. The latter, from the Latin for right of soil, tethers the acquisition of citizenship to the territory of the county in which the individual is born. Although scholarship tends to identify *jus sanguinis* as embodying a less progressive form of citizenship grounded in exclusionary conceptions of ethnonationalism and *jus soli* as progressive given its apparent inclusionary dynamic, this is arguably rather anachronistic given the actual history of these concepts. For a more extensive discussion of Brubaker’s position, see Brubaker, Citizenship and Nationhood, supra note 13, Dieter Gosewinkel, “Citizenship and Naturalization Politics in Germany in the Nineteenth and Twentieth Centuries” in Daniel Levi and Yfaat Wess, eds, Challenging Ethnic Citizenship: German and Israeli Perspectives on Immigration (Oxford: Berghahn, 2002) at 59 for an account that complicates Brubaker’s depiction of German citizenship as linked to an ethno-cultural conception of the German nation.
important implications for broader conclusions we might wish to draw about emerging post-national trends both across the EU and globally insofar as it exemplifies how completing membership regimes or ‘multileveled’ forms of citizenship can result in problematically qualified and stratified forms of status.

III. THEORIZING POST-NATIONALISM: CONCEPTS AND CLAIMS

Before turning to an assessment of the prospects and possibilities of post-national forms of membership within the German context, it is imperative that we first clarify the conceptual dimensions of the post-nationalist position that is to be assessed. This is of central importance, given that the post-national debate hinges on a series of claims regarding the changing status, meaning, and significance of central conceptual categories such as citizenship, membership, and nationality, as well as assertions about the sources of such transformations. Moreover, the contours of the debate between post-nationalists and proponents of the nation-centered perspective speak to the need to lay out the specifics of the post-nationalist claims to be assessed, if only to avoid the risks of a discussion characterized by potential misconstrual and confusion.

The conceptual ambiguities and misunderstandings that have frequently characterized exchanges between post-nationalists and their critics have been highlighted by Christian Joppke, leading him to suggest that post-nationalists and defenders of citizenship frequently find themselves talking past one another. More recently, Randall Hansen has noted that divergences both between and within the perspective of those who defend post-nationalist claims regarding the status of citizenship have led to a great degree of ambiguity over the implications of the post-nationalist thesis. For their own part, proponents of the post-nationalist position have defensively bemoaned being frequently “misinterpreted” and “misread” by critics, as well as having their arguments misrepresented by “strawmen versions of post-nationalism.” These considerations all suggest the need for specifying the theoretical commitments of the post-national perspective under consideration. Accordingly, I offer a brief reconstruction of the crucial elements of the post-nationalist position, one accommodating the post-nationalist assertion that they do indeed recognize the persisting importance of national institutions alongside emerging transnational and global trends.

A central component of the post-nationalist thesis to be assessed is the historical and conceptual claim of a progressive decoupling of components

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16 Hansen, "The Poverty of Postnationalism," supra note 5 at 4-5.
of citizenship from nationhood and the nation state. As Saskia Sassen writes, “[w]hether it is the organization of formal status, the protection of rights, citizenship practices, or the experience of collective identities and solidarities, the nation state is not the exclusive site for their enactment.”\(^{18}\) In sketching out the post-nationalist position it is helpful to further distinguish between the multiple dimensions of citizenship that are potentially undergoing transformation. Following Joppke, we may differentiate analytically between the elements of citizenship along three levels.\(^{19}\) First, with regard to citizenship as formal membership status in the state, post-nationalists argue that contemporary trends indicate the diminishing importance of national membership. Second, with regards to rights traditionally accorded by such status, they stress that a growing set of entitlements have become decoupled from formal citizenship.\(^{20}\) Pointing to contemporary examples of the extension of broad social and economic rights to non-citizens, post-nationalists emphasize that the status of residency is coming to approximate that of citizenship in important ways. As one commentator has put it, “the membership status and rights of resident foreigners have reached the point where the distinction between citizen and noncitizen is not very significant.”\(^{21}\) But of equal importance, in a move that spans both the status and rights dimensions of citizenship in liberal democratic states, post-nationalists have advanced the ambitious claim that the nation state is no longer exclusively the most important generator of rights. Emphasizing the novel character of EU citizenship as an embodiment of “postnational citizenship in its most elaborate legal form,” they thus argue for a partial decoupling of both rights and status from the state itself.\(^{22}\) Third, with regard to identity, to the extent that rights come to assume “universality, legal uniformity, and abstractness” alongside persisting conceptions of national identity as expressions of bounded particularity, rights and identity can be said to part ways.\(^{23}\) But concurrent with this is a transformation in the nature of the identity of citizenship itself, which comes to be decoupled from particularistic accounts of nationhood as “national identities that celebrate discriminatory uniqueness and naturalistic canonization become more and more discredited.”\(^{24}\) As a former critic of post-nationalism has noted, “the increasing universalism of citizenship, which we could observe on its status and rights dimensions, cannot but

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\(^{18}\) Sassen, *Towards Post-National and Denationalized Citizenship*, supra note 1 at 278.


\(^{20}\) The distinction between citizenship status and rights is important, because it is frequently only in the context of liberal democratic regimes that the former can be presumed to entail the latter. As the citizens of authoritarian states can well attest, it is quite possible to possess the status of citizenship without enjoying many rights; because of this, we ought not imagine that all states are liberal when theorizing citizenship.

\(^{21}\) Jacobson, *supra* note 1 at 38.

\(^{22}\) Soysal, *supra* note 1 at 148.

\(^{23}\) *Ibid*, at 159.

\(^{24}\) *Ibid*, at 161.
affect the identity of citizenship, diluting its national distinctness.”

In addition to arguing for shifts in the location, status, and meaning of elements of citizenship, post-nationalists make a related claim about the sources of these dynamics. In this vein, they have contended that traditional configurations of membership are being transformed by international and transnational human rights norms that have increasingly come to inform the behaviour of states. Thus these authors suggest a post-national source to the historical decoupling of the elements of citizenship—that is, “global factors transform the national order of citizenship.” The various contemporary shifts in the nature of membership noted above are driven by the emergent influence and power of the post-war international human rights regime, whose stress on the context-transcending rights of universal personhood has come to at least contest and destabilize more exclusionary forms of membership. This has been framed by Soysal as the redefining of individual rights as “human rights on a universalistic basis and legitimized at the transnational level,” and by Sassen as processes of “denationalization” marked by the growing use of transnational and international human rights instruments in national courts. These authors therefore controversially contend that the forces that have driven the decoupling of rights from exclusive conceptions of national citizenship, alongside a concomitant expansion of migrant rights, lie outside the confines of the nation state. This is not to say that post-nationalists dismiss the “national” as a frame or imagine that international and transnational norms have fully dissolved the importance of the state. Indeed, they are quick to concede that “the exercise of universalistic rights is tied to specific states and their institutions” and that “it is through the agency of the state that rights are enacted and implemented.” But they do argue that international and transnational human rights norms are increasingly coming to influence the contours of immigration and citizenship policy, as well as the status accorded to non-citizens. In sum, for these scholars, the emergence of post-national forms of membership signifying the decoupling of rights, status, and identity from national citizenship is ultimately driven by sources outside particular states.

IV. THE DIS-AGGREGATION OF CITIZENSHIP? GERMANY’S MIGRANT POPULATIONS

26 Soysal, supra note 1 at 148.
27 Ibid, at 164. See also Sassen, Territory, Authority, Rights: from Medieval to Global Assemblages, supra note 1 at 309.
28 Soysal, supra note 1 at 157, 165.
As discussed above, the two central claims of the post-nationalist position concern particular transformations in the nature of membership within a polity and locating the source of these post-national dynamics of inclusion and universalism outside the confines of the nation state. Here I turn to an assessment of the first of these claims within the context of Germany with an eye to identifying and attending to potentially competing trends in the dynamics surrounding membership in the German polity. Tracking the implications of shifts both in the significance of EU citizenship and recent reforms in nationality policy that bear on the status of third-country nationals, I suggest that a close examination of Germany provides ambivalent evidence for the post-nationalist thesis. On the one hand, the recent emergence of an increasingly “thick” European Union citizenship lends greater credence to the position that it exemplifies a form of post-national membership decoupled from possession of nationality in the state of residence. Thus non-nationals within Germany with privileged access to the exclusive entitlements of Union status enjoy rights and benefits that approach, and indeed potentially exceed, those of nationals. On the other hand, the contemporary situation of Germany’s larger third-country population tells a different story, one in which traces of exclusivist conceptions of national belonging continue to play a prominent role despite attempts to move to a more inclusive model of membership. The enduring gap between the rights of third-country migrants and formal citizens, as well as the persistence of the national in debates over German naturalization and dual citizenship thus cut against the grain of the post-nationalist trends seemingly exemplified by EU citizenship. What is more, these developments provocatively suggest the potential emergence of a “European” border on access to full membership.

As a novel form of transnational or supranational legal status, European Union citizenship has long been heralded by post-nationalists as an exemplar of the decoupling of membership rights and identity from nationality. Originally formalized by the Maastricht Treaty in 1992 and further elaborated by the Amsterdam Treaty in 1997, citizenship in the Union is conferred on the nationals of all EU member states and has come to be linked to a number of increasingly impressive rights and entitlements. Given that Germany hosts the largest population of resident non-national EU-citizens among member states, the recent developments in the status of EU citizenship have important implications for how we should understand the nature of membership within the German context and more broadly.

The central features of EU citizenship include a number of important rights originally intended to supplement the status of nationals of member states. These include the right to move freely between EU member states, as well as the right to settle and take up employment in their chosen country of residence. These rights of movement are complemented by the right to vote and stand as a candidate in both local and European Parliament elections where they reside, as well as accountability mechanisms in the form of the right to petition the European Parliament and an Ombudsman. Moreover, EU citizens enjoy the right to diplomatic protection of other member states.
when in third-countries. Arguably the most important of these rights with regard to the expansionist thrust of EU citizenship, the right to free movement for employment and residence purposes, is linked to prohibitions against any discrimination on the basis of nationality. Thus, European Union law bans “discrimination based on nationality among workers of the member states with regard to employment, social security, trade union rights, living and working conditions, and education.”30 Recent transformations in the significance of EU citizenship, primarily driven by European Court of Justice (ECJ) activism, have played on exactly this obligation of non-discrimination to extend the implications of this status.31 Thus, following post-nationalist predictions, European Union law has indeed come to increasingly entitle EU citizens to “equal status and treatment with the nationals of the host country.”32 As we shall see, in a certain sense, the seemingly limited right of freedom of movement proved to be the sharp end of a large wedge.

But while the evolution of EU citizenship no doubt represents a novel legal development, the significance of its emergence for the post-nationalist thesis has remained rather contested. Thus we must ask: does EU citizenship in the context of Germany constitute a form of post-national membership? Is it emblematic of the dis-aggregation of crucial components of citizenship away from nationality and nationhood and therefore signify a diminishment in the importance of national citizenship? In order to adequately answer these questions we must account for two challenges raised by scholars skeptical of post-nationalist claims regarding the nature of EU citizenship.33

First, critics of post-nationalists have suggested that EU citizenship, far from exemplifying a superceding of the national, is best understood as a subset of national citizenship, given that it is enjoyed only by the nationals of member states.34 As they have stressed, EU citizenship is a derivative status that “itself independently generates not a single right” and therefore, they suggest, it is a mistake to construe EU citizenship as a challenge to the nation state as it ultimately “reinforces rather than detracts from national citizenship.”35 This criticism, attentive to the foundational treaty-language of EU citizenship that did indeed cast the status as supplementary to national citizenship, admittedly provided an important correction to the optimism of early post-nationalists. More recent commentators have also stressed the persistently ‘contingent’ status of EU citizenship, access to which still remains entirely dependent on the acquisition of national citizenship in

32 Soysal, supra note 1 at 148.
33 I take this important set of challenges from Hansen, “A European Citizenship or a Europe of Citizens? Third Country Nationals in the EU,” supra note 5.
Member states. However, contemporary dynamics, most notably the ECJ’s judicial activism discussed above, have transformed EU citizenship in significant ways. Indeed, these dramatic and expansive changes in the nature of EU citizenship as a result of recent ECJ case law have lead Joppke, a former critic of post-nationalism now turned convert, to concede that this status now represents “a free-standing source of rights” worthy of the name of post-national citizenship. In a series of crucial developments, the ECJ has established a right to free moment and residence inherent in Union citizenship independent of a tie to economic activity and moreover that there are, “next to formal rights of free movement and residence, substantive social rights that accrue to EU citizens qua citizens, outside prior economic status categories.” As one commentator has noted, the ECJ has thus increasingly granted “autonomous content” to EU citizenship, transforming the “Union’s non-discrimination provisions into a fundamental and personal right for all European citizens.” Through a series of rulings leading up to its historical decision of Grzelczyk in 2001, the ECJ extended the principled prohibition against discrimination on grounds of nationality toward EU citizens exercising their right to free movement to entail extensive access to social benefits, thus lending credence to its claim that “Union citizenship is destined to be the fundamental status of nationals of the Member States.”

While this statement may still have more the sound of prophecy than present day reality, it does speak to the remarkable transformations in the nature of EU citizenship that have taken place. Indeed, the more recent ECJ case Rottmann v. Freistaat Bayern, involving the relationship of Community law to the loss of nationality, seems to herald the potential for an even greater degree of preeminence of Union citizenship over national citizenship. The court’s decision both highlighted the dependent relationship between national citizenship in an EU member state and EU citizenship, while simultaneously suggesting that judgments concerning the loss of the former should be subject to considerations flowing from the importance of the latter status. The outcome of Rottmann is particularly striking, as nationality and citizenship are matters traditionally “considered as falling within the domestic jurisdiction, within the internal legislative competence, of the individual State.”

38 Ibid.
39 Wind, supra note 31 at 242.
41 Janko Rottmann v. Freistaat Bayern, C-135/08, [2010] ECJ I-1467 [Rottmann].
42 Echoing the sentiments of Grzelczyk, the ECJ both established that the potential loss of citizenship fell ‘within the ambit of European Union law’ in the event that it would render an individual capable of losing ‘the status conferred by Article 17 EC and the rights attaching thereto’ (Grzelczyk at I-1487) and that states must apply standards of proportionality take into account the consequences of a decision revoke citizenship ‘with regard to the loss of the rights enjoyed by every citizen of the Union’ (Grzelczyk at I-1490).
43 Peter Weis, Nationality and Statelessness in International Law, 2nd ed. (1979), at 65. As Weis notes of the conventional view, the “right of a State to determine who are, and who are not, its
eventual ramifications of these developments, it is hard not to interpret Rottmann as signaling only the beginning of a likely encroachment of EU citizenship rights on member states’ control over nationality itself. In light of this, EU citizenship has become increasingly hard to conceptualize as merely a derivative status while its development as well as expansion appears to be directly challenging what has been viewed as the exclusive competencies and prerogatives of member states.\textsuperscript{44}

This connects up with the second challenge critics have raised against the post-nationalist claim that EU citizenship should be read as a competing status on par with and challenging national membership. Pointing to the limits of EU citizenship—most notably restrictions on political rights and public service—scholars have raised doubts regarding the significance of EU vis-à-vis nationality and thereby called into question its significance.\textsuperscript{45} However, contemporary trends seem to have vindicated the post-nationalist position. With regard to social and economic rights, the dramatic judicial and policy changes outlined above have radically reinvented the entitlements of EU citizens relative to nationals. Indeed, as Joppke has stressed, the increasingly robust nature of the rights and entitlements of EU citizenship has opened up the possibility of reverse discrimination against nationals, “who, for instance, now perversely have lesser family reunification rights under national law than border-hopping EU citizens may enjoy in the same country under European law.”\textsuperscript{46} This striking outcome emerges from the interaction of EU and national law, where Community law rights attached to the free movement provisions generally become salient only with transit across an EU internal border, while the absence of such movement leaves the jurisdiction wholly internal and under domestic law.\textsuperscript{47} Thus, the interaction of these two jurisdictions means that “EC law sometimes engenders reverse...
discrimination internally against nationals of Member States in relation to other EU nationals who have moved there and benefit from EC law.\textsuperscript{48}

Additionally, it appears that nationals can take advantage of these jurisdictional slippages to upgrade their status in relation to their fellow citizens. Thus, border-crossing nationals can in some instances draw on a broader range of entitlements than their stationary counterparts in virtue of exercising their free movement rights.\textsuperscript{49} Instances of this possibility of differential rights for citizens or of nationals enjoying fewer rights than foreigners are deeply anomalous from the traditional standpoint of national citizenship and are presumably unlikely to persist for long. Yet, perhaps more importantly for the post-national implications of Union citizenship, subsequent developments in EU case law point in the direction of the erosion of this anomaly from ‘above’ rather than from ‘below’ insofar as the ECJ has suggested that actual cross-border movement may be less central to invoking rights derived from EU citizenship. In the important 2011 \textit{Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)} decision on the family reunification rights of EU citizens, the ECJ appeared to move in this very direction. In its decision, the ECJ allowed for the exercise of EU rights in exceptional circumstances in what would appear to be a purely internal situation, given the absence of any prior cross-border movement.\textsuperscript{50} Given these realities, the fact that EU citizenship has the potential to generate more expansive legal entitlements and rights than those granted to the nationals of a given territory signals an important transformation and the gradual emergence of a supra-national site of citizenship. Moreover, given that Conant has demonstrated that the anti-discrimination provisions of EU law have already acted as an important constraint on domestic policymakers in Germany, it seems highly likely that contemporary developments in EU citizenship will only reinforce this trend, thereby deepening the significance


\textsuperscript{49} The implications of ‘reverse discrimination’ have at times been quite notable, leading one commentator to go as far as to suggest that “the law as it stands today makes it clear that possessing the nationality of the Member State of residence can make one worse off.” See: Dimitry Kochenov, “Double Nationality in the EU: An Argument for Tolerance,” (2011) \textit{European Law Journal} 17:3, at 335.

\textsuperscript{50} See: \textit{Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm), Case C-34/09, [2011] ECJ I-01177 [Zambrano]}. The exceptional circumstances concerned the potential loss of enjoyment of Union rights that would be imposed upon minor EU citizens compelled to leave Union territory, absent the conferring of derivative rights of residence and employment upon the parents. Notably, the radical potential of Zambrano lies in the erosion of the need for any link to actual cross-border movement for the exercise of Union rights, at least in certain situations. The court thus ruled that Article 20 of the Treaty on the Functioning of the European Union “precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union” even in apparently purely ‘internal’ contexts. However, as have been noted by others, the grounds of this important shift remain rather underdetermined by the decision, leading to significant ambiguity regarding its long-term legal implications; see P. V. Elsuwege and D. Kochenov, “On the limits of judicial intervention: EU citizenship and family reunification rights,” (2011) \textit{European Journal of Migration and Law}, 13(4), 443-466.
of this transnational status.\textsuperscript{51}

EU citizens also enjoy important political entitlements traditionally reserved for national citizens, including the right to local political participation, diplomatic and consular protection, and freedom of moment with regard to entering and exiting their state of residence. The rights of EU citizens to political participation have not undergone a similar expansion, having remained limited to voting rights and the ability to stand for office in local elections and the European Parliament, but this may be less problematic than we might suspect. A potentially salient reason why persisting limits on political participation within an EU citizen’s country of residency may be less \textit{practically}, as well as \textit{normatively}, important for the situation of EU citizens residing in another member state is suggested by the fact that their legal status is seemingly decoupled from national jurisdictions in important ways. As noted above, EU citizens can draw on Community law with regard to regulations affecting their status and situation upon crossing an internal frontier, thereby partially detaching themselves from domestic jurisdiction and the actions of domestic legislatures. Moreover, the actual behavior of EU nationals does in part ask us to reconsider the importance of this continued omission of more robust national-level political status.\textsuperscript{52}

While this is not the place to enter into a discussion of the value of active civic engagement in the practice of citizenship, such trends among EU citizens do in part provide a partial response to the charge that post-nationalism is “a tribute to mass disenfranchisement.”\textsuperscript{53} This is because EU citizens do possess important political entitlements, despite showing a general aloofness toward exercising the important political rights of participation secured under their status. But, perhaps more problematically for those who might argue for the primacy of the right to participate in national elections, EU citizens show an equally striking lack of interest in naturalizing—the necessary prerequisite to participating in local and national elections within Germany. Moreover, such trends have continued even in the wake of important shifts in Germany’s policies toward the

\textsuperscript{51} Conant, “Contested Boundaries”, \textit{supra} note 42.

\textsuperscript{52} In what should be a matter of some concern to those who celebrate EU citizenship, despite the granting of relatively expansive local political participation rights as foreigners, EU citizens on the whole express little interest in exercising their entitlements to civic participation—despite national initiatives aimed at informing EU citizens of their political rights. This is suggested by a 2006 European Commission report, which found that the proportion of EU non-nationals registered to vote was relatively low; see European Commission, Press Release, MEMO/64/484, “Report on the application of Community law in the 2004 European elections” (13 December 2006) online: European Commission <http://ec.europa.eu/>. The persistence of such trends has led one commentator to assert that there is ‘no strong demand for the current [political] rights and responsibilities of EU citizenship’; see Damian Chalmers et al, eds, \textit{European Union Law: Text and Materials} (Cambridge: Cambridge University Press, 2010) at 575. While such political indifference may be a lamentable fact, it seems that EU citizens residing outside their country of nationality themselves place a lesser value on this element of the practice of citizenship. Moreover, this trend with regard to civic engagement is reflected within Germany where, as a proxy of general political participation, non-national EU citizens registered to vote in the 2004 European Parliament elections stood at a dismal 6.1per cent; see European Commission, \textit{supra} note 46.

\textsuperscript{53} Hansen, “The Poverty of Postnationalism,” \textit{supra} note 5 at 20.
naturalization of EU citizens.

Thus, arguably the strongest case for the growing significance of EU citizenship over national citizenship for Germany’s population of EU citizens is captured in their apparent near indifference toward acquiring German citizenship. As one scholar has noted, naturalization rates for EU nationals remained remarkably low from 2001-2008, hovering between 0.6 per cent and 1.0 per cent.\(^54\) This is all the more striking since Germany instituted the automatic toleration of dual nationality for EU citizens from 2007 onward, given that German resistance to dual nationality is widely perceived as the primary impediment to the broader naturalization of its third-country population. Indeed, even as dual nationality has become an available and accessible reality within Germany for privileged residents from EU member states, national citizenship is arguably waning in value relative to EU citizenship.\(^55\)

Extrapolating from such behaviour, we may infer that the benefits of naturalization are sufficiently marginal to this class of non-nationals within Germany that, even with the privilege of full access to German citizenship alongside their original nationality, interest in naturalization remains low. The failure of EU citizens residing in Germany to take up national citizenship despite the liberalization of German nationality law and the formal tolerance of dual nationality would seem to suggest that these EU citizens, on the whole, view their rights as on par with those of nationals. According to Simon Green, “this probably reflects the comprehensive availability of welfare and residential rights, and partial availability of political rights...which has rendered any material gain from naturalization for this group effectively meaningless.”\(^56\) But this observation can be put more strongly in light of the discussion of the expansion and development of EU citizenship status. As was noted, as a result of recent ECJ interventions it has become increasingly difficult for states to withhold any substantive rights and privileges to EU citizens that had been previously reserved for nationals. Indeed, in some situations member states have been compelled to grant greater rights to EU non-nationals than to their own citizens. If this observation is correct, we must concede that, in the eyes of EU citizens, the status and rights conferred by EU citizenship closely approximate those of German nationals in all but negligible ways.

While the situation of EU citizens within Germany provides a striking


\(^{55}\) However, as Green notes elsewhere, the difference between formal citizenship and EU citizenship has not been rendered entirely irrelevant in the German context. As he writes, “[c]ompared with some other EU member-states, the material benefits of nationality in Germany are in fact comparatively high: as well as granting full voting rights, nationality is a prerequisite for civil service positions (Beamte), which in Germany includes most middle- and senior ranking positions in education, law enforcement, the judiciary and the administration at local, Land and federal levels.” See Simon Green, “Between Ideology and Pragmatism: The Politics of Dual Nationality in Germany” (2005) 39(4) International Migration Review 921 at 934 [Green, “Ideology”].

\(^{56}\) Green, “Much Ado”, supra note 48 at 180.
testament to the emergence of post-national trends, the case of the country’s large third-country migrant population arguably has proven to be far more ambiguous in light of contemporary developments. Germany’s sizable migrant population is to a great extent the result of the post-war guest-worker program instituted in the 1950s by the (West) German government in response to labour shortages arising in the context of the Wirtschaftswunder. Viewing these labour migrants though the prism of Germany’s formal rejection of the status of a country of immigration, most Germans “assumed that foreigners were temporary sojourners” whose stay in the country would be far from permanent.57 However, stay they did and, with some irony as trends toward longer-term residence emerged, belated attempts of the German government to curtail its growing migrant population only “reinforced the process of settlement, sharply limiting back-and-forth migration and prompting a surge in the immigration of family members.”58 Thus even with the end of formal recruitment for its guest worker policy in 1973, Germany’s population of foreign nationals continued to grow and became more settled as large numbers of “guests” decided to remain within the country and to sponsor dependents. Coupled with the effects of Germany’s up until recently generous asylum policy, the country’s non-national population continued to expand only stabilizing in 2004.59 As of 2008, Germany’s population of non-nationals not from EU member states, and therefore lacking the entitlements of EU citizenship, stood at an impressive 4.74 million or roughly 5.8 per cent of Germany’s population.60

As the host of Europe’s largest population of non-EU nationals, recent developments in Germany’s citizenship and naturalization policies remain central to an assessment of the post-nationalist position. Moreover, Germany’s experiences in its post-war history of immigration have formed an important, though perhaps potentially misleading, part of the story told by post-nationalist scholars. The changing status and expanding resident rights of Germany’s guest worker population is cited as a component of Soysal’s claim that membership rights and national citizenship have become progressively decoupled, leading to the “decreasing importance of formal citizenship status in determining the rights and privileges of migrants in host countries.”61 Indeed, it was precisely because Germany’s notably exclusivist approach toward citizenship, grounded in its 1913 nationality law, coexisted alongside the gradual unfolding of extensive social and economic rights for resident aliens that scholars could take up the case of Germany as an example of broader post-nationalist trends. Moreover, read through this same lens, even Germany’s recent liberalization of its citizenship policy could be viewed as a separating of forms of membership from exclusivist

59 Green, “Much Ado”, supra note 48 at 180.
60 Eurostat, supra note 9.
61 Soysal, supra note 1 at 122-30, 132.
ethno-cultural notions of national identity, as a population long regarded as intrinsically foreign was finally becoming ostensibly incorporated into Germany’s national citizenship regime through the removal of formal barriers to naturalization and the broader opening up of citizenship. These changes—including the introduction of *jus soli* citizenship alongside Germany’s longstanding use of *jus sanguinis*—have been viewed by many as a historical milestone, both with regard to Germany’s conception of membership and as conferring belated institution and legal recognition of its long-standing *de facto* status as a country of immigration and thus potentially suggested the emergence of a conception of community membership seemingly characterized by the progressive “decoupling of the citizenry from a particular nation or ethnic group.”

Such developments should not be trivialized given Germany’s past history of conceiving nationality in rather narrow and exclusionary terms. While classically characterized by Brubaker as embodying a conception of its citizenry as a “community of descent,” these developments potentially point to the erosion or disappearance of an “ethnocultural inflection of German self-understanding and German citizenship law.” For what had remained “unthinkable in Germany” for Brubaker from the standpoint of the country’s historically embedded national self-understanding—the adoption of *jus soli*—is a concrete reality less than 20 years later. Thus within Germany the combined trends of progressively expanding alien rights and a remarkable liberalization of access of citizenship seem to lend credence to the post-nationalist claim that the distinction between citizen and alien is “disappearing” and that “citizenship has been devalued.”

However, the post-nationalist thesis arguably remains far too sanguine with regard to the status of third-country migrants, despite shifts in the conditions of access to important membership rights as well as more recently undeniable landmark transformations in Germany’s citizenship and naturalization policy. As I indicate subsequently, focusing on the developments discussed above should not lead us to paper-over important details in the complex dynamics surrounding membership, rights, and identity within contemporary Germany, lest we overlook important counter-trends that seemingly point to the persisting importance of the national.

Three elements of the situation of third-country nationals stand out in this regard. First, in an important sense, the development of alien rights for Germany’s migrant population does not point to the emergence of locations of citizenship outside the state. Unlike the evolution of EU citizenship outlined above, which has progressively decoupled a growing number of membership rights from national boundaries and jurisdictions, the status of

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64 Ibid, at 185.
65 Jacobson, *supra* note 1 at 9, 40.
third-country residents remains fairly rooted within a national context, with
important consequences. This is particularly salient for two reasons. As
Joppke has suggested in his most recent work, there is a clearly identifiable
trend toward moving to “upgrade” the value of formal national citizenship
in contemporary government policies across Europe. His analysis identifies
such policy developments as attempts to compensate for potential political
backlash with regard to a “significant opening for legal immigration in
Europe” which, though primarily “highly selective and skill-focused,” has
still proved to be highly unpopular in the eyes of anxious publics.66 Joppke
optimistically interprets such developments as “ultimately futile, rearguard
actions against the inevitable lightening of citizenship in the West” with an
eye to the increasingly substantive form that EU citizenship has taken.67

Tracking the effects of recent ECJ activism rehearsed above, Joppke
suggests that any attempts to thicken the entitlements granted in virtue of
national status are inevitably stymied by the trend toward virtual equality
established between national citizens and residents from EU member states.
Thus, by virtue of the non-discrimination provisions attached to their free
movement, any differential improvement by governments of nationals rights
will have to be opened up to EU residents. Crucially however, while the
supra-national status rooted in Community law of resident EU nationals
provides an easy-in for Union citizens under the protective gaze of the ECJ,
this same logic is not as effortlessly applied to the status of third-country
migrants.68 This suggests that if European governments become serious in
their efforts to “thicken citizenship” by delimiting the scope of economic and
social welfare rights, or to render the internal frontiers of the Schengen Area
increasingly semi-porous, it may very well be that non-EU resident aliens are
the ones who will lose out. While such a situation is speculative, it remains
an immanent possibility because resident aliens remain primarily the
subjects of domestic law and conditions of naturalization are firmly the
prerogative of each member state.69 Therefore, the reemergence of a
broadening divergence between the status of Union citizens and third-

66 Joppke, “Citizenship and Immigration”, supra note 19 at 156.
67 Ibid.
68 The application of Community Law is triggered by movement from one member state to
another and therefore covers all EU nationals residing within another member state. In contrast,
third-country nationals’ rights were originally entirely a matter for national law regulation’ and
while there has been movement to strengthen third-country nationals rights in recent directives,
this has proceeded only very slowly; see Tillotson & Foster, supra note 44 at 351. At this stage
there seems little possibility that the ECJ will be able to accomplish anything close to the
revolution in EU citizenship with regard to third-country nationals, given that the latter process
was driven by prohibitions against discrimination on the basis of nationality built into the status
of EU citizens.
69 The fact that naturalization—that is, access to national citizenship—remains firmly rooted in
domestic contexts is quite important because it is precisely acquisition of nationality in an EU
member state that enables access to the expansive rights regime of Union citizenship. While
there has been important legal innovations, as noted above in the discussion of Rottmann,
regarding the loss of EU status, further development regarding acquisition of EU citizenship
either through introducing mechanisms for its acquisition that do not depend upon
naturalization in a member state or through harmonization of domestic citizenship laws, has
still yet to happen to any significant degree.
country nationals is not beyond the possible, but very much up to the vagaries of the domestic political climate. While Joppke argues that the increased status of EU citizens will only help the status of third-country nationals because it is “inherently difficult to justify a distinction between two types of internal free movers” this follows less convincingly from his arguments.\textsuperscript{70} Indeed, we must be careful to avoid the distortions that arise from simply assimilating the situation of EU citizens to that of third-country nationals, most obviously because the latter remain specifically severed from the particular legal status of EU citizenship formulated in the Maastricht Treaty. If governments persist in trying to raise the apparent value of national citizenship in light of its diminished currency in the face of Union citizenship entitlements, there is no strong reason flowing from the logic of an expansive EU citizenship that suggests why third-country nationals will not lose out instead, especially if European states witness growing trends of populist xenophobia and intolerance toward non-nation populations, a far from unimaginable scenario in the context of continuing economic malaise.

A second concern comes from the persisting differences in the entitlements of third-country nationals and German citizens that should cause us to remain skeptical of the post-nationalist claim regarding the progressive decoupling of important membership rights from formal citizenship. While the above discussion highlighted how alien rights remain generally embedded within a domestic legal context and therefore potentially insulated from the expansionist thrust of developing EU citizenship, here I point to the empirical reality of a persisting gap between aliens and citizens.

Third-country nationals who have established permanent residency status do enjoy an impressive array of privileges, ranging from family reunification rights, unrestricted access to the labor market, as well as entitlements to education and many social security benefits on the same conditions as citizens. But though it may be true that at present the social and economic rights of resident aliens within Germany have come to increasingly approximate those of nationals, it would be inappropriate to equate resident status with full membership. As has been stressed more generally by others, certain rights of central importance remain crucially bound up with the possession of formal citizenship, and this certainly remains the case with regard to Germany’s third-country nationals.\textsuperscript{71}

First, Germany’s non-EU permanent residents lack entitlements to diplomatic and consular representation on behalf of the German government. This is an important omission given that, in crucial circumstances that have become an all too present possibility in our global

\textsuperscript{70} Joppke, “Citizenship and Immigration”, \textit{supra} note 19 at 169. A clear example of this concerns the continued and sustained domestic resistance toward permitting dual-citizenship among non-EU nationals. While unconditional tolerance of dual nationality is available to all EU nationals who would wish to naturalize, the current German government is strongly opposed to extending such an option to its large population of third-country nationals.

security climate, the right to diplomatic protection “can be of decisive importance for the individual migrant’s life chances.”72 This of course contrasts with the enhanced status of nationals of EU member states who are in certain circumstances able to draw on the diplomatic representation of Germany by virtue of their Union citizenship. Second, unlike formal citizens, third-country nationals are not free from the threat of deportation and expulsion.73 This is an important vulnerability given that Germany is among the “chief deporting states in the advanced industrialized world” having conducted over 35,000 deportations in 2000.74 It is true that in Germany permanent residents do enjoy a greater degree of protection against expulsion than temporary residents; however even that protection is by no means total. For instance, third-country nationals may be expelled on grounds of posing a threat to public order, or on the basis of providing false information to gain residency status.75 Remarkably, the latter provision has been applied to allow for the discretionary deportation of the children of migrants on the basis of their parents’ deception with regard to immigration proceedings—despite the former having been born and raised to adulthood in Germany. Here the experience of Mohammad Eke is a disturbing reminder of the vulnerability to deportation of third-country nationals; despite having lived his entire life in Germany, Elke was deported at the age of 21 to Turkey, a country he had never even visited, on the grounds that his parents relied on false papers to gain residency status over two decades prior.76 Indeed, it is important to note that in Germany receiving social assistance may provide legal grounds for the deportation of even permanent residents, though in practice such expulsions are rare.77 Thus, to view the situation of Germany’s third-country migrants as one to be experienced as notably precarious when contrasted with the status of citizens would not be without reason. Whether pursued under the banner of national security or immigration policy, these trends point to the continuing salience of an unqualified right against expulsion for Germany’s third-country migrants, the absence of which emphasizes the lasting

73 The legal basis for such measures is contained in the “Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners” (Immigration Act) of 2002.
74 Antje Ellermann, States Against Migrants: Deportation in Germany and the United States (Cambridge: Cambridge University Press, 2009) at 4. This total reflects a three-fold growth in the number of expulsions over ten years, corresponding to “a period of highly politicized immigration politics that culminated in far-reaching policy reform” (Ellermann at 4). The policy response was a historical tightening of Germany’s asylum controls (Ellermann at 18-21)
77 Groenendijk, supra note 67 at 46. This is particularly relevant in light of the prior discussion of the expanding status of EU nationals, given that ECJ rulings have expanded Union citizen’s social rights to almost mirror those of nationals including so-called ‘mixed type’ benefits. Also see Joppke, supra note 5 at 46; Conant, “Contested Boundaries”, supra note 42 at 305-08.
The importance of access to national citizenship for this population.

Finally, a last crucial category of rights refused to third-country migrants in Germany concerns the continued denial of access to either active or passive political participation. Prior to Germany’s partial easing of naturalization policies in 1992 and the more recent integration of *jus soli* into its nationality law, this total political exclusion of a inter-generational population of guest-workers turned long-term residents—what Michael Walzer called a “disenfranchised class”—was particularly scandalous from the standpoint of the normative commitments at the core of modern liberal democracies. As Joppke has eloquently put it, “liberal democracy demands congruence between the subjects and objects of rule, irrespective of the ethnic composition of the population”—and it was arguably the persisting lack of such congruence that finally led to the emergence of a rights-based claim to naturalization and the reforms of Germany’s nationality law. Yet, even following the partial liberalization of access to citizenship, Germany has continued to host a large population of third-country nationals whose continued disenfranchisement constitutes an important challenge to the post-nationalist claim regarding the decoupling of rights from formal citizenship. Ironically, in many ways the presence and expanding entitlements of EU citizens only further throws into sharp relief the third-class status of third-country nationals within Germany.

Unlike other member states that grant to third-country nationals the right to vote in local elections, and in some cases the right to stand for office, Germany has persisted in offering neither. This means that third-country migrants who may have been long-term residents, or perhaps even born within Germany, not only hold less political rights than German citizens, who possess full entitlement to civic participation on the local, Land, federal, and EU level, but also, remarkably, enjoy fewer political rights than non-nationals from EU member states who have resided within Germany for a far shorter time. Participation in political organizations is limited because naturalization remains a precondition for candidacy in Germany’s political parties and under German law immigrants that have not naturalized cannot

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79 Joppke, “Citizenship”, *supra* note 5 at 87.
81 Länder based initiatives to introduce local voting rights to long term residents were ruled unconstitutional in 1990 by the German Constitutional Court, signaling that the extension of electoral rights to third-country nationals could only be accomplished through legislative changes facilitating naturalization or through the amendment of the Basic Law to allow non-nationals access to political rights. However, as noted above, all EU citizens gained access to local political rights as a result of the transposition into German law of European Council Directive 94/80/EC. Given that the original rational for the denial of municipal voting rights rested on the purported link between German nationality and the exercise of local voting rights, this disjunction in the treatment of two categories of resident foreigners appears rather problematic.
constitute the majority of members in any political party. Moreover, unlike their privileged European counterparts, third-country nationals lack the robust protections granted on EU citizens by Community Law, while remaining politically excluded subjects of a framework of laws and institutions in which they have no say. Indeed, political rights seem all the more important given that there are persisting trends of social marginalization toward the largest minority group among German’s third-country residents with unemployment at double the national average for Turkish nationals and 28 per cent reporting discrimination when searching for employment. What official political voice that Germany’s non-naturalized Turkish nationals possess is limited to the Ausländerbeiräte councils established to articulate immigrant’s interests, but these organizations are widely perceived as ineffective by those they are meant to represent. In this context, given that the modern emancipatory thrust of the meaning of citizenship has been tied to the progressive extension of political inclusion, through which those subject to the laws of the state are allowed to participate, it is hard not to view arguments regarding the “post-national membership” of Germany’s population of third-country nations as anything but a perverse tribute to second-class citizenship. Thus, because of these reasons, national citizenship continues to remain crucial to securing an important array of rights.

A final way in which the situation of Germany’s third-country nationals seems to undermine assertions about the waning importance of national membership and the nation state is captured in the tensions that have emerged in the context of recent reforms in German nationality and citizenship law. On a superficial level, the gradual opening up of access to national citizenship to Germany’s large third-party migrant population may be viewed as more grist for the mill for post-nationalists. From this perspective, these progressive reforms are indicative of an emerging recognition of the rights of long-term residents, while the shift to more inclusive notions of citizenship suggests the decoupling of full membership status from particularistic and exclusionary conceptions of community and nationhood. However, I wish to suggest that the developments leading up to Germany’s current regime of naturalization and citizenship with regard to third-country nationals should be understood as an important challenge to the post-national thesis.

On the one hand, if formal national membership has progressively become less important, then why has Germany’s approach to citizenship law reform focused on opening up access to German nationality some 15 years after the post-nationalist thesis initially emerged? Put another way, if the

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84 Ögelman, supra note 73.
development of extensive membership rights for permanent residents suggests the waning importance of citizenship, how are we to explain the appearance of access to citizenship and naturalization as a central political issue? Arguably the reemergence of a right to citizenship with regard to Germany’s large non-EU national population should be read as a powerful counterpoint to the post-nationalist claim that the acquisition of citizenship has lost much of its significance as a result of “the disappearing distinction between citizen and alien.”  

Such a view is supported both by the statements of German government officials who progressively have come to view the continued exclusion from citizenship of the country’s large guest-worker population turned settled residents as deeply problematic and by the actions of third-country migrants, who responded to the easing of naturalization requirements by increasingly taking up German citizenship, that is until provisions disallowing dual nationality were tightened. Therefore, the rise of citizenship reform in Germany indicates the persisting value and meaningfulness—both in the eyes of government officials and of third-country nations—of the formal status of national citizenship.

On the other hand, features of Germany’s reformed citizenship and naturalization regime, while of course marking a historical departure from the country’s prior approach toward its population of third-country nationals, arguably still betrays more than a trace of exclusionary forms of national membership. If post-nationalists wish to suggest that our contemporary political context is marked by the progressive decoupling of citizenship from exclusionary forms of identity and membership, then Germany’s contemporary citizenship regime, which cannot quite be called post-ethnonationalist, poses a further challenge to their claims. In this sense, the politics of naturalization in Germany show not only that citizenship still matters, but also that it seems to matter in ways that are strikingly contrary to the post-nationalist position.

The exclusionary dimensions of German’s approach to nationality have come out most clearly through the continued, though markedly selective, rejection of dual nationality in the country’s contemporary citizenship policy, even while access to naturalization and citizenship have been broadly reconfigured in light of the reforms introduced in 2000. Aspects of these and subsequent amendments to German citizenship and nationality law not only eliminated loopholes that had allowed Turkish nationals to gain dual citizenship through re-acquiring Turkish citizenship after naturalizing in Germany, but introduced jus soli in an importantly circumscribed form.

85 Jacobson, supra note 1 at 39.
86 Green, “Much Ado”, supra note 48 at 184. Thus, as early as 1984, there was widespread agreement that the integration of Germany’s large third-country population represented an important government priority, with officials declaring that “no state can in the long run accept that a significant part of its population remain outside the political community.” See Brubaker, “Citizenship  and Nationhood”, supra note 14 at 78.
87 For a more extensive discussion of the elimination of informal mechanisms for dual citizenship for Germany’s Turkish population and the frequently resulting loss of nationality in the wake of the reforms introduced in 2000, see Betty De Hart & Kees Groenendijk, “Multiple
This latter feature of the new citizenship regime is exemplified in the *Optionsmodell*, which sought to render possible cases of dual citizenship generated through the country’s adoption of jus soli only temporary, by requiring individuals to opt out of other nationalities at the age of 23 or risk losing German citizenship. Indeed, it is worth noting that the implications of the *Optionsmodell* are no longer merely prospective - there have now already been a number of cases of individuals being stripped of their German nationality as a result of these provisions, sometimes merely as a result of inaction resulting from ignorance of the implications of the new citizenship regime.

Moreover, while proposed reforms suggest the introduction of a more relaxed policy toward dual nationality under the *Optionsmodell*, this does little to address the position of third-country nationals not falling under such provisions, while also highlighting the persisting importance of the acquisition of national citizenship to full status.

While this is not the place for a theoretical discussion of the merits or deficiencies of dual citizenship, in the German context the continued formal rejection of dual citizenship has particular importance for how we should understand citizenship more broadly. The refusal to allow dual nationality for a significant portion of Germany’s largest group of third-country nationals is widely perceived to be the chief deterrent against naturalization among those of Turkish origin. Thus in a development that would seem paradoxical for a series of policy reforms intended to both encourage and open up access to naturalization, since the introduction of the 2000 reforms naturalizations have reduced by half—falling from 2.6 per cent to 1.6 per cent from 2000-2007, with the drop in naturalizations German’s Turkish population being considerably greater. As Simon Green has put it, far from opening up citizenship to Germany’s large population of resident third-country nationals, the new naturalization regime “is actually helping to create fewer citizens than the old, supposedly more restrictive law.” But perhaps most problematically, this restrictive approach toward dual nationality for third-country nationals has developed alongside a far more permissive policy reserved for nationals from other EU member states. Recall that under Germany’s post-2007 citizenship law amendments, dual citizenship has become automatically permitted for all EU citizen applicants. Reminiscent of Germany’s long-running policy of automatically granting access to citizenship to so-called ethnic Germans who may have never

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89 Green, “Much Ado”, supra note 48 at 179. Green reports that the reduction in naturalization among Turkish nationals represents “a fall from 1999 of over 75 per cent”.

90 Ibid, at 14.
resided within the country while effectively denying access to citizenship to its intergenerational population of Turkish residents, the country’s current approach toward citizenship embodies a double-standard: formally tolerating dual nationality for EU citizens and “ethnic Germans,” while effectively denying it to many third-country nationals. This persisting pattern has led Green to rightly suggest that German citizenship retains “more than a whiff of ethnocultural exclusivity.” 91 Recall, for example, the concrete effects the Optionsmodell has already begun to have on the lives of descendents of third-country nationals granted access to German nationality under the recent citizenship reforms. That individuals who may have been born and raised in Germany have in some cases been actively stripped of their German, and consequently EU, citizenship simply because of the possession of dual nationality in a non-EU state should certainly trouble our interpretation of the inclusionary dynamics of the reforms in German citizenship law and of the EU more broadly. 92 Importantly for our discussion, this distinction stresses the differential treatment of EU citizens from third-country nationals within Germany and highlights how such divergent experiences should be understood as frustrating post-nationalist expectations, if only because exclusionary conceptions of membership—now perhaps configured around a “European” identity—seemingly continue to take precedence over norms grounded in a conception of universal personhood.

V. GERMANY’S PERSISTING AMBIGUITIES OF BELONGING AND MEMBERSHIP

We have has examined the post-nationalist’s assertion that emerging forms of membership point to a important shift in the configuration of the rights, status, and identity attached to citizenship as traditionally understood. This shift has seen the aforementioned components of membership become decoupled in complex ways, leading to the diminished importance of the nation state and national citizenship. Taking contemporary Germany as a crucial case for assessing the existence and meaningfulness of such trends, I have sought to examine empirically whether existing institutional arrangements of the largest host country of non-nationals within the European Union vindicate the post-nationalist claim. Focusing on the

91 Green, “Ideology”, supra note 49 at 948.
92 Indeed, that the Optionsmodell’s entails and has produced the automatic loss of German citizenship, and consequently, of EU citizenship, would seem to run entirely contrary to the approach defended in Rottmann as discussed above. For reports of these outcomes, see Dempsey, “Difficult Choice”, supra note 87. Whether these outcomes will provoke a legal response similar to that outlined in Rottmann is hard to predict given that the Rottmann case clearly depended on a cross border movement in order to activate EU competency. “While there are indications of reforms on behalf of the current German government that would alter these circumstances by allowing dual nationality under the Optionsmodell, such a development would be contrary to the post-national thesis, both originating at the domestic level and stressing the persisting importance of the acquisition of actual national citizenship to full status for third-country nationals.”
position of EU citizens and third-country migrants, I have suggested that we are confronted with a deeply ambivalent situation. On the one hand, the emerging status of EU citizenship under an intrepid ECJ has come to resemble a post-national form of membership, exemplifying a partial decoupling of both rights and status from the nation state and in its increasingly robust form, paradoxically come to potentially empower EU citizens with greater rights than nationals. On the other hand, Germany’s population of third-country nationals remains largely insulated from the post-national dynamics of such developments. Their experience highlights the lasting importance of national citizenship in ways that undermine the post-nationalist position. This is borne out in the many important rights that third-country nationals continue to be denied and in the politics of dual citizenship that has unfolded in Germany in the context of its recent citizenship reforms, the latter highlighting persisting elements of ethno-nationalism. Thus, given the continued precarious position of Germany’s large population of third-country migrants, a group frequently far more economically, politically and socially disadvantaged than their EU national neighbors, we must admit that the post-nationalist perspective is a deeply problematic lens for understanding what the current stakes of citizenship are today.

A number of practical considerations emerging from these important dynamics ought to inform our thinking about the contemporary nature of citizenship more broadly. Although I have argued that EU citizenship has recently undergone important transformations that significantly enhance its claim to represent a novel post-national form of membership, juxtaposing the experience of Union citizens with that of third-country nationals alerts us to the persistence of powerful counter-trends in the development of citizenship regimes. This suggests that scholars and practitioners concerned with social and political inclusion should remain wary of viewing developments in EU citizenship as suggesting the unimportance of nationality today. Indeed, the lessons of Germany suggest that multiple, at times problematically stratified, regimes of membership can coexist.

Most concretely, the troubling outcomes of the Optionsmodell policy—which has already resulted in the loss of German nationality by descendents of third-country nationals—show how the full retention of state control over naturalization policy, as a subset of citizenship law, can sustain problematic forms of exclusion even within the context of the EU. The treatment of this population with regard to intolerance of dual nationality as a condition of naturalization is hard to justify when compared to the differential treatment accorded to nationals from other EU member states, and yet the current government has expressed little interest in further reforms of the German citizenship regime. Admittedly many scholars believe that Germany’s present approach toward citizenship and naturalization with regard to descendents of third-country nationals is deeply unstable, with some suggesting that the denial of dual citizenship to third-country residents is likely to run afoul of the European Convention. Others suggest that the Optionsmodell’s effect of the automatic loss of nationality is likely to be
equally problematic in the eyes of the German constitutional court, where a legal challenge is to be expected. That said, for the time being, it is hard not to view the position of Germany’s third-country nationals as one tantamount to second-class citizenship.