

## Illiberal Liberalism Cultural Restrictions on Migration and Access to Citizenship in Europe

*This Article addresses a simple but important question: is culture a legitimate criterion for regulating migration and access to citizenship? While focusing on France, Germany, the Netherlands, the United Kingdom, and Denmark, I describe how these countries embrace illiberal migration policies which violate the same values they seek to protect. I then construct a two-stage set of immigration-regulation principles: at the first stage, immigrants would have to accept some structural liberal-democratic principles as a prerequisite for admission; these principles are not culturally-oriented but rather constitute a system of rules governing human behavior in liberal democracies. At the second stage, as part of the naturalization process, immigrants would be expected to recognize and respect some constitutional principles essential for obtaining citizenship of a specific state. I*

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*call this concept "National Constitutionalism." As the American debate on immigrant integration policy comes to a head, the European experience has some important lessons for U.S. policymakers.*

## INTRODUCTION

In *America as a Land of Opportunity*,<sup>1</sup> Benjamin Franklin expressed his qualms as to whether America would remain an Anglo-Saxon society. Franklin was concerned that foreigners would overwhelm the American cultural fabric. "The Number of purely white People in the World is proportionably very small," he was worried, as "all Africa is black," and "Asia is chiefly tawny." His tone may contain echoes of racism but Franklin was more concerned with American culture than with racial impurity. He was particularly anxious about German immigrants: "Why should Pennsylvania, founded by the English, become a Colony of Aliens, who will shortly be so numerous as to Germanize us instead of our Anglifying them, and will never adopt our Language or Customs?"

Since Alexis de Tocqueville's concept of American exceptionalism, through the nativist movements of the nineteenth century, and up to the current revival of English-only movements, Franklin's fears have shaped America's immigration history. There were days when Americanism was an enterprise based on race (a Whites-only country), religion (anti-Catholics), and nationality (national-origin quotas)—but all along, America's immigration and naturalization laws have been shaped by cultural anxiety.<sup>2</sup> Recently, with the growing number of Latinos in the United States, immigrants' culture has been spotlighted. First, empirical studies have claimed that Latinos, as a case, are *sui generis*—they marry spouses from within their own communities,<sup>3</sup> and their offspring's identification with America is fragile.<sup>4</sup> Second, there are normative arguments regarding their uniqueness. In his thought-provoking book *Who We Are?*, Samuel Huntington argues that Latinos are diluting Anglo-Protestant culture.<sup>5</sup> Other scholars have asserted that Latinos do not absorb

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1. See Benjamin Franklin, *America as a Land of Opportunity*, in DAVID B. DAVIS & STEVEN MINTZ, *THE BOISTEROUS SEA OF LIBERTY: A DOCUMENTARY HISTORY OF AMERICA FROM DISCOVERY THROUGH THE CIVIL WAR* 119 (2000).

2. See, e.g., ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* (2002); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (2d ed. 1988).

3. See, e.g., Qian Zhenchao & Daniel T. Lichter, *Social Boundaries and Marital Assimilation: Interpreting Trends in Racial and Ethnic Inter-marriage*, 72 *AM. SOC. REV.* 68 (2007).

4. See, e.g., ALEJANDRO PORTES & RUBÉN G. RUMBAUT, *LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION* (2001).

5. See SAMUEL HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004).

American values and hence threaten the American character.<sup>6</sup> In *The New Case against Immigration*, Mark Krikorian warns that Latino migrants are a “twenty-first century version of *Reconquista*,” and “are going to Latinize America.”<sup>7</sup> And lastly, there are legal proposals, beginning with the call for an immigration time-out, moving on to demand that migrants participate in compulsory English courses, and concluding with the invocation of a more assimilationist policy. The U.S. Senate has recently passed bipartisan legislation intended to promote “the patriotic integration of prospective citizens into the American way of life” by requiring them to participate in civics and English lessons.<sup>8</sup>

This Article seeks to provide the discussion with a theoretical framework and a comparative perspective. Focusing on Europe as a case study, I ask whether culture is a legitimate criterion for regulating migration and access to citizenship. On the one hand, states usually regulate immigration and naturalization by means of traditional criteria, such as public health, public order, and public safety. On the other hand, the use of criteria such as ethnicity, race, and religion is often presumed to be illegitimate in immigration and naturalization cases.<sup>9</sup> Because culture is not firmly embedded in either category, this Article questions whether culture should be deemed a legitimate immigration criterion. My argument does not dismiss culture as a legitimate criterion in immigrant selection, yet it does support a narrow version of culture. I suggest a two-stage immigration process. At the first stage, migrants would have to subscribe to structural liberal-democratic principles as a prerequisite for admission; these principles are generally not culture-oriented but constitute a system of structural rules governing human behavior in liberal democracies. At the second stage, as part of the naturalization process, migrants would be required to be familiar with, and respect, essential constitutional principles in order to obtain citizenship of a specific country—as long as these principles are essential to citizenship and just as it is reasonable to expect given the state’s circumstances; I call this concept *National Constitutionalism*.

The Article proceeds as follows: Part I briefly describes the new challenge of migration in the light of changes in migration patterns and in European society. It continues with a discussion of the cultural clashes that these patterns have instigated, and how radical

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6. See, e.g., PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* (2006); PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* (1996).

7. See MARK KRIKORIAN, *THE NEW CASE AGAINST IMMIGRATION: BOTH LEGAL AND ILLEGAL* 51, 56-59 (2008).

8. See Strengthening American Citizenship Act of 2007, Bill #S.1393, available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.2721>.

9. See CHRISTIAN JOPPKE, *SELECTING BY ORIGIN: ETHNIC MIGRATION IN THE LIBERAL STATE* (2005).

religion and radical liberalism reinforce clashes across the Continent, culminating in a moral panic about immigration. A review of the new challenge will help us understand the background against which Member States and the EU itself have recently redesigned immigration laws for the purpose of coping with increasing numbers of culturally diverse migrants.

Part II describes new immigration policies in France, Germany, the Netherlands, the United Kingdom, and Denmark. By systematically analyzing these countries' immigration and naturalization laws, I show how they have increasingly turned into a culture-based concept. *First*, these laws demonstrate a move from voluntary to compulsory cultural assimilation. *Second*, they illustrate a trend away from cultural assimilation as a prerequisite for citizenship, and toward cultural assimilation as a prerequisite for admission. *Third*, the concepts "culture" and "assimilation" are shifting from thin to thick versions. *Fourth*, assimilation is being transformed from a means of social inclusion into a means of overt exclusion of unwanted immigrants. And *finally*, cultural restrictions are being extended beyond foreign workers to family members. All these developments have created a new immigration regime under which family members are required to follow the native-born mores and customs in addition to familiarization with the local language as a prerequisite of admission and citizenship.

Part III evaluates immigration and naturalization laws in Europe and the extent to which they can be explained by i) various normative goals—national security, population size, the welfare system, social cohesion, and cultural preservation; ii) various theories of citizenship—republicanism, communitarianism, cosmopolitanism, and liberalism; and iii) various legal disciplines—constitutional law, EU law, and international law. It also explores the empirical evidence relating to these laws. Part III then offers some moral distinctions between liberal and illiberal policies. It shows why parts of the cultural restrictions imposed on immigrants in Europe can be regarded as illiberal, and how they undermine the very values they wish to protect.

Part IV touches upon the question of whether culture *should* be a criterion for regulating immigration and naturalization. In principle, I argue that culture should be given a very narrow interpretation in the field of immigration and naturalization laws. I then elaborate on the above mentioned two-stage set of immigration-regulation principles.

## I. THE NEW CHALLENGE OF MIGRATION

### A. *Europe and Migration—Winds of Change*

People have always moved from one place to another to find employment, improve their lives, join their families, and escape conflicts. But the contemporary phenomenon of migration poses a new challenge. Changes in migration patterns are a major reason for this new challenge. *First*, the number of immigrants worldwide has almost tripled in the last decades. Technological changes in global transportation and communications facilitate easier and cheaper movement between states and continents, culminating in the largest wave of immigration in history. In the 1960s, the world had 75 million immigrants; today, the number is 191 million—three percent of the world's population—and this number will most likely continue to grow.<sup>10</sup> *Second*, the composition of the current wave of immigrants is different. Until the 1950s, migration usually remained within the boundaries of the Western World, for example, European migration to the United States at the turn of the nineteenth century and the early twentieth century. International migrants may have been foreigners to the target states, but they were generally not strangers to Western political ideas. Today, however, most international migrants come to Europe from nonliberal societies in Africa and Asia;<sup>11</sup> their culture travels with them and it often challenges liberal values.<sup>12</sup> Because immigrants frequently concentrate geographically, and maintain close ties with their home country, they create a type of “inside-out communities,” that is, communities that physically reside inside the country, yet culturally remain outside. *Third*, the goals of

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10. See TRENDS IN TOTAL MIGRANT STOCK: THE 2005 REVISION 1 (2005). In Western Europe, the number of international migrants increased from 6,995,054 in 1960 (5.2% of the population) to 22,075,278 in 2005 (11.9%). In Europe as a whole, the number of international migrants raised from 14,244,764 in 1960 (3.4% of the population) to 64,115,850 in 2005 (8.8%). See World Migrant Stock: The 2005 Revision Population Database, United Nations, available at <http://esa.un.org/migration/index.asp?panel=1>.

11. Intra-regional movements constitute 47% of foreign-born migrants in Europe; the rest arrive from Africa (27%), Asia (14%), America (10%), and other regions (2%). When excluding intra-regional migration, international migrants mostly arrive from illiberal societies. The leading sources are Algeria and Morocco in France; Turkey in Germany; Morocco, Turkey, and Suriname in the Netherlands; South Africa, India, and Pakistan in the United Kingdom; Iraq, Somalia, and Turkey in Denmark. See Peter Stalker, *Migration Trends and Migration Policy in Europe*, 40(5) INT'L MIGRATION 151, 174 (2003).

12. The literature on this issue is vast. See, e.g., CHRISTOPHER CALDWELL, REFLECTIONS ON THE REVOLUTION IN EUROPE: IMMIGRATION, ISLAM, AND THE WEST (2009); AYAAN H. ALI, INFIDEL (2008); WALTER LAQUEUR, THE LAST DAYS OF EUROPE: EPITAPH FOR AN OLD CONTINENT (2007); Francis Fukuyama, *Identity, Immigration and Liberal Democracy*, 17(2) J. DEM. 5 (2006); TONY BLANKLEY, THE WEST'S LAST CHANCE: WILL WE WIN THE CLASH OF CIVILIZATION (2005); BAT YE'OR, EURABIA: THE EURO-ARAB AXIS (2005); ROGER SCRUTON, THE WEST AND THE REST: GLOBALIZATION AND THE TERRORIST THREAT (2003).

migration have changed. Until the mid-twentieth century, migration to Europe was mainly perceived as a temporary phenomenon; most immigrants were guest workers whose admission was encouraged in the main due to their economic benefits. Today, however, family, rather than labor migration, characterizes the vast majority of global migration.<sup>13</sup>

It is not just migration patterns that have changed—the face of Europe has changed as well. *First*, Europe is facing a demographic crisis due to the numerical erosion of its population. Fewer people are getting married, and the divorce rate is unprecedented—in some EU states it has risen above fifty percent.<sup>14</sup> Many states face a low birth-rate<sup>15</sup> and an aging population.<sup>16</sup> The decline in number and size of families is countered by the conspicuous growth in the number of immigrants with a relatively high birth rate.<sup>17</sup> *Second*, Western values and lifestyles are different today than in the past. Immigrants arrive into societies whose values they often do not share. True, a gap between values and lifestyles of native and immigrant groups has always existed, but today's gap is more difficult to reconcile. Europe is much more permissive, liberal, and secular than before: consider issues such as women rights, sexual freedom, and same-sex marriages. This gap has produced a “culture shock” for some immigrants that sometimes results in cultural clashes. *Third*, it's a small world. A Turkish immigrant in Berlin can easily stay “Turkish”: she can read *Hürriyet*, eat at the *Hasir* restaurant, watch *TRT International*, and speak with Turkish relatives on her laptop. The modern world allows people to live in their host country while retaining close ties

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13. In 2005, family migration constituted 70% of the total migration to the United States, 62% to New Zealand, 61% to France, 60% to Canada, 58% to Italy, 57% to Australia and Sweden, 47% to Switzerland, 46% to the Netherlands, 45% to Germany, and 35% to the United Kingdom. When excluding refugees and asylum seekers, family migration constitutes about 80 to 90% of total migration. See WORLD MIGRATION 2008: MANAGING LABOUR MOBILITY IN THE EVOLVING GLOBAL ECONOMY 157 (2008).

14. See *The Family in the EU25 Seen through Figures*, 59 EUROSTAT (2006) (“Nearly one divorce for every two marriages in the EU25 . . . two thirds of the households in the EU25 are without children.”).

15. The Total Fertility Rate (TFR) is the number of children that a woman bears over her lifetime. The TFR needed for demographic stability—the Replacement Fertility—is 2.1 children per woman. The TFR in the United States is 2.01, and the average European level is 1.6. While France has a relatively stable TFR of 1.98, Germany has a TFR of 1.39, the United Kingdom of 1.6, the Netherlands of 1.72, and Denmark of 1.85. See *Low Fertility and Population Ageing: Causes, Consequences, and Policy Options*, RAND CORP. EURO. 55-58 (2004); Giampaolo Lanzieri, *Population in Europe 2007: First Results*, 81 EUROSTAT 1, 6 (2008).

16. See Konstantinos Giannakouris, *Ageing Characterises the Demographic Perspectives of the European Societies*, 72 EUROSTAT (2008).

17. See Luke Harding et al., *Low Birthrate: How Parenthood Lost its Charm*, THE GUARDIAN, May 3, 2006, at 23; Gaby Hinsliff & Lorna Martin, *How the Baby Shortage Threatens Our Future*, THE OBSERVER, Feb. 19, 2006, at 8; James Graff, *We Need More Babies!*, THE TIME, Nov. 21, 2004, available at <http://www.time.com/time/magazine/article/0,9171,785317,00.html>.

with their home country and preserving their original national identity. Cheap, easy air transport and communications facilitate the existence of “transnational communities.”<sup>18</sup> Dual citizenship, once an exception under international law, has become common in many countries.<sup>19</sup> These trends are more visible in European states which may be less likely to tolerate a further erosion of their identity because their national identity is eroding due to the corrosive effect of globalization and the European Union on the one hand,<sup>20</sup> and by immigrants and national minorities demanding political recognition on the other hand.<sup>21</sup>

These changes—in migration patterns and in the character of European society—engender new challenges. While they bring new opportunities, they also raise new concerns. My interest lies in the cultural challenge: how can culturally distinct mass migration be reconciled with liberal democracies seeking to preserve their identity?

### B. *Moral Panic across the Continent*

Lately, there have been wake-up calls across Europe, as immigrant and native Europeans clash on a number of fronts. To begin with, illiberal practices adhered to by immigrant and minority groups have emerged over the Continent. Examples include female genital mutilation (FGM),<sup>22</sup> honor killings,<sup>23</sup> and forced marriages.<sup>24</sup> Fur-

18. See PEGGY LEVITT, *THE TRANSNATIONAL VILLAGERS* (2001) (arguing that living transnationally becomes the rule rather than the exception). In a way, some immigrant groups are more than “societies within societies.” They hold their country of origin’s nationality, language and identity, and share ethnic and religious backgrounds. Some scholars argue that they create a “sub-state nationalism.” See HELEN CATT, *SUB-STATE NATIONALISM: A COMPARATIVE ANALYSIS OF INSTITUTIONAL DESIGN* (2002).

19. See RANDALL HANSEN & PATRICK WEIL, *DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE: THE REINVENTION OF CITIZENSHIP* (2002).

20. SCRUTON, *supra* note 12, at 152-55. The defeat of the Treaty establishing a Constitution for Europe by a referendum held in France and in the Netherlands signals that at least these states are not willing to give up their national identity so fast. See, e.g., Bruno Jérôme & Nicolas G. Vaillant, *The French Rejection of the European Constitution: An Empirical Analysis*, 21(4) *EURO. J. POL. ECON.* 1085 (2005); MARCEL LUBBERS, *Regarding the Dutch ‘Nee’ to the European Constitution*, 9(1) *EURO. UNION POL.* 59 (2008).

21. See, e.g., TOVE H. MALLOY, *NATIONAL MINORITY RIGHTS IN EUROPE* (2005); *MINORITY GOVERNANCE IN EUROPE* (Kinga Gál ed., 2002).

22. See BRUCE BAWER, *WHILE EUROPE SLEPT: HOW RADICAL ISLAM IS DESTROYING THE WEST FROM WITHIN* 16-27 (2006).

23. See stories and statistics in the Guardian’s special section of “Forced Marriages,” available at <http://www.guardian.co.uk/world/forced-marriage>; Damien McElroy, *Saudi Woman Killed for Chatting on Facebook*, *DAILY TELEGRAPH*, Apr. 1, 2008, at 16; *One in 10 ‘Bucks Honour Killings’*, *BBN NEWS*, Sept. 4, 2006, available at [http://news.bbc.co.uk/2/hi/uk\\_news/5311244.stm](http://news.bbc.co.uk/2/hi/uk_news/5311244.stm).

24. See, e.g., Edwige Rude-Antoine, *Forced Marriages in Council of Europe Member States*, Council of Europe (2005); *Dealing with Cases of Forced Marriage*, Home Office (2007).

thermore, opinion polls have revealed that native Europeans and immigrants, especially of Muslim origin, often espouse different values and lifestyles.<sup>25</sup> Finally, immigrants and minorities are increasingly challenging the authority of European Constitutions. For instance, 46.7% of German Muslims stated that the Koran's commandments are more important than democratic principles.<sup>26</sup> In the Netherlands, a majority of Muslim students declared that in case of an irreconcilable conflict, they would choose loyalty to Allah over the Dutch Constitution.<sup>27</sup> Among British Muslims, 32% claimed that Western values are "immoral" and should be prohibited, and 61% wished "to be governed by *Sharia* law."<sup>28</sup> These findings have come to the forefront in part due to demographics as the non-native population in EU Member States has been consistently increasing.<sup>29</sup> Demographic forecasts indicate that foreign-born population,<sup>30</sup> especially of Muslim origin, will become the majority in main European cities before 2050.<sup>31</sup>

One might question the empirical validity of such statements. For example, even though the press reports on instances of FGM and honor killing with alacrity, the extent of these phenomena is unclear. It is also unclear whether these practices are embedded in a certain

25. See *The Great Divide: How Westerners and Muslims View Each Other*, the Pew Global Attitudes Project (2006) (describing how Muslims and Westerners see each other, and their different perceptions on terrorism, religion and democracy); JOHN L. ESPOSITO & DALIA MOGAHED, *WHO SPEAKS FOR ISLAM? WHAT A BILLION MUSLIMS REALLY THINK* 87-91, 105-22 (2008) (revealing findings of a Gallup study on Muslims' beliefs and customs); *Islamic Extremism: Common Concern for Muslim and Western Publics*, Pew Global Attitudes Survey (2005) (describing how Muslims and Westerners see Western values differently).

26. See CHRISTINE SCHIRRMACHER, "MUSLIMS IN GERMANY" A STUDY BY THE FEDERAL MINISTRY OF THE INTERIOR 8 (2008).

27. See IAN BURUMA, *MURDER IN AMSTERDAM: LIBERAL EUROPE, ISLAM, AND THE LIMITS OF TOLERANCE* 94-95 (2006).

28. See MELANIE PHILLIPS, *LONDONISTAN* 82-83, 97 (2006); Alan Travis & Madeleine Bunting, *British Muslims Want Islamic Law and Prayers at Work*, *THE GUARDIAN*, Nov. 30, 2004, at 1; *British Muslim Poll: Key Points*, BBC NEWS, Jan. 29, 2007, available at <http://news.bbc.co.uk/2/hi/6309983.stm>.

29. Statistics are not consistent due to different definitions, variables, and sources. In general, non-native population—people who are not citizens of the country in which they reside—constitutes 25 million, about 5.5% of the total EU population. The largest non-native population lives in Luxembourg (38.6%), Austria (9.4%), Germany (8.9%), Spain (6.6%), France (5.6%), and the United Kingdom (4.7%). See *Non-national Populations in the EU Member States*, 8 EUROSTAT (2006).

30. Among the cities that have a sizeable foreign-citizen population are Amsterdam (47%), London (27%), and Berlin (25%). See *Integration of the Immigrant Population in European Capitals, Union of Capitals of the European Union* (2003).

31. Among the cities that have a sizeable Muslim population are Marseille and Rotterdam (25%), Malmö (20%), Brussels and Birmingham (15%). See *An Uncertain Road: Muslims and the Future of Europe 4*, the Pew Research Center (2005). Demographic forecasts predict that Muslims will become the majority in some of these cities, and one fifth of the entire EU population, in 2050. See Timothy M. Savage, *Europe and Islam: Crescent Waxing, Cultures Clashing*, 27(3) WASH. Q. 25, 26-28 (2004).



religion, culture or lifestyle.<sup>32</sup> Differences likewise exist between states and between sects, and any generalization may be mere conjecture. In addition, one might question the scope of such statements. For instance, it is possible to ask how devout Christians or ultra-Orthodox Jews would respond to an irreconcilable conflict between their religion and their Constitution. One can also have doubts as to whether current trends are accurate predictors of future reality. Finally, the normative implications are also open to question. Even assuming the accuracy of these forecasts, does this reality constitute a “threat” and, if so, what kind of “threat,” and what exactly is being “threatened”: is it democracy, liberalism or Western culture? How this “threat” ought to be combated: should states contend with this issue through immigration laws, or by imposing civil and criminal sanctions? Is it a problem of migrants in general, or only of certain kinds of immigrants?

Generally, a sort of moral panic is spreading in Europe.<sup>33</sup> To begin with, there are subjective concerns of threats to enlightenment values and national identities.<sup>34</sup> Then there is hostility, which, while differing among states and groups, cannot be ignored. Prejudice and discrimination against immigrants does exist and, according to the EU, “can be attributed to Islamophobic attitudes as well as to racist and xenophobic resentment.”<sup>35</sup> All this is fueled by right-wing parties that have emerged in Europe,<sup>36</sup> and it creates what Buruma terms “enlightenment fundamentalists.”<sup>37</sup> Buruma sees a clash not between immigrant cultures and enlightenment values, but between radical religion and radical liberalism.<sup>38</sup> The confrontation of radical religion with radical liberalism might even exacerbate the conflict.

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32. It is doubtful, e.g., whether the practice of arranged marriages is rooted in religion or culture; it is especially doubtful if it is a Muslim practice. Arranged marriages exist also in Asian cultures, and among some sects of ultra-Orthodox Jews. See Bhikhu Parekh, *Minority Practices and Principles of Toleration*, 30(1) INT’L MIGRATION REV. 251, 267-68 (1996).

33. Moral Panic is defined as “the intensity of feeling expressed by a large number of people about a specific group of people who appear to threaten the social order at a given time.” See STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (2002) (defining five stages of its process: concern, hostility, consensus, disproportionality, and volatility).

34. See, e.g., MARK STEYN, *AMERICA ALONE: THE END OF THE WORLD AS WE KNOW IT* xiii (2006); BURUMA, *supra* note 27, at 25 (in referring to Dutch voices expressed against Muslims, Buruma notes that “the fruits of the European Enlightenment must be defended, with force if necessary. It is time for Muslims to be enlightened too . . . the solution to the Muslim problem is a Muslim Voltaire, a Muslim Nietzsche—that is to say, people like ‘us, the heretics.’”). See also *supra* note 12 and accompanying text.

35. See PERCEPTIONS OF DISCRIMINATION AND ISLAMOPHOBIA: VOICES FROM MEMBERS OF MUSLIM COMMUNITIES IN THE EUROPEAN UNION (2006).

36. See Elisabeth Ivarsson, *What Unites Right-Wing Populists in Western Europe? Re-Examining Grievance Mobilization Models in Seven Successful Cases*, 41(3) COMPARATIVE POLITICAL STUDIES 3 (2008).

37. BURUMA, *supra* note 27, at 27.

38. *Id.* at 32.

The French scholar Olivier Roy notes that radical Islamism in Europe is not a product of Islam, but a byproduct of the collision between tradition and modernity; the requirement to subscribe to liberal ideas so alien to the migrants' tradition produces a crisis in Muslim identity.<sup>39</sup> Joseph Raz likewise asserts that "multicultural society often makes cultural groups more repressive."<sup>40</sup> Interestingly, surveys show that second and third-generation Muslims living in Europe identify with Islam more strongly than do Muslims living in the country of their origin and are less integrated into European society than their parents and grandparents.<sup>41</sup>

Even if this panic somehow reflects reality, one might question whether culture is its main cause. During the last decades, European states have gradually moved away from being "countries of emigration" to "countries of immigration,"<sup>42</sup> mainly from the Third World.<sup>43</sup> Various reasons—among them decolonization,<sup>44</sup> a need for unskilled workers to reconstruct post-war Europe, the reunification of Germany, and the end of the Cold War—have led to movements toward and inside Europe. Many of the migrants had been brought to Europe during the 1960s and 1970s as guest workers needed to engage with the so-called "3-D" jobs (dirty-dangerous-difficult). They were expected to return to their home country and thus there were no policies aimed at their integration.<sup>45</sup> Many guest workers, however, became permanent residents. After the oil crisis of 1973, when the labor market no longer had a need for more workers, these workers started to bring their relatives over through family reunification. Later, they were joined by other groups, mostly refugees seeking political asylum as victims of repression, civil wars, and armed conflicts in Asia and Africa. Here, too, since their stay was supposed to have been temporary, little had been done to integrate them. This is not to

39. See OLIVER ROY, *GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH* (2004).

40. See Joseph Raz, *Multiculturalism: A Liberal Perspective*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 155, 170-71 (1994) (multicultural society "tends to encourage conservative elements in cultural groups which, resisting all chance in their culture which is equated with its dilution to the point of extinction.").

41. See Karoly Lorant, *The Demographic Challenge in Europe* 16 (2005), available at <http://www.europarl.europa.eu/inddem/docs/papers/The%20demographic%20challenge%20in%20Europe.pdf>.

42. See Patrick Weil, *Access to Citizenship: A Comparative of Twenty-Five Nationality Laws*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 17, 21, 28-31 (Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

43. See, e.g., Philip Muus, *International Migration and the European Union, Trends and Consequences*, 9 *EUROPEAN JOURNAL OF CRIMINAL POLICY & RESEARCH* 31 (2001).

44. Decolonization led to migration into Europe: Algerians settled in France, West Indians in Britain, and Indonesians, Moluccans and Surinamers in the Netherlands.

45. See Randall Hansen, *The Free Economy and the Jacobin State, or How Europe Can Cope with the Coming Immigration Wave*, in *DEBATING IMMIGRATION* 223 (Carol M. Swain ed., 2007).

say that if more had been done in those years, the current situation would have been all that different, but only that little was done and, consequently, the current crisis has its roots in more than simply a culture clash.

These clashes will not disappear in the foreseeable future. On the one hand, because of the demographic crisis and its economic implications, Europe needs more immigrants, whose numbers, according to the European Parliament, are expected to reach 56 million by 2050.<sup>46</sup> At the same time, some EU states are facing a Continental version of “white flight.”<sup>47</sup> On the other hand, push-pull economic factors in third-world countries as well as in Europe can be expected to prompt further waves of immigration.<sup>48</sup> These immigrants are likely to induce significant demographic pressures alongside cultural pressures if they come from illiberal societies. Herein lies the rub: whereas Europe calls upon immigrants to maintain an economy that rewards only its best and brightest, those same immigrants sometimes challenge the cultural values that sustain this conflict-ridden environment.

## II. “CULTURAL DEFENSE” OF NATIONS

This Part describes legal counter-reactions to the new challenge raised by culturally diverse migrants in the area of immigration and citizenship law, what I call Europe’s *cultural defense*. I focus on five countries: France, Germany, the Netherlands, the United Kingdom, and Denmark. Although these are limited examples, they provide a fairly good picture of current immigration trends in Europe. On the whole, these trends represent a process of culturalization of immigration rules under which culture increasingly becomes an essential factor for migrant selection.

### A. *The French Communauté*

Faiza Silmi was legally admitted into France. She married a French citizen and gave birth to three French children. She did everything necessary to become a French citizen, but her application for

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46. See *Europe Needs 56 Million Immigrant Workers by 2050*, WORKPERMIT.COM, Jan. 14, 2008, available at <http://www.workpermit.com/news/2008-01-14/europe/eu-needs-56-million-migrants-2050.htm>.

47. Britain and the Netherlands are examples. See *British Emigration Reaches a High*, BBC NEWS, Nov. 4, 2004, available at [http://news.bbc.co.uk/2/hi/uk\\_news/3982217.stm](http://news.bbc.co.uk/2/hi/uk_news/3982217.stm); Joanne Selms, *The Netherlands: Death of a Filmmaker Shakes a Nation*, MIGRATION POLICY INSTITUTE (2005).

48. Another wave of migrants may arrive from Latin America and the Caribbean, especially if the United States restricts their admission and Europe provides better opportunities. The present recession may affect these estimates, but basically the need for foreign workers is brought about by low fertility rates in European countries and, consequently, the need itself will in all probability be a constant feature of European society.

citizenship was nonetheless rejected. Her traditional headdress, the *niqab*, was incompatible with French values, claimed the French officials. Silmi filed a petition in court to reverse the decision, but lost. She did not give up and took the case to the highest French administrative court, *le Conseil d'Etat*, where she challenged the lower court decision. On June 27, 2008, the *Conseil d'Etat* backed the denial of her citizenship based on “insufficient assimilation” into the French Republic. The *Conseil* ruled that Silmi adopted a “radical religious practice,” incompatible with the “values essential to the French *communauté*, notably the principle of gender equality.”<sup>49</sup> The *Conseil* invoked a new amendment in the French Civil Code saying that “the government may, on grounds of indignity or lack of assimilation other than linguistic, oppose the acquisition of French nationality by the foreign spouse,” and that “no one may be naturalised unless he proves his assimilation into the French community.”<sup>50</sup> It was the first time in French history that citizenship was officially rejected on such a basis.

The exact reasons for the *Conseil d'Etat*'s decision are not clear. It is uncertain whether Silmi was denied citizenship due to her beliefs, or her conduct, or both. Silmi came to the immigration interview wearing a *niqab*. She refused to remove it when officials asked for identification and a passport photo, even after she was offered the opportunity to be interviewed by a woman. She told the officials she was not interested in voting since “only men should vote.” She knew nothing about *laïcité*—the French concept of secularism—and declared that she was a Salafi—an adherent of a radical Sunni sect. Most of these facts did not appear in the decision; they were publicized by the press.<sup>51</sup> Thus, it is unclear what the case stands for. Is the ruling based on wearing a *niqab*, or refusing to vote? Is it because Silmi expressed no sense of belonging to the French Republic, or because she was unwilling to participate in French political life?<sup>52</sup> If the decision stands for what she has inside her head rather than what she wears on top of it, then it should not matter whether she wears a

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49. See Conseil d'Etat, 27 Juin 2008, No. 286798 (“Mme . . . adopté une pratique radicale de sa religion, incompatible avec les valeurs . . . essentielles de la communauté française, et notamment avec le principe d'égalité des sexes ; qu'ainsi, elle ne . . . remplit pas la condition d'assimilation.”).

50. See French Civil Code, book I, title I, Ch. III, Sec. I §3 Arts. 21-4, 21-24.

51. See *Une Marocaine en Burqa se Voit Refuser la Nationalité Française*, LE MONDE, July 11, 2008, at 9; Katrin Bennhold, *A Muslim Woman too Orthodox for France*, INT'L HERALD TRIBUNE, July 18, 2008, at 4; Katrin Bennhold, *A Veil Closes France's Door to Citizenship*, N.Y. TIMES, July 19, 2008, at A1 (pointing out an interesting fact that Silmi had repeatedly accepted treatment by a male gynecologist).

52. The case might have been different had she refused to remove the *niqab* for a passport photo and identification. In that case, her application might have legitimately been rejected, but for technical rather than substantive reasons. This criterion, however, is not mentioned in the *Conseil* decision, and it is unclear what role it played in the case.

*niqab* or a thong. In addition, contrary to what was implied by the press, the ruling is not based on the principle of *laïcité*—on which the 2004 law banning the wearing of conspicuous religious symbols in public schools was based—but on the principle of gender equality. The *Conseil* found that Silmi's lifestyle and clothing evince total submission to her male spouse, which indicates gender inequality, which further indicates insufficient assimilation. Yet, even that leaves it unclear exactly what is held in the case. Is *le principe d'égalité des sexes* a universal concept, or a French version of *d'égalité des sexes*? Is the *niqab* the only religious headscarf indicating the absence of gender equality, or do other head-coverings transmit a similar message? Moreover, the case refers to "values essential of the French *Communauté*" yet it does not specify what these values are. Is it the French *Communauté*, or French *Nationalité*? What exactly is being defended in the Civil Code?

At its essence, the *Conseil* decision implies that assimilation is a prerequisite for membership in the French *communauté*, and the only route to citizenship. Hence, in order to acquire French status, one must first demonstrate some sense of identity with the Republic, some level of political participation, or both. Yet, even if this rule is justifiable in principle—even if only in the French context—it still raises the question of whether the Silmi case was the appropriate occasion for its application. Even if one assumes that citizenship is a participation-based endeavor, the fact that Silmi was not willing to vote does not necessarily indicate that she did not participate in other spheres of French life. In fact, by fighting for her rights and bringing her case to several courts, she had demonstrated a high level of political participation. And even if citizenship is an identity-based concept, the fact that Silmi wore a *niqab* does not necessarily mean that she was denying her French identity. In fact, by speaking first-rate French and having a French spouse as well as three French-born children,<sup>53</sup> Silmi certainly exhibited her wish to attach herself, at least partly, to France.

The *Conseil d'Etat's* decision is typical of an emerging trend. In recent years, failed integration of immigrants from the Maghreb,<sup>54</sup>

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53. Children born in France are entitled to citizenship. Their noncitizen parents are entitled to citizenship only after fulfilling certain preconditions, among them is the above "assimilation other than linguistic" requirement. See Giovanna Campani & Olivia Salimbeni, *Marriage Migration in France, Country Study*, in MARRIAGE AS IMMIGRATION GATE: THE SITUATION OF FEMALE MARRIAGE MIGRANTS FROM THIRD COUNTRIES IN THE EU MEMBER STATES (2004) [hereinafter MARRIAGE AS IMMIGRATION GATE].

54. France has become home to a large community of Algerian and Moroccan immigrants. In 2005, 8.1% of its population were immigrants, most of them foreigners (non-French citizens). See Marcus Engler, *France, Country Profile*, MIGRATION FOCUS (2007) ("In French statistics, immigrants (*immigrés*) and foreigners (*étrangers*) are recorded separately. Immigrants are defined as people who were born abroad as for-

together with the consequent social tensions that culminated in the 2005 civil unrest spearheaded by youthful immigrants from North Africa,<sup>55</sup> motivated France to embrace a forced cultural assimilation model. As of January 2007, every immigrant must sign a legally stipulated “Reception and Integration Contract” (*Contrat d’accueil et d’intégration*)<sup>56</sup> before receiving a permanent residence permit.<sup>57</sup> By signing the contract, the immigrant accepts the obligation to respect the “fundamental values of the Republic,” to take French language lessons, and to participate in a one-day civic training.<sup>58</sup> During the session, the immigrant learns about French values through watching a film entitled *Living Together in France*, followed by a personal interview to test the immigrant’s language skills and personal outlook.<sup>59</sup> In the film, he or she is exposed to the French idea of nationhood as based on “*liberté, égalité, fraternité*.”<sup>60</sup> Noncompliance with the contract’s terms can lead to the refusal to issue a residence permit, non-renewal of the permit, or a fine.<sup>61</sup>

### B. *The German Kulturation*

First came Baden-Württemberg. In September 2005, the *Land’s* Minister of the Interior ordered to introduce a series of new questions for the purpose of assessing the loyalty of people requesting naturalization into the German “free democratic basic order” (*freiheitliche demokratische Grundordnung*). Under this policy, such loyalty is assessed by an interview examining the applicant’s personal beliefs and moral judgements. Let’s take a look at a few examples:<sup>62</sup>

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eign citizens, and they continue to be recorded as such even if they acquire French citizenship . . . foreigners are defined as people who do not have French citizenship.”)

55. See Yvonne Y. Haddad & Michael J. Balz, *The October Riots in France: A Failed Immigration Policy or the Empire Strikes Back?*, 44(2) INT’L MIGRATION 28 (2006).

56. The Reception and Integration Contract is available at [http://www.anaem.fr/IMG/pdf/Contrat\\_2008.pdf](http://www.anaem.fr/IMG/pdf/Contrat_2008.pdf).

57. See Décret n° 2006-1791 du 23 décembre 2006; article 5 of LOI n° 2006-911 du 24 juillet 2006 relative à l’immigration et à l’intégration, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000266495&dateTexte>.

58. See Alexandre Devillard, *France*, in COMPARATIVE STUDY OF THE LAWS IN THE 27 EU MEMBER STATES FOR LEGAL IMMIGRATION 237-49 (2008) [hereinafter COMPARATIVE STUDY OF THE 27 EU MEMBER STATES].

59. The film is available at [http://www.anaem.fr/contrat\\_d\\_accueil\\_et\\_d\\_integracion\\_47/living\\_together\\_in\\_france\\_759.html](http://www.anaem.fr/contrat_d_accueil_et_d_integracion_47/living_together_in_france_759.html).

60. Before receiving citizenship, the immigrant must also pass a citizenship test. The test includes 100 multiple-choice questions about French geography, history, family life, Constitutional principles, nationalism, and the EU. See <http://www.testfrance.com/>.

61. See Virginie Guiraudon, *Integration Contracts for Immigrants: Common Trends and Differences in the European Experience*, REAL INSTITUTO ELCANO (2008).

62. The Baden-Württemberg questionnaire is on file with the author.

- Imagine that your adult son comes to you and declares that he is a homosexual and would like to live with another man. How would you react?
- Your daughter applies for a job in Germany but she is rejected. Later, you discover that a black African from Somalia got the job. How would you react?
- Some people accuse the Jews of being responsible for all the evil in the world, and even state they were behind the September 11 attacks? Do you believe in such statements?
- Your adult daughter or your spouse would like to dress like other German girls and women. Would you try to prevent it? If yes, by which means?

The Baden-Württemberg questionnaire is unusual in the intrusiveness of its questions—thirty in total—about gender equality, religion, conversion, politics, marital relations, promiscuity, and culture—all in a two-hour oral exam. The *Land's* Minister of the Interior explained the test's rationale: "Until now, we have always asked what the immigrants know about our Constitution . . . but there's a big difference between what one knows, and what one believes or identifies with."<sup>63</sup> Significantly, these questions originally applied only to applicants from one of the fifty-seven Member States of the Organization of the Islamic Conference, or other applicants "appearing to be Muslims."<sup>64</sup>

Hesse came next. In March 2006, the Hessian *Land* issued a new naturalization test containing 100 questions on nine subjects: Germany and Germans, German history, human rights, elections, federal states, state authorities, Germany in Europe, culture and science, and national symbols. The test is less intrusive but still includes questions on ethics, politics, and culture. It provides an opportunity to understand the Hessian concept of being German. The applicant first has to list three reasons for wanting to become a German citizen. Then he or she has to explain—it is not a multiple choice exam—the concept of Reformation, the Holocaust, the "right of Israel to exist," and some constitutional principles such as freedom of religion, free speech, and equality. Next, the applicant has to explain "which measures are permitted and which are forbidden" in educating children, and whether "it should be allowed for a woman to

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63. See Charles Hawley, *Muslim Profiling: A German State Quizzes Muslim Immigrants on Jews, Gays and Swim Lessons*, SPIEGEL ONLINE, Jan. 31, 2006.

64. See The Über-Citizen and German Kulturkampf –s.10 German Naturalisation Law: A Front? 3-4, Islamic Human Rights Commission (2007). Following criticism, the Muslims-only application had changed to any applicant "whose loyalty to the German Basic Law is doubted." *Id.* For a comprehensive analysis of the questionnaire, see Rainer Grell, *Dichtung und Wahrheit: Die Geschichte des "Muslim-Tests" in Baden-Württemberg, 30 Fragen, die die Welt erregten* (2006) (on file with the author).

remain in public without being accompanied by a close male relative.” In the next part, the applicant has to name German composers, musicians, athletes, and philosophers, and German poems. Some questions are peculiar—they focus on German symphonies, newspapers and automobile manufacturers. Others require a high degree of social knowledge, for example, “to which sport event does the film ‘The Miracle of Bern’ refer to” (the 3:2 victory of Germany on Hungary in the 1954 World Cup Final).<sup>65</sup>

Since September 2008, a federal test has replaced the *Länder* tests. The federal test includes 33 multiple choice questions selected randomly from a catalog of 310, from which the applicant must correctly answer 17 (the *Länder* can pick and choose questions from the catalog).<sup>66</sup> It is a less intrusive test, focusing on history, geography, constitutional principles, national symbols and German customs, such as “what Germans traditionally do at Easter” (painting eggs).<sup>67</sup> However, passing the test is not the sole criterion for becoming German. Revisions of the Nationality Act (*Staatsangehörigkeitgesetz, StAG*) require every applicant who wishes to become naturalized to demonstrate an “adequate knowledge of [the] German” language by taking compulsory integration courses<sup>68</sup> and to “confirm commitment to the free democratic constitutional system.”<sup>69</sup> This commitment has to be proved by a written “declaration of loyalty” to the rule of law, judicial independence, human rights, German foreign interests, and a long list of values.<sup>70</sup> Furthermore, spouses of German citizens can be naturalized only if “it is ensured that they will conform to the *German way of life*.”<sup>71</sup> An adequate knowledge of the language and a capability to integrate into the German way of life is also a prerequi-

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65. A copy of the questionnaire is on file with the author.

66. See *Objections to Citizenship Test Continue to Mount*, DEUTSCHE WELLE, July 10, 2008, available at <http://www.dw-world.de/dw/article/0,,3473415,00.html>; *New German Citizenship Questions Flunk Cultural Sensitivity Test*, DEUTSCHE WELLE, July 8, 2008, available at <http://www.dw-world.de/dw/article/0,,3469730,00.html>; *Germany to Introduce Controversial New Citizenship Test*, SPIEGEL ONLINE, June 11, 2009, available at <http://www.spiegel.de/international/germany/0,1518,559021,00.html>.

67. Questions sample are on file with the author.

68. The course is divided into 600 hours of language courses, and additional 30 hours of orientation courses. At the end, the immigrant has to pass a proficiency test. See sections 10(1)(6), 10(3) and 10(4) of the *Nationality Act*, available at <http://www.bmi.bund.de/>.

69. See Section 10(1)(1) of the *Nationality Act*. The applicant has to give up her previous citizenship (section 10(1)(4)), and “possesses knowledge of the legal system, the society and the living conditions in the Federal Republic of Germany” (section 10(1)(7)).

70. See Section 85.1.1.1 of the *Allgemeine Verwaltungsvorschrift zum Staatsangehörigkeitsrecht (StAR-VwV)* (Dec. 13, 2000) GMBL 2001, 122.

71. See Section 9(1)(2) of the *Nationality Act* (emphasis added).



site for getting a residence permit under the Residence Act (*AufenthG*).<sup>72</sup>

In order to understand the current developments in Germany, we must understand the evolution of the German concept of citizenship.<sup>73</sup> German citizenship law was originally based on ethnicity, that is, where the migrant's ancestors come from. Until recently, naturalization was rare in Germany. A person could reside in Germany for decades without being permitted to become German. However, ethnic Germans living in Eastern Europe could be freely naturalized under repatriation laws.<sup>74</sup> In principle, access to citizenship had been based on one's blood (*jus sanguinis*) rather than on one's place of birth (*jus soli*).<sup>75</sup> This rule has recently changed, but anti-immigration rhetoric still remains part of the public discourse. The initial expectations were that non-ethnic Germans would become culturally Germans by a long residence in Germany. The residence requirement for citizenship is currently eight years (it was fifteen in the past), and it is designed to facilitate cultural assimilation.<sup>76</sup> This assimilation, however, has not transpired fully. Immigrants—notably from Turkish origin, one of the largest immigrant groups in Germany—have not always been culturally Germanized. Consequently, Germany has recently modified its immigration law by asking every immigrant to conform to its “way of life” before being able to become a German.<sup>77</sup>

The German tests mirror not only what German culture is, but also what the Germans want it to be. The tests raise many questions that cannot be explored without understanding the goals they wish to achieve. Although the *Länder* tests have been replaced by a federal

72. The *Residence Act (AufenthG)* of 30 July 2004, sec. 9(2)(7) (acquiring “adequate knowledge of the German language” as a prerequisite for getting a settlement permit), sec. 9a(2)(4) (possessing “a basic knowledge of the legal and social system and the way of life in the Federal territory” for getting a EC long-term residence permit), sec. 43-5 (“the aim of the integration course is to successfully impart the German language, legal system, culture and history to foreigners.”).

73. For the development of German immigration laws, see Key Hailbronner, *Citizenship and Nationhood in Germany*, in *IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA* 67 (William R. Brubaker ed., 1989); Norbert Cyrus & Dita Vogel, *Germany*, in *CURRENT IMMIGRATION DEBATES IN EUROPE: A PUBLICATION OF THE EUROPEAN MIGRATION DIALOGUE* (Jan Niessen, Yongmi Schibel & Cressida Thompson eds., 2005) [hereinafter *CURRENT IMMIGRATION DEBATES IN EUROPE*]; Mária Gulicová-Grethe, *Marriage Migration and the Significance of this Migration, Issue in Germany. Country Study*, in *MARRIAGE AS IMMIGRATION GATE*, *supra* note 53; Rolf Gutmann, *Germany*, in *COMPARATIVE STUDY OF THE 27 EU MEMBER STATES*, *supra* note 58, at 251-63.

74. A “German” is defined in art. 116 of the German Constitution. This definition includes the ethnic Germans living outside Germany—if they come to Germany they are “resettlers”—and the Jewish Germans deprived their citizenship under the Third Reich.

75. See Rogers Brubaker, *Immigration, Citizenship, and the Nation-State in France and Germany*, in *THE CITIZENSHIP DEBATES* 131 (Gershon Shafir ed., 1998).

76. See Veysel Özcan, *Germany, Country Profile*, *FOCUS MIGRATION* 4 (2007).

77. See *IMMIGRATION LAW AND POLICY* 41-47, 80-86 (2006).

test, they indicate an ideological concept of *Kulturnation*. By adopting these policies, Germany embraces a strict rule of forced cultural assimilation. The rationale was explained by Jörg Schönbohm, the German Minister of the Interior: “Those who come here have to adopt the German *Leitkultur*.<sup>78</sup> Our history has developed over a thousand years. We cannot allow that this basis of our community be destroyed by foreigners.”<sup>79</sup> The German Chancellor Angela Merkel goes even further: “Anyone coming here must respect our Constitution and tolerate our Western and *Christian* roots . . . a democracy cannot tolerate lawless zones or parallel societies . . . immigrants must respect our laws and acknowledge our democratic ways of doing things.”<sup>80</sup>

### C. *The Dutch* Inburgering

Like France and Germany, the Netherlands has a growing foreign population, largely of Moroccan and Turkish origin. Most of them live in-group around the cities of Amsterdam, The Hague, Rotterdam, and Utrecht. Dutch statistics distinguish between natives (*allochtoon*) and foreigners (*allochtonen*) and, unlike other countries, also distinguish Western and non-Western foreigners.<sup>81</sup> Recently, problems with the multicultural policy have shifted the focus from social inclusion to the exclusion of unwanted immigrants.<sup>82</sup> Current immigration policy is aimed at *inburgering* immigrants. The term *inburgering*, which has no equivalent English word, means “having become like the natives, autochthonous.”<sup>83</sup> It is a process of accultur-

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78. *Leitkultur* as a political philosophy erupted in Germany during recent years. It means dominant or leading culture. See RICHARD BERNSTEIN, *A Continent Watching Anxiously Over the Melting Pot*, N.Y. TIMES, Dec. 14, 2004, at 4; Charles Hawley, *What's a German? The Search for Identity Continues*, SPIEGEL ONLINE, May 9, 2006, available at <http://www.spiegel.de/international/0,1518,415207,00.html>.

79. See NICOLAS KUMANOFF, *What is Leitkultur? In a Raging Debate, Leitkultur is the Operative Term*, THE ATLANTIC TIMES, Dec. 2004, available at [http://www.atlantic-times.com/archive\\_detail.php?recordID=69](http://www.atlantic-times.com/archive_detail.php?recordID=69).

80. See Ray Furlong, *Germans Argue over Integration*, BBC NEWS, Nov. 30, 2004, available at <http://news.bbc.co.uk/2/hi/4056109.stm> (emphasis added).

81. See Evelyn Ersanilli, *Netherlands, Country Profile*, FOCUS MIGRATION 1-2 (2007) (“Allochtonen are officially defined as persons who were born outside the Netherlands or who have at least one parent who was born outside the Netherlands . . . western allochtonen are people from Europe (excluding Turkey), North America, Oceania, Indonesia and Japan; non-Western allochtonen are defined as people from Turkey, Africa, Latin American and the rest of Asia.”). In 2006, 19.3% of the population was *allochtonen*—8.8% Westerners and 10.5% non-Westerns. *Id.*

82. See Christian Joppke, *The Retreat of Multiculturalism in the Liberal State: Theory and Policy*, 55(2) BRIT. J. SOC. 237, 247-49 (2004). A prominent work is Paul Scheffer’s article, *Het Multiculturele Drama* (the Multicultural Drama), available at <http://www.nrc.nl/W2/Lab/Multicultureel/scheffer.html>. Scheffer warns that an alienated foreign population undermines the social cohesion of Dutch society and calls for a new policy based on shared language, history, and norms.

83. See Leonard F.M. Besselink, *Integration and Immigration: The Vicissitudes of Dutch ‘Inburgering*, LIBERTY & SECURITY (2008).

ation under which, in order to become Dutch, the immigrant has to subscribe to the Dutch values.

The first immigration reform occurred in 1998, with the legislation of the Integration of New Immigrants Act (*Wet Inburgering Nieuwkomers*).<sup>84</sup> The Act requires immigrants to take integration courses on Dutch language and Dutch society once they are already in the Netherlands. Back then, it was a turning point in the multiculturalist view, which assumes that all cultures are equal. A few years later, another reform pushed through, with the legislation of the Integration Abroad Act of 2005 (*Wet Inburgering in het Buitenland*). This Act incorporates a brand new concept in worldwide migration. Every individual aged between sixteen and sixty-five wishing to enter the Netherlands on a non-visitor visa must go to the Dutch embassy in his or her country of citizenship, or country of residence, and participate in language courses and civic training.<sup>85</sup> At the end, he or she must pass two tests in the Dutch embassy: an oral exam testing elementary knowledge of Dutch language, and a computerized exam testing elementary knowledge of Dutch society. Passing the tests does not guarantee Dutch citizenship, but merely admission.<sup>86</sup> After being admitted, the applicant must attend further integration courses. The applicant then has to pass an additional exam, testing a higher level of Dutch language, and finally, an exam testing a higher level of knowledge of Dutch society and daily life situations.<sup>87</sup> The content of the exams is undisclosed, and there is no official handbook for exam preparation. Failing to pass the tests within a period of three-and-a-half years—there is a strict time limit—may result in administrative fines—up to €1000—and the denial of the citizenship application. This process is currently regulated by the Civic Integration Act of 2007 (*Nieuwe Wet Inburgering*), which replaced the 1998 Immigrants Act.<sup>88</sup>

In spite of its title as a “civic integration examination abroad,” the Dutch policy seems to be a culture-based concept. The applicant

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84. For Dutch immigration policies, see Vera Marinelli, *The Netherlands, in CURRENT IMMIGRATION DEBATES IN EUROPE*, *supra* note 73; Ivo Magnée & Eke Gerritsma, *The Netherlands, EU AND US APPROACHES TO THE MANAGEMENT OF IMMIGRATION* (Jan Niessen et al. eds., 2003); Tessel de Lange, *Netherlands, in COMPARATIVE STUDY OF THE 27 EU MEMBER STATES*, *supra* note 58, at 355-68; Mária Gulicová-Grethe, *Marriage Migration in the Netherlands, Country Study, in MARRIAGE AS IMMIGRATION GATE*, *supra* note 53.

85. These courses are costly—€350 per course and an extra €64 for the education pack—and the applicant has to bear the cost. See The Civic Integration Examination Abroad, Immigratie- en Naturalisatiedienst (2006); Residence in the Netherlands, Immigratie- en Naturalisatiedienst (2008); Leonard F.M. Besselink, *Unequal Citizenship: Integration Measures and Equality, in THE NEXUS BETWEEN IMMIGRATION, INTEGRATION AND CITIZENSHIP IN THE EU 14* (Sergio Carrera ed., 2006).

86. *Id.*

87. *Id.*

88. Besselink, *supra* note 85.

has to watch a two-hour film about the Dutch society. The film gives the impression that it would be better to stay out.<sup>89</sup> It treats the immigrant as a Martian who will have to contend the “complexity” of escalators and computers. The applicant is also exposed to Dutch customs, such as leaving house curtains open, shaking hands with women, and bringing birthday presents. One of the scenes shows homosexuals kissing and topless women, and no exemption is made for religious scholars like Jewish rabbis or imams.<sup>90</sup> A woman in the film explains: “It has taken us five-hundred years to get this far and I would like to put a plea to keep it like that for a very long time.”<sup>91</sup> The film provides a glimpse into the Dutch perception of themselves, and their sense of Dutchness. Unlike the Baden-Württemberg test, the Dutch integration-from-abroad program is “universal” and seemingly applies to all immigrants. Yet one needs only look at the endless list of exemptions to understand with whom the tests are concerned. The process does not apply to EU citizens, nor to citizens of Australia, Canada, Japan, New Zealand, Switzerland, and the United States. The Western world, then, is exempted.<sup>92</sup> Ostensibly, these exemptions are the consequence of EU laws relating to freedom of movement in the EU, as well as bilateral agreements between states, but some states do not fall within these categories. In such cases, the exemption is apparently based on a premise that citizens of some states are presumed to be more liberal.

The Dutch require applicants to integrate in advance—even before receiving a temporary residence permit (*mvv*). This change is due to a change in the very premise of citizenship: it is no longer seen as a Dutch in-the-making, but rather as the peak of Dutch assimilation. As Joppke observes, it is a “philosophical shift from naturalization as a tool of integration to naturalization as end-point of successful integration.”<sup>93</sup> Yet, it is quite difficult to learn to speak Dutch and become familiar with Dutch society by watching movies in the Dutch embassy in Pakistan. As Joan Scott rightly notes, this is like “asking them to pass final exams at the beginning of the course.”<sup>94</sup> Under the Dutch policy, the applicant needs to pass a computerized test from abroad; twenty-one out of thirty questions have to

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89. The film starts with statements such as “it’s too cold here,” “my goodness, they really are white,” “Dutch people really have very little patience,” “people suffer from culture shock here,” and the like. Details about the film, *Coming to the Netherlands (Naar Nederland)*, are available at <http://www.naarnederland.nl/>.

90. These scenes appear only in the unedited version. However, the film has an edited version without scenes of sexual connotations. This is because it is prohibited to show some of these scenes in certain countries, and it would even be considered a crime.

91. *Naar Nederland*, *supra* note 89.

92. Civic Integration Examination Abroad, *supra* note 85.

93. See Christian Joppke, *Comparative Citizenship: A Restrictive Turn in Europe?*, 2(1) L. & ETHICS HUM. RTS. 1 (2008).

94. See JOAN W. SCOTT, *THE POLITICS OF THE VEIL* 103 (2007).

be correctly answered.<sup>95</sup> And this policy applies to non-exempted family members as well, which can lead to harsh results. If a Dutch man falls in love with a foreign woman, he must wait until she can speak Dutch and pass tests on Dutch society before they can live together in the Netherlands.

In a recent case, the Amsterdam District (*Rechtbank*) Court ruled that the policy of forced-assimilation is unlawful, to the extent that it applies to family members. In that case, a Moroccan spouse of a Dutch citizen was refused Dutch citizenship. She was illiterate and failed to pass the tests—which, like other tests, assume that the person can read and write. Under Dutch rules, an illiterate person has to participate in a literacy course, a very long process indeed, and then take the *inburgeringsexamen*.<sup>96</sup> The Court denounced the forced-integration policy as far as it applies to family members living in the Netherlands. The Court's reasoning, however, is based on a technical statutory interpretation rather than on substantive law regarding equal protection and family life.<sup>97</sup> Hence, and because there is no constitutional judicial review in the Netherlands other than that available under EU law,<sup>98</sup> the ruling of the *Rechtbank* Amsterdam is not binding nationwide.<sup>99</sup>

In adopting these policies, the Netherlands has drastically swung from one extreme to the other. Like other European countries, after World War II the Netherlands initially welcomed labor migration of temporary guest workers from former Dutch colonies. Until the 1970s, no integration policy was implemented, and the guest workers were expected eventually to return to their country of origin. Immigrants were even encouraged to maintain their culture, because diversity was seen as an advantage. By and large, until 1998, admission and naturalization requirements were minimal—one needed

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95. The applicant talks with a computer by phone. The test has four parts: repeat sentences, answer short questions, repeat short stories, and indicate opposites. See Eva-Maria Schneiderhofer, *Citizenship Tests as Instruments of Power: The Case of the Dutch Integration Exam*, a Master thesis submitted to Universiteit van Amsterdam, Aug. 2008.

96. Baden-Wuerttemberg has recently decided that illiterates are not eligible to become citizens. The *Land's* administrative court ruled that an illiterate Turkish man who has lived in Germany for twenty years is not eligible to become German. See *Court Denies Illiterate Turkish Man German Citizenship*, DEUTSCHE WELLE, Feb. 27, 2009, available at <http://www.dw-world.de/dw/article/0,,4060882,00.html>.

97. See LJN BD7189, *Rechtbank 's-Gravenhage, zittingsplaats Amsterdam*, AWB 07/18932, available at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije\\_tekst=BD7189](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije_tekst=BD7189).

98. See arts. 94 and 120 to the Dutch Constitution.

99. The policy is still in force in spite of the court decision; an appeal is pending. For legal criticism of the policy, see *The Netherlands: Discrimination in the Name of Integration Migrants' Rights under the Integration Abroad Act*, Human Rights Watch (2008); *Note of the Meijers Committee on the Draft Integration Act*, in *THE NEXUS BETWEEN IMMIGRATION, INTEGRATION AND CITIZENSHIP*, *supra* note 85, at 42-49.

only to show no criminal record and pass a short interview.<sup>100</sup> Integration had been seen as a Dutch in-the-making triggered by residing in the Netherlands and having Dutch citizenship. Yet, failures of integration—notably among migrants from Moroccan and Turkish origin—have led to the adoption of an opposite policy. Social segregation of immigrant groups, a high level of school drop-out rates and unemployment, challenges to enlightenment values, and social unrest culminating in the assassination of the Dutch film maker Theo van Gogh—have all contributed to the sentiment that the multicultural dream is over. Pim Fortuyn, the assassinated and highly popular Dutch politician,<sup>101</sup> summarized the new philosophy: “This is our country, and if you can’t conform, you should get the hell out, back to your own country and culture.”<sup>102</sup> Fortuyn and others promoted a romantic ideal of a nation whose members share language and culture. Under this concept, diversity is an obstacle; migrants are welcome but only after they prove a high degree of assimilation. A recent public survey indicates that fifty-six percent of the Dutch population sees Islam as a threat, and fifty-seven percent maintain that allowing migration was “the biggest mistake in Dutch history.”<sup>103</sup> Recently, a memo released by the Labor Party President, Lianne Ploumen, suggests making a U-turn in cultural relativism: “The mistake that we should never again make is swallowing criticism of cultures or religions for the sake of tolerance.”<sup>104</sup>

#### D. *The UK Britishness*

In the wake of World War II, the United Kingdom became a country of immigrants, most of who came from former British colonies. Currently, more than eight percent of the total British population is foreign-born, with a relatively high percentage of Indians and Pakistanis.<sup>105</sup> Interestingly, in spite of its liberal antidiscrimination policies and enormous efforts to accommodate immigrants, the alienation and radicalization among British Muslims is greater than among any Muslim immigrant groups in Europe. Brit-

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100. Ersanilli, *supra* note 81, at 4.

101. Fortuyn was chosen by a public opinion poll as the greatest Dutch figure in history—before Erasmus, Rembrandt, and William the Silent. See BURUMA, *supra* note 27, at 45.

102. *Id.* at 67.

103. See *Dutch: Mass Immigration our Biggest Mistake Ever*, NIS NEWS, Mar. 27, 2008, available at [http://www.nisnews.nl/public/270308\\_1.htm](http://www.nisnews.nl/public/270308_1.htm).

104. See John Vinocur, *From the Left, a Call to End the Current Dutch Notion of Tolerance*, INT’L HERALD TRIBUNE, Nov. 29, 2008, available at <http://www.nytimes.com/2008/12/29/world/europe/29iht-politicus.3.18978881.html>.

105. Foreign-born means people who were born outside the United Kingdom, whether non-British or British citizens. See Randall Hansen, *United Kingdom, Country Profile*, FOCUS MIGRATION 1, 3 (2007); Richard Kerbaj, *Muslim Population ‘Rising 10 Times Faster than Rest of Society’*, THE TIMES, Jan. 30, 2009, available at <http://www.timesonline.co.uk/tol/news/uk/article5621482.ece>.

ish Muslims espouse more negative views of Westerners compared to other EU states, and about half of them believe that “there is a conflict between being a devout Muslim and living in a modern society”—a much higher percentage than French Muslims and German Muslims.<sup>106</sup> Referring to this paradox, Joppke observes that while no other EU state has gone as far in accommodating its immigrants—British Muslims are “the most negatively disposed toward the non-Muslim majority.”<sup>107</sup>

During recent years, the clash between Britons and immigrants has become more salient. In a thought-provoking article, published in February 2004 in *Prospect*, David Goodhart states that Britain has become too diverse to sustain a good society. Too many immigrants, from too many backgrounds, erode British common culture. Britain, he claims, “has long since ceased to be Orwell’s ‘family’” and is approaching a turning point where it may be “difficult to sustain the legitimacy of a universal risk-pooling welfare state.”<sup>108</sup> Diversity threatens solidarity, and solidarity is necessary for social cohesion. Goodhart puts the blame on the British concept of citizenship. He notes that “modern liberal societies cannot be based on a simple assertion of . . . the rule of law [and] of equal legal treatment for everyone.” Thus, citizenship must arise “out of shared history, shared experience, and, often, shared suffering.”<sup>109</sup> Goodhart is clear about what Britain needs—more people of “our own kind,” that is, “people who think and behave like us.”<sup>110</sup> Only thus, he asserts, can Britain survive.

Goodhart is not alone. The Denham Report on *Building Cohesive Communities*—aimed at investigating the causes and implications of the 2001 violent riots in Bradford, Burnley, and Oldham—finds that a key cause for the riots was “lack of a strong civic identity or shared social values to unite diverse communities.”<sup>111</sup> It points out that British youths grow up “ignorant of other cultures and lifestyles,” and that this reality is a source of conflicts. It thus recommends promoting an idea of citizenship that gives citizens a shared sense of belonging and “expresses common goals and aspirations.”<sup>112</sup> Shared identity, the Report notes, is needed to unite diverse people and to

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106. See Islamic Extremism: Common Concern for Muslim and Western Publics, Pew Global Attitudes Project (2005).

107. See Christian Joppke, *Limits of Integration Policy: Britain and Her Muslims*, 35(3) *J. ETHNIC & MIGRATION STUD.* 453 (2009).

108. See David Goodhart, *Too Diverse?*, 95 *PROSPECT*, Jan. 22, 2004.

109. *Id.* (“Immigration have loosened the ties of a common culture . . . the laissez-faire approach . . . in which ethnic minority citizens were not encouraged to join the common culture (although many did) should be buried.”).

110. *Id.*

111. See *Building Cohesive Communities: A Report of the Ministerial Group on Public Order and Community Cohesion 11-12, 18*, Home Office (2001).

112. *Id.* at 12.

create community cohesion. It does not mean cultural uniformity, but it does include mastering the English language and “recognition of and adherence to fundamental rights and duties.”<sup>113</sup> The Report opines, however, that this vision has to be developed by the communities; the Government may lead the process, but should not impose values. Similar conclusions appear in the Cattle Report, published by the Home Office. The Report finds the lack of a meaningful concept of British citizenship to be a key factor to the riots and recommends to “develop[e] clear values of what it means to be a citizen of a modern multi-racial Britain.”<sup>114</sup> In 2004, the Home Office published its own version of what it means to be British:<sup>115</sup>

To be British seems to us to mean that we respect the laws, the elected parliamentary and democratic political structures, traditional values of mutual tolerance, respect for equal rights and mutual concern; and that we give our allegiance to the state (as commonly symbolised in the Crown) in return for its protection. To be British is to respect those over-arching specific institutions, values, beliefs and traditions that bind us all, the different nations and cultures together in peace and in a legal order.

This prescription of the essence of the British identity is basically shared by most liberal democracies. Respecting the rule of law or the democratic political structure is British just as it is French, German or Dutch. In an interesting article, Christian Joppke rightly points out the paradox of trying to have a specific national identity while invoking universal principles and values. “The British state is caught in the paradox of universalism,” Joppke observes, “it perceives the need to make immigrants and ethnic minorities parts of *this* and not of *any* society, but it cannot name and enforce any particulars that distinguish the ‘here’ from ‘there’ . . . [British values] are nationally anonymous.”<sup>116</sup>

The 2001 riots, alongside other events—such as the 2005 London terrorist attacks carried out by British Muslims<sup>117</sup>—have spurred an increasingly lively debate on the need to redefine British identity. In 2007, the Smith Institute published a thick volume directed at defining a common idea of *Britishness*.<sup>118</sup> The discussion is instructive. There is an agreement among the contributors that Britishness does

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113. *Id.* at 20.

114. See A Report of the Independent Review Team chaired by Ted Cattle 9 (2001).

115. See Life in the United Kingdom: A Journey to Citizenship 15, Home Office (2004).

116. See Christian Joppke, *Immigration and the Identity of Citizenship: The Paradox of Universalism*, 12(6) CITIZENSHIP STUD. 533, 538 (2008).

117. PHILLIPS, *supra* note 28, at 4-18, 77-100.

118. See BRITISHNESS: TOWARDS A PROGRESSIVE CITIZENSHIP (Nick Johnson ed., 2007).



not connote British folklore, but rather British values. The hard question is which values, and whose? Most of the contributors define values that are more universal than merely British, such as social justice, tolerance, diversity, and egalitarianism; the only particular values are language and history. But are English language and Commonwealth history “British”? What about particular English or Scottish identities? Redefining Britishness is a lofty idea, but the process yields very little so far. While the Government searches for a British version of *Liberté, Égalité, Fraternité*, no British statement of values has yet been found. When *The Times* sponsored a motto-writing contest, the slogan favored by most readers was “No Motto, please, We’re British.”<sup>119</sup> In the Smith Institute’s volume, Trevor Phillips refers to courtesy as British. He asserts that even though British values are not unique to Britain, the way the British express them is British.<sup>120</sup> He has no answer to what values are British, but he is sure that “we would never do anything as French as set this down on paper so that everyone could read it.”<sup>121</sup>

Phillips is right—Britain does not set down its values on paper as France does. However, they have recently set them down on a computer program. The new *Life in the UK Test* establishes a solid civic identity that must be learned before an immigrant can settle in the United Kingdom (a settlement permit grants permission to stay in the United Kingdom indefinitely).<sup>122</sup> The test seeks to promote effective integration of newcomers and thereby to achieve community cohesion.<sup>123</sup> Following revisions of the *Nationality, Immigration and Asylum Act of 2002* from 2007, every immigrant must demonstrate “sufficient knowledge of the language”—which can be English or Scottish Gaelic or Welsh—and “sufficient knowledge about life in the UK.” At first glance, *Life in the UK* may sound better than French assimilation, the German way of life, or Dutch *inburgering*, but it is still a catch-all term including the whole package: demography, history, and geography; practical knowledge on education, health, housing, and the labor market; constitutional institutions and principles; national holidays; religion; civil liberties; and leisure. The handbook of how to prepare for the test includes an abundance of data about *Life in the UK*.<sup>124</sup> The test is not intrusive and does not

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119. See Sarah Lyall, *Britain Looks for Its Essence, And Finds Mostly Punch Lines*, N.Y. TIMES, Jan. 26, 2008, at 1.

120. Trevor Phillips, *Britishness and Integration*, in BRITISHNESS, *supra* note 118, at 42-44 (“Both we and the Americans believe very strongly in freedom. However . . . th[e] way that Americans express the idea of freedom is very different from the way we think of it.”).

121. *Id.* at 45.

122. The formation of the test was recommended by the Crick Report, *The New and the Old*, Home Office (2003).

123. See Knowledge of Life in the UK Settlement Q&A, Home Office (2007).

124. See LIFE IN THE UNITED KINGDOM TEST: CITIZENSHIP STUDY GUIDE (2007).

invade privacy, yet it asks about sports (horse racing, rugby, and cricket), children's pocket money, or other features of daily life. The applicant has to know "what should people do if they are involved in a road accident?" and to provide a definite answer to questions such as: "Suppose you spill someone's pint in the pub. What, according to the book, usually happens next?" Other questions focus on religious myths, such as "where does Father Christmas come from?"<sup>125</sup>

Compared to other European states, the UK policy is far less rigid. *First*, unlike the Dutch *inburgering in het buitenland* test, the UK test can be taken in the United Kingdom. However, unlike the French and the German tests, which are part of the naturalization process, the UK test is a prerequisite for obtaining a permanent residence permit. *Second*, unlike the Dutch model, which has two tests—on the Dutch language and on the Dutch society—the United Kingdom only requires one test. Passing the *Life in the UK* test means that the migrant proves sufficient knowledge of the language as well. *Third*, unlike the Dutch, who keep the content of their test secret, the British publish a detailed handbook of how to prepare for the test. Joppke notes that the Dutch believe that "one cannot study to be Dutch, one has to feel Dutch."<sup>126</sup> The British, on the other hand, see citizenship as something that can be gained by learning, like a bar exam. Hence, they do not ask open questions on moral beliefs.<sup>127</sup> *Fourth*, unlike the Dutch case, where the test results are only valid for one year after which one must retake the test, the UK test has no time-limit. And *finally*, unlike the Dutch exemptions for immigrants arriving from liberal societies, the United Kingdom—although it exempts EEA citizens seeking settlement in the United Kingdom, due to EU-laws on freedom of movement—asks EEA citizens seeking British citizenship to pass the test as part of the naturalization process. In this regard, the British test is more equal and universal.

The immigration reform in the United Kingdom is the most comprehensive since the 1960s. In recent years, the United Kingdom has not only absorbed its largest wave of immigrants ever, but has also faced the largest emigration of its natives.<sup>128</sup> Beginning in 2004, every naturalized person has to attend a citizenship ceremony in which he or she must pledge loyalty. The applicant has to declare: "I will give my loyalty to the United Kingdom and respect its values, rights and freedoms. I will uphold its democratic values. I will ob-

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125. Details on the *Life in the UK* Test are available at <http://www.lifeintheuktest.gov.uk/>.

126. Joppke, *supra* note 93.

127. The *Life in the UK* Test includes multiple choice questions and true/false statements.

128. See Katrin Mahnkopf & Mária Gulicová-Grethe, *Is Marriage Migration an Immigration Gate? The Situation in the United Kingdom*, in MARRIAGE AS IMMIGRATION GATE, *supra* note 53; Bernard Ryan, *United Kingdom*, in COMPARATIVE STUDY OF THE 27 EU MEMBER STATES, *supra* note 58. at 453-64.

serve its laws faithfully and fulfill my duties and obligations as a British citizen.”<sup>129</sup> In addition to the pledge of loyalty, the applicant has to take an oath of allegiance in which he or she “swear[s] by Almighty God that, on becoming a British citizen, I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs, and successors, according to law.”<sup>130</sup> Recently, a proposal has been put forth to establish a British Day, such as the American Fourth of July or the French Bastille Day.

A new report issued by the Home Office, *The Path to Citizenship*, takes the integration requirements one step further. It suggests a new status—a “probationary citizenship” status, which will be introduced between temporary residence and citizenship. Over the course of the probationary period, the applicant will have to improve his or her command of the language, show that he or she has paid taxes for a minimum time period, prove self sufficiency, maintain a clean criminal record, and demonstrate active participation in society.<sup>131</sup> The last requirement is not mandatory but, if fulfilled, allows the applicant to apply for citizenship after one year instead of the regular course of three years.<sup>132</sup> Acquiring citizenship is a journey: people actively participating in the journey should be rewarded. The expectation is that a fast-pass ticket to citizenship will speed up integration into the British way of life.<sup>133</sup> As a result, Britain hopes to create the “strong bonds [needed] to hold it together.” Multicultural Britain has focused on differences among people, but what Britain needs is to find what people have in common.<sup>134</sup>

### E. *The Danish Exceptionalism*

In May 2007, Denmark introduced its own citizenship test (*indfødsretsprøve*). Every applicant who requests Danish citizenship has to correctly answer twenty-eight out of forty multiple-choice questions within an hour.<sup>135</sup> A wide range of topics are addressed.

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129. See details at [http://www.opsi.gov.uk/ACTS/acts2002/ukpga\\_20020041\\_en\\_15](http://www.opsi.gov.uk/ACTS/acts2002/ukpga_20020041_en_15).

130. *Id.*

131. See *The Path to Citizenship: Next Steps in Reforming the Immigration System*, Home Office 29-30 (2008). The Report proposes that “there should be minimum time periods that migrants are required to . . . demonstrate the strength of their contribution to the economy . . . with a track record of self sufficiency.” *Id.* at 7. Yet, although “working and paying tax is seen as an essential precursor to acquiring citizenship,” the Report does not specify a fixed period of time of economic contributions. *Id.* at 12-15, 25-26.

132. *Id.* at 29-31.

133. *Id.* at 7.

134. *Id.* at 14.

135. See Silvia Adamo, *Northern Exposure: The New Danish Model of Citizenship Test*, 10(1) INT’L J. MULTICULTURAL SOC’YS. 10 (2008) (“Of these questions, thirty-five are taken from two hundred in a bank of questions which is open and available on the website of the Ministry of Integration. The remaining five questions are not known

The applicant has to be familiar with Danish history from the Viking era, royal families, sports, literature, poetry, and art.<sup>136</sup> The applicant should know that during the twelfth century, Saxo Grammaticus wrote *Gesta Danorum*, which is an essential source of Danish history; that the story of *The Ugly Duckling* was written by Hans Christian Andersen; that Jørn Utzon is a Danish architect who designed the Sydney Opera House; that Vilhelm Hammershøi is a Danish painter; that Niels Bohr is a Danish scientist who won a Nobel Prize in Physics; that Denmark won the European Football Championship in 1992; and that Erik Balling is the director of the film *The Olsen Gang*. Other questions focus on constitutional issues, such as abortion, equality or free speech.

Passing the test is only one step on the road to citizenship. The applicant is required to renounce other citizenships, if requested,<sup>137</sup> to declare loyalty to the Danish state,<sup>138</sup> to pass a test proving a high level of proficiency in the Danish language,<sup>139</sup> to have resided in Denmark for nine years without interruption,<sup>140</sup> and to be self-supporting for at least one year prior to the application.<sup>141</sup> These requirements apply to family members and refugees alike. They come in addition to another set of requirements needed for admission. One of the admission criteria is the “housing requirement.” Under this clause, a Danish citizen seeking family reunion must demonstrate that he or she owns a dwelling place—renting is not sufficient—of a “reasonable size”—that is, “no more than two occupants per room” that “must have an area of at least twenty square meters per occupant.”<sup>142</sup> Admission is also subject to the “24-year age requirement.” Under this rule, both spouses have to be above the age of twenty-four years; this condition, it is alleged, is part of the efforts to prevent forced marriages.<sup>143</sup> A more controversial criterion is the “attachment requirement.” Under this provision, both spouses must

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beforehand, but revolve around current events in, for example, Danish politics and elections.”).

136. Questions sample and study materials are *available at* [http://www.nyidanmark.dk/en-us/citizenship/danish\\_nationality/citizenship\\_test.htm](http://www.nyidanmark.dk/en-us/citizenship/danish_nationality/citizenship_test.htm).

137. Dual nationality is accepted in very rare situations. *See* art. 7 of the Act on Danish Nationality, Act No. 422 of 2004.

138. *See* [http://www.nyidanmark.dk/en-us/citizenship/danish\\_nationality/conditions\\_to\\_be\\_satisfied.htm](http://www.nyidanmark.dk/en-us/citizenship/danish_nationality/conditions_to_be_satisfied.htm).

139. *See* art. 11(9)(iii) of the Aliens (Consolidation) Act No. 826 of 24 August 2005.

140. Information is *available at* [http://www.nyidanmark.dk/en-us/citizenship/danish\\_nationality/conditions\\_to\\_be\\_satisfied.htm](http://www.nyidanmark.dk/en-us/citizenship/danish_nationality/conditions_to_be_satisfied.htm).

141. *See* arts. 9(3), 9(5) and 11(4) of the Aliens (Consolidation) Act.

142. *Id.* art. 9(6).

143. *Id.* art. 9(1)(i). For criticism on the twenty-four-year age requirement, *see* Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to Denmark 8, 22 CommDH(2004)12, Council of Europe (2004).

demonstrate that their aggregate attachments to Denmark are stronger than their aggregate attachments to *any* foreign nation.<sup>144</sup>

But even all these requirements are not sufficient. Before naturalization, the applicant has to sign a *Declaration of Awareness* of the terms, and provide a deposit of DKK 54,158 (about €7,270) to cover future public expenses that his or her spouse may incur.<sup>145</sup> In addition, the applicant has to sign a *Declaration on Active Participation and Integration* into the Danish society. Here are some parts of the declaration:<sup>146</sup>

I declare that to the best of my abilities I will make active efforts to ensure that I and my children (if any) acquire Danish language skills and integrate into Danish society.

I will make active efforts to become self-supporting through gainful employment.

I will make active efforts to learn the Danish language.

I will make active efforts to acquire an understanding of the fundamental norms and values of Danish society.

I will make active efforts to participate in the life of the community.

I will participate actively in any introductory programme I am offered.

I will make active efforts to facilitate the integration of my children by working with day-care centres, schools, etc. to ensure that they acquire Danish language skills as early as possible.

[ . . . ]

I am aware that in Denmark principles apply such as the need for respect and for equal opportunities for girls and boys to develop; that adults are obliged to listen to their children; and that corporal punishment is prohibited.<sup>147</sup>

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144. *Id.* art. 9(7). An exemption exists when the Danish citizen has been living in Denmark for twenty-eight years. Attachments to Denmark is assessed by several factors, such as family ties with Danish citizens, completion of studies in Denmark, having a job in Denmark, mastering language proficiency, and having children in Denmark. See MARRIAGE AS IMMIGRATION GATE: THE SITUATION OF FEMALE MARRIAGE MIGRANTS FROM THIRD COUNTRIES TO THE EU MEMBER STATES 25-26 (2003).

145. See Declaration Pursuant to Section 11 b of the Danish Marriage Act of Awareness of the Rules of the Danish Aliens Act on Reunification of Spouses, Danish Ministry of Refugee, Integration and Immigration Affairs (2005).

146. See Declaration on Active Participation in Acquiring Danish Language Skills and Achieving Integration into Danish Society, Danish Immigration Service (2006).

147. Similar integration agreements exist in other EU states. See INTEGRATION AGREEMENTS AND VOLUNTARY MEASURES: COMPULSION OR VOLUNTARY NATURE – COMPARISON OF COMPULSORY INTEGRATION COURSES, PROGRAMMES AND AGREEMENTS AND VOLUNTARY INTEGRATION PROGRAMMES AND MEASURES IN AUSTRIA, FRANCE, GERMANY, THE NETHERLANDS AND SWITZERLAND (2005).

There is evidence to suggest that these developments have been designed to deter further migration in order to preserve Danish national identity; they serve as gatekeepers to regulate the quantity and quality of migrants.<sup>148</sup> Currently, non-Danish constitute about 5.5% of the population of Denmark. Migrants and their descendants—namely, people of non-Danish origin living in Denmark—constitute about 9% of the population.<sup>149</sup> Most of these migrants arrived from non-Western countries.<sup>150</sup> In recent years, there has been rising concern that non-Western migrants pose a threat to the Danish identity. Right-wing parties, such as the Danish Peoples Party (DPP), explicitly promote anti-migrant policies aimed at protecting national identity. “We live in a Christian country, and when you come here you must conform to Danish norms, laws and habits,” declared a member.<sup>151</sup> The DPP is the third largest party in Denmark, and won 14% of the popular vote in the 2007 election.<sup>152</sup> It has revived a romantic, nostalgic sentiment of Denmark as *kulturnation* or, to use a different term, Danish exceptionalism.<sup>153</sup> Although it is difficult to pinpoint what Danish exceptionalism means, its main elements include Danish nationalism, welfare system, and liberal values.<sup>154</sup> Denmark, like other EU states, is struggling over defining the essential elements of *Danishness*. One way to identify what is Danish is by defining what is *not* Danish. Danish sociologist Peter Gundelach explains: “We know we are Danes only because others are not. It’s all cultural.”<sup>155</sup> The “others” are the non-Western migrants, who have “hijacked the Danish identity.”<sup>156</sup> As part of the campaign to spot the “other,” the DPP showed a poster of a blond Danish girl (“Denmark today”) contrasted with a veiled Muslim woman (“ten years ahead”).<sup>157</sup> The “other” is seen as a cultural threat and a social burden. Danish Prime Minister Fogh Rasmussen explains: “Denmark must not be the social security office for the rest of the world.”<sup>158</sup>

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148. Adamo, *supra* note 135.

149. See Statistical Review: Migration and Asylum 2007, Danish Immigration Service (2008).

150. *Id.*

151. Quoted in Joppke, *supra* note 116, at 540.

152. See *Danish Centre-Right Wins Election*, BBC NEWS, Nov. 14, 2007, available at <http://news.bbc.co.uk/2/hi/europe/7091941.stm>.

153. See Katrina Feilberg, Gedske M. B. Messel & Brian Stout, *Fighting for the Flag: Danish Identity and National Symbolism*, HUMANITY IN ACTION 106, 108 (2006).

154. *Id.*

155. See Anna Mazur & Kristian B. Arentsen, *Exclusively Danish: Attempting to Dissolve the Illusion of a Static Danish Identity for the Future of Immigration*, HUMANITY IN ACTION 102 (2002).

156. *Id.*

157. See Lindsey Rubin, *Love’s Refugees: The Effects of Stringent Danish Immigration Policies on Danes and their Non-Danish Spouses*, 20 CONN. J. INT’L L. 319, 322 (2005).

158. *Id.* at 325-26.

Danish immigration policies are among the strictest in Europe and have been criticized by the Council of Europe and the United Nations.<sup>159</sup> Recently, a decision of the European Court of Justice (ECJ) that restricts Member States' power to regulate migration—and implies that the Danish policies are incompatible with EU rules—has brought to the forefront the relationship between Member States and EU institutions over matters of immigration regulation. In that case, the ECJ reviewed whether a restrictive Irish law, stipulating that foreign spouses of EU citizens must have lawfully resided in another EU state before being granted admission to Ireland, is in line with the EU Directive on Family Reunification.<sup>160</sup> In an important precedent, the ECJ recognized the authority of Member States to regulate terms for entry and residence of non-EU family members, but noted that these terms may be based only on “grounds of public policy, public security or public health.”<sup>161</sup> The ECJ dismissed other grounds, such as economic need and culture. It ruled that EU citizens have a protected right to freedom of movement within the EU, which includes the right to reside freely in another Member State with non-EU family members who accompany them.<sup>162</sup> In addition, the ECJ has called upon Member States to review their legislation to ensure that it is in line with the EU law. According to opinion polls, fifty-five percent of the Danes disagree with the EU's intervention in Danish immigration law, seeing it as “robbing our national statehood.”<sup>163</sup> The DPP leader stated that “the Government must tell the EU system that it was a prerequisite for Danish EU membership to be able to run our migration policies independently; it is [the] *Folketinget* [Danish Parliament] that decides—not ECJ judges.”<sup>164</sup> To date, the Danish policies are still in force.

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159. *Id.* at 337.

160. Art. 7(2) of the Council Directive 2003/86/EC on the Right to Family Reunification of 22 September 2003 allows Member States to ask foreign family members to “comply with integration measures, in accordance with national law.”

161. See C-127/08 Judgment of the Court of Justice (July 25, 2008). The Irish law seeks to avoid a situation where, for instance, a Dutch national comes to Ireland for a long-term professional position, marries a non-EU citizen who resides unlawfully in Ireland and, as a result of the marriage, asks Ireland to grant a resident permit to the spouse.

162. *Id.*

163. See Anders under, *The European Court of Justice—The EU Legislator Who Awakened Ogier the Dane?*, EURO-MED.DK, July 31, 2008, available at <http://euro-med.dk/?p=1322>.

164. See at <http://beta.kimcm.dk/index.php/2008/08>. Denmark is a Member State of the EU, yet has made a special reservation under title IV of the Treaty establishing the European Community. Denmark is not obligated to abide by legislation offered under this title.

### III. BECOMING A EUROPEAN: EUROPE'S ROAD TO CITIZENSHIP

Europe has been moving towards a process of forced cultural assimilation. Immigrants are excluded from European territory and membership if they do not succeed in speaking the local language, conforming to the native way of life, and passing tests about Kant, Goethe, Father Christmas, and a bevy of national athletes, painters, musicians, and novelists. "When in Rome," to quote a famous proverb, they are asked to "do as the Romans do." But what exactly do the "Romans" do? Why has this become a legal obligation? And where does it lead to?

This Part discusses the normative goals of Europe's immigration policies, the empirical evidence underlying these policies, and their legitimacy under different theories of citizenship and different legal disciplines. It shows why some of the policies can be seen as illiberal.

#### A. *Normative Goal*

The road to citizenship in today's Europe has several dimensions. The first dimension is normative: what is the goal of these policies? Is cultural assimilation the ultimate end, or is it only a means to an end? This question has no simple answer and differences exist among states. One possible goal can be national security: culture can serve as a pretext to keep out certain kinds of immigrants who certain politicians see as a potential terrorist and as a security risk.<sup>165</sup> A second goal relates to the population mix, that is, culture is another criterion in the general enterprise to restrict migration. Under that explanation, states do not want migration in a broad scale, irrespectively of its composition, and culture is just another means to reduce the number. A third explanation can be protecting the welfare system, that is, culture is used to keep out certain migrants who might become a financial burden. The assumption is that there is a linkage between culture and chances of participation in the job market. A fourth goal can be the promotion of social cohesion, that is, culture is used as a criterion based on the premise that a cultural homogeneous society is more stable.<sup>166</sup> The assumption here is that a society that is too diverse may lose its solidarity. A fifth goal can be to encourage democratic participation. Under this explanation, citizens in liberal democracies should watch over the government and participate in public life. To do so, they need to speak the language and not be cul-

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165. Driven by fears of terror attacks and social unrest, these arguments have been made by right-wing parties in Europe. See SHADOWS OVER EUROPE: THE DEVELOPMENT AND IMPACT OF THE EXTREME RIGHT IN WESTERN EUROPE (Martin Schain, Aristide Zolberg & Patrick Hossay eds., 2002).

166. See Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice*, in DEBATING IMMIGRATION 63 (Carol M. Swain ed., 2007).



turally-alienated.<sup>167</sup> The assumption is that people of a certain culture find it easier to fulfill their civil duties. A sixth goal can be to help migrants prepare for their new life by enriching their civic experience. Cultural integration here is perceived as good for the migrants themselves. In these examples, culture-based criteria serve as a means to achieve a non-cultural end.<sup>168</sup>

There can be another explanation according to which cultural preservation is an end in itself. In *The Limits of Nationalism*, Chaim Gans discusses various types of cultural preservation. He distinguishes between *statist nationalism*, in which cultural criteria are needed to preserve the cultural hegemony of the state, and *cultural nationalism*, in which cultural hegemony is needed because people have an interest in adhering to their own culture and in sustaining the culture for generations.<sup>169</sup> Gans also distinguishes between liberal and illiberal cultural nationalism and makes a case for a narrow version of liberal cultural nationalism. In his view, continued existence of culture is worth protection because people's culture is a prerequisite to freedom and an essential element of their identity.<sup>170</sup> However, culture-based criteria are not the only means to achieve cultural preservation. Giving preferences to educated and skills-based migrants over family-based migrants may influence the cultural composition of qualified migrants.

Consider the English language requirement in Britain. One way to justify it is to say that English is an essential element of British identity, a value that has to be preserved. Another justification is more instrumental—mastering English is a functional element necessary for daily life in Britain.<sup>171</sup> This distinction has implications. If culture is only a means to promote civic or economic goals, it is possible to find less intrusive ways to achieve these goals. Restrictions can only be justified to the extent they promote the essential goal. For instance, one might claim that it is possible to be part of the job market in international cities, such as Amsterdam or Berlin, even

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167. See John S. Mill, *Representative Government*, in UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT Ch. 16 (Geraint Williams ed., 1993) (“Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist.”).

168. See also Christian Joppke, *Do Obligatory Civic Integration Courses for Immigrants in Western Europe further Integration?*, FOCUS MIGRATION 8 (2007).

169. See CHAIM GANS, *THE LIMITS OF NATIONALISM* 7 (2003).

170. *Id.* at 39-66.

171. In *The Path to Citizenship*, *supra* note 131, at 22, the Home Office notes that knowing English is essential because there is evidence that the command of English “increase[s] the chance [to be employed] by about 22 percent.”

without knowing Dutch or German because people speak English as well.<sup>172</sup>

Culture thus can be a means, or an end, in immigrant selection. Four cases can be distinguished: in the first case, a state seeks to achieve a *cultural purpose* by using *cultural criteria*; in the second case, a state pursues a *cultural purpose* by using non-cultural criteria; in the third case, a state seeks to achieve a *non-cultural purpose* by using *cultural criteria*; and in the fourth case, a state promotes a *non-cultural purpose* by using *non-cultural criteria*. This Article does not focus on whether cultural preservation is a legitimate *purpose* to restrict migration. Rather, it asks whether culture is a legitimate *criterion* in immigrant selection. This question falls in cases one and three: using culture-based criteria in order to achieve a cultural purpose, or a non-cultural purpose. I focus primarily on case one: using culture-based criteria to achieve a cultural purpose. For the sake of the discussion, I assume that some elements of cultural preservation can serve as a legitimate end to restrict migration. I ask whether migrants' cultural background is a legitimate criterion to achieve the above end.

### B. Empirical Puzzle

The second dimension to the European road to citizenship is empirical. At this point, we know very little about where the compulsory citizenship tests and forced integration courses lead. As long as the goal is to reduce the number of migrants, it seems that they are an effective means.<sup>173</sup> Yet it is unclear if citizenship tests, in one format or another, are an effective predictor for the applicant's adherence to certain values. It would be naïve to assume that a person who can quote Goethe or Nietzsche is assimilated. He might be more educated, but is he a more integral part of German society? It is also unclear if it is possible to assess integration merely by using a test. In addition, there is little evidence to suggest that a "Blitzkrieg-style" of integration, in which the applicant is asked to participate in hundreds of hours of integration lessons, or a "contract-based" model, in which integration is a contractual liability,<sup>174</sup> indeed foster integra-

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172. See *Make English Second Official Language*, DUTCHNEWS.NL, Aug. 8, 2008; *Europe's Wealth Consists Essentially in its Variety of Languages*, GOETHE-INSTITUT, May 2006 (finding that fifty-one percent of EU citizens speak English).

173. For the Dutch case, see Evelyn Ersanilli & Ruud Koopmans, *Rewarding Integration? Citizenship Regulations and Socio-Cultural Integration of Immigrants in the Netherlands, France and Germany*, J. ETHNIC & MIGRATION STUD. (forthcoming, 2010). For the Danish case, see Kristina Touzenis, *Denmark*, in COMPARATIVE STUDY OF THE 27 EU MEMBER STATES, *supra* note 58, at 193-204.

174. See Dieter Grimm, *Integration by Constitution*, 3(2) INT'L J. CON. L. 193, 196 (2005) ("A regulation forcing constitutional integration upon its citizens would be truly vain . . . other factors, such as nationhood, religion, history, culture, or a common enemy, have more reliable integrative effects.").

tion. To get back to Raz's argument, forced integration may be counterproductive and lead to radicalization among minority groups as a reaction to what they see as a threat to their own culture.<sup>175</sup> This raises the question whether these policies resolve a "problem," or exacerbate it?<sup>176</sup>

The empirical puzzle is even more complex. Under EU laws, freedom of movement for EU citizens exists within Member States.<sup>177</sup> The Netherlands, for example, cannot prevent a Polish citizen from moving and resettling in its territory. Therefore, it may be harder to preserve cultural sameness if culturally diverse EU citizens can freely move from one state to another. True, all Member States share certain liberal democratic values, anchored in the Copenhagen Criteria, which are principles that every Member State has to maintain before being eligible to join the EU.<sup>178</sup> However, these principles do not guarantee the preservation of Dutch, German or French national identity. Moreover, under the current European regime, an immigrant who wishes to become a European citizen will be able to be naturalized in a more permissive state, for instance Sweden, and then to resettle in a state with stricter immigration policies, for instance Denmark.

### C. *Theoretical Framework*

The third dimension is theoretical. It asks what is the theory of citizenship by which to analyze European immigration policies. Let us mention briefly four perspectives: republicanism, communitarianism, cosmopolitanism, and liberalism. Under republican theory, the important virtue of citizenship is active participation in public life. A citizen has to be politically active and holds, to use Aristotle's term, "indefinite office."<sup>179</sup> A state is a "partnership of citizens in the Constitution"; the chief business of the citizens is engaging in public service, not only by voting but also by political deliberation or serving on juries and participating in military service, and living a self-sufficient life.<sup>180</sup> Under communitarian citizenship, a state is likened to a club whose members enjoy a right of closure, meaning that they can

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175. Raz, *supra* note 40.

176. See Martha Minow, *Tolerance in the Age of Terror*, 16 S. CAL. INTERDIS. L.J. 453, 492 (2007).

177. See Council Directive 2004/38 on the Rights of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, O.J. (L 158) (EC).

178. See Copenhagen European Council, Presidency's Conclusions, EC Bull. 6-1993.

179. See ARISTOTLE, *POLITICS*, book III (Benjamin Jowett trans., 1943). Political decision-making is also a central virtue of citizenship in Rousseau's *Social Contract*. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, book III(15) (G.D.H. Cole trans., 2008).

180. *Id.*

set up cultural criteria to control the character of migrants. A state is viewed as a community of character and migrants are to accord with this character. Citizens should attach themselves to certain principles and constitute "a community of fate."<sup>181</sup> Under cosmopolitan theory, however, borders are arbitrary and should usually be open unless there are just constraints relating to individual freedoms that may be harmed by migration. Joseph Carens considers culture to be such a constraint, but only if a "threat to basic liberal democratic values" exists.<sup>182</sup> Under liberal theory, a state is neither a club whose members enjoy the right of closure, nor a global project open "to whom it may concern." Joppke observes that Hobbesian "liberalism is an institutional modus vivendi that allows many diverse ways of life to co-exist peacefully, without the presumption of overarching common values," while Lockean "liberalism is a more ambitious, ethical project of finding a 'rational consensus on values' and arriving at an 'ideal form of life'."<sup>183</sup> Though many differences exist, political liberalism does not dismiss the use of culture but requires, at the very least, some forms of fairness toward aliens and some concepts of justice toward citizens.<sup>184</sup>

The legitimacy of the use of culture-based criteria for admission and naturalization may be evaluated differently under different theories of citizenship. Under a republican theory of citizenship, the crucial question is the necessity of culture for active citizenship. If culture is an inevitable instrument of political deliberation, it may be a justified qualification for naturalization. Under this approach, the Danish Declaration on Active Participation, or the British idea of active citizenship, are more reasonable. Migrants' culture is relevant if it is essential for the economy, or public life. However, it is generally less justified to exclude people merely based on cultural background if they are willing to commit themselves to civic participation and political deliberation.

From one variant of a cosmopolitan perspective, culture-based criteria can be justified in cases where they are used to keep out criminals, terrorists, and the like.<sup>185</sup> Yet, it will be an arbitrary criterion as long as its purpose is to admit only people of "our kind."<sup>186</sup> Excluding is only legitimate when there is an actual threat to individ-

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181. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31-64 (1983); David Miller, *Immigration: the Case for Limits*, in CONTEMPORARY DEBATES IN APPLIED ETHICS 193 (Andrew Cohen & Christopher H. Wellman eds., 2005).

182. See Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POL. 229, 241 (1987).

183. See CHRISTIAN JOPPKE, VEIL: MIRROR OF IDENTITY 118 (2009).

184. See John Rawls, *Justice as Fairness in the Liberal Polity*, in THE CITIZENSHIP DEBATES, *supra* note 75, at 53; Macedo, *supra* note 166.

185. Carens, *supra* note 182, at 229.

186. *Id.* at 234-35.

ual freedoms otherwise everyone should have a right to sign the “contract,” even if it “change[s] the character of the community.”<sup>187</sup> A cosmopolitan view sees the whole world as the beneficiary of goods. Immigration restrictions prevent individuals from enjoying the goods of living in a liberal society. Furthermore, a cosmopolitan view asks to balance potential costs derived from admission of culturally diverse migrants with potential benefits of such admission to the whole world.

From at least one version of a communitarian view, culture-based criteria are fairly justifiable as long as they overlap with the concept of national identity. In an insightful article, Gerald Neuman observes that the legitimacy of cultural criteria depends on what theory of citizenship is applied. Referring to a communitarian theory, Neuman asserts that culture-based naturalization criteria, which he calls “ideological naturalization criteria,” “would only be defensible if the proscribed ideas were incompatible with national identity.”<sup>188</sup> Under this theory, cultural preservation might serve as an end in itself, though the limit of the use of cultural criteria to achieve this end is less clear.

#### D. *Legal Discipline*

The fourth dimension is legal. It explores the legal limits imposed on states’ power to restrict migration in general, and based on culture in particular. We should distinguish between different legal disciplines. The first discipline is constitutional law. In some states, constitutions do not generally apply extraterritorially to noncitizens located outside the territory, and therefore do not provide substantive constitutional protection in admission cases.<sup>189</sup> The constitution, however, may nonetheless impose some limits on admission policies. An example is the case of family migration, an issue that touches not only upon interests of noncitizens, but also on constitutional rights of citizens, such as equal protection and family life.<sup>190</sup> As for citizenship policies, the constitution surely applies within the respective state’s territory.

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187. *Id.* at 250 (“It would change the character of the community but it would not leave the community without any character; it might destroy old ways of life, highly valued by some, but it would make possible new ways of life, highly valued by others.”).

188. See Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT’L L. 237, 261 (1994).

189. For American law, see *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). For British law, see *R (Al Skeini) v. Secretary of State for Defence*, EWCA Civ 1609 (2005). For Canadian law, see *R. v. Hape*, SCC 26 (2007). For a comprehensive theoretical and legal discussion, see GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW* (1996).

190. See Liav Orgad, *Love and War: Family Migration in time of National Emergencies*, 23(1) GEO. IMMIG. L.J. 85, 116-19 (2008).

At least until now, the policies discussed above have not been declared unconstitutional. There might be various explanations to this reality: the newness of the policies, the deference of courts to the legislature, and the relationship between EU law and constitutional law of Member States. All in all, constitutional law hardly leaves room for invalidating culture-based immigration criteria, particularly in European countries where no constitutional judicial review exists.<sup>191</sup>

A second discipline is EU law. The EU is anything but consistent on the question of integration criteria into EU Member States. Under *The Hague Programme: Strengthening Freedom, Security and Justice in the EU*, Member States decided to develop a common integration policy for newcomers to the EU.<sup>192</sup> Soon after, they agreed upon the Common Basic Principles for Immigrant Integration Policy.<sup>193</sup> These principles include “basic knowledge of the host society’s language, history and institutions,” and “basic values of the EU and fundamental human rights.”<sup>194</sup> The principles are not binding, yet they guide Member States in forming migrant integration policies. More recently, the EU adopted the *European Pact on Immigration and Asylum*, a document directed, among other things, at formulating fundamental principles of migrant integration policies. The Pact allows Member States to regulate admission criteria and ask migrants to accommodate the state’s language, and to respect the “identities of the Member States and the European Union and . . . their fundamental values, such as human rights, freedom of opinion, democracy, tolerance, equality between men and women, and the compulsory schooling of children.”<sup>195</sup>

It is difficult to evaluate immigration policies under EU law because the EU has not yet established clear admission criteria for immigrants. A set of admission criteria exists for Member States—the Copenhagen Criteria—but not for individual admission. Clearly, there is a European interest in having a harmonized European pol-

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191. It should be noted that there is no constitutional review in the Netherlands and Denmark, that constitutional judicial review applies only before the promulgation of Parliamentary acts in France, and that courts cannot invalidate Parliamentary acts in England but only declare them incompatible with the Human Rights Act of 1998. The only country discussed in which the court has the power to declare an act as unconstitutional is Germany. See HANS V.D. BRANDHOF & MARTEN BURKENS, CONSTITUTION LAW OF 15 EU MEMBER STATES (Lucas Prakke & Constantijn Kortmann eds., 2005).

192. See *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, Point 1.2 & 1.5 in the Presidency conclusions, 16054/04, JAI 559 (Dec. 13, 2004).

193. See Justice and Home Affairs, 2618th Meeting, Council of the European Union, 14615/04 (Nov. 19, 2004).

194. *Id.* at 17-18.

195. See *European Pact on Integration and Asylum*, Council of the European Union (2008).

icy—because different policies among Member States may affect the whole Union—but at this point there is no EU directive that sets the frame for this issue. What we have instead is a set of inconsistent guidelines that leave a wide range of discretion to Member States.<sup>196</sup> However, from the recent precedent of the ECJ previously mentioned, one could learn that at least when it comes to EU-citizens' family members, it may be unlawful under EU law to impose cultural restrictions on their entry.<sup>197</sup>

A third discipline is international law. Modern international law provides states with broad discretion to regulate immigration and naturalization rules. Since the classic *Nottebohm* case held that “international law leaves it to each State to lay down the rules governing the grant of its nationality,”<sup>198</sup> international law rarely interferes with states' jurisdiction on issues of immigration. The European Court of Human Rights usually defers to states' power to control their borders, even in cases of family migration that involve rights of EU citizens.<sup>199</sup> Moreover, under international law, the right of peoples to self-determination includes a right to “freely determine their political status and freely pursue their economic, social and *cultural* development.”<sup>200</sup> In 1984, the Inter-American Court of Human Rights ruled that preferences in naturalization criteria issued by Costa Rica for nationals of Central American countries, Spaniards, and Ibero-Americans are compatible with the American Convention on Human Rights and presents no discrimination.<sup>201</sup> The Court justified granting preferences in naturalization requirements for Central American nationals by noting that they are “closer historical, cultural and spiritual bonds with the people of Costa Rica . . . [Central American nationals will] identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve.”<sup>202</sup>

An important limitation exists in the International Convention on the Elimination of all Forms of Racial Discrimination (CERD). The CERD provides that nationality, citizenship or naturalization laws of States Parties cannot “discriminate against any particular national-

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196. See Liav Orgad, ‘Cultural Defence’ of Nations: Cultural Citizenship in France, Germany and the Netherlands, 15(6) EURO. L.J. (2009).

197. See *supra* note 161 and accompanying text.

198. See *Liechtenstein v. Guatemala* 1955 I.C.J. 4.

199. See, e.g., *Abdulaziz v. U.K.*, (1985) 7.E.H.R.R. 471, *Gul v. Switzerland*, (1996) 22 E.H.R.R., *Ahmut v. The Netherlands*, (1997) E.H.R.R.

200. Emphasis added. See art. 1(1) of the International Covenant on Economic, Social and Cultural Rights, U.N.T.S. 993 (1976); art. 1(1) of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1976).

201. See *Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (OC-4/84).

202. *Id.*

ity.”<sup>203</sup> It is unclear yet whether culture might be considered a kind of “particular nationality.”<sup>204</sup> In addition, Article 1(2) to the CERD makes clear that the CERD does not apply to distinctions between “citizens and non-citizens.” In interpreting this clause, the U.N. Committee on the Elimination of Racial Discrimination has noted that discrimination occurs only if the criteria “are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”<sup>205</sup> It seems unlikely that international human rights law would outlaw culture-based restrictions on admission, though it might outlaw some forms of culture-based discriminations in access to citizenship.<sup>206</sup>

### *E. The European Illiberal Road to Citizenship*

“Would you tell me, please, which way I ought to go from here?” Alice asks the Cheshire cat in Wonderland.<sup>207</sup> Well, “that depends a good deal on where you want to get to,” says the cat. Alice has no idea where exactly she wants to go, as long as she will “get somewhere.” “Oh”, says the cat, “you’re sure to do that if only you walk long enough.”

Europe, too, will get “somewhere.” The question is whether the road to “somewhere” is also liberal. I argue that this road, in some of its parts, is illiberal—even if it is legal. To a certain extent, European states embrace illiberal policies that violate the same values they seek to protect. This creates a *Paradox of Liberalism*: liberal states, in order to preserve what they perceive as a liberal regime, are resorting to illiberal means to guarantee liberal values. Here lies the paradox: either the liberal must tolerate illiberal practices, or turn to illiberal means in order to “liberate” the illiberal. Either choice undermines liberalism.<sup>208</sup>

From a liberal view, this paradox raises at least three concerns. The first is the ideological nature of some of the immigration policies. Certain immigration regimes in Europe are not content with applicants’ knowledge and understandings of the host society’s way of life,

203. See art. 1(3) of the International Convention on the Elimination of all Forms of Racial Discrimination, 60 U.N.T.S. 195 (1965).

204. The argument can at least be based on the discriminatory impact of the use of culture on particular racial groups.

205. See Consideration of Reports Submitted by States Parties under Article 9 of the Convention, UNITED NATION, CERD/C/DEN/CO/17 (Oct. 19, 2006).

206. See Rüdiger Wolfrum & Volker Röben, Gutachten zur Vereinbarkeit des Gesprächsleitfadens für die Einbürgerungsbehörden des Landes Baden-Württemberg mit Völkerrecht (2006), available at [http://www.mpil.de/shared/data/pdf/gutacht\\_gespraechleitfaden\\_einbuengerung.pdf](http://www.mpil.de/shared/data/pdf/gutacht_gespraechleitfaden_einbuengerung.pdf).

207. See LEWIS CARROLL, ALICE IN WONDERLAND (Ralph Steadman ed., 2006).

208. Joppke, *supra* note 183, at 115 (“much as the liberal state might wish its members to identify with liberal norms (which cannot but be the goal of civic integration), it cannot legally force its members to do so. If it did, it would cease to be a liberal state.”).



but explore their moral perceptions. Immigration rules are often interested in psychological attitudes and moral judgments rather than cognitive understanding and legal acceptance. They investigate the applicant's reactions to ideas like homosexuality, nudism and children education, and their political agenda. The weight of each question in the overall assessment is unknown. But as long as the questions are given some weight, they may be a form of ideological exclusion. In extreme cases, they try to control the applicant's freedom of thought and freedom of conscience.

Moreover, some questions do not have a moral right-or-wrong answer and, unlike questions such as what are the colors of the flag, do not have a right answer at all. How "wrong" is it when an immigrant visits the widow of a deceased co-worker instead of sending a card (it is one of the questions in the Dutch test). Or, consider the British question of "you spill someone's pint in the pub. What, according to the book, usually happens next?" The possible answers are A) You would offer to buy the person another pint; B) You would offer to dry their wet shirt with your own; and C) You may need to prepare for a fight in the car park. The "right" answer under the British handbook is A. Yet, one might choose B, and ask whether this choice is morally or legally wrong. But my concern lies in a more fundamental point: why is the British government interested in private interaction in bars? Spilling pints in a bar is not generally illegal behavior and, as long as the reaction to such an act is legal, one might ask what the Government has to do with this issue. Should not the response be learnt by daily life interactions rather than Governmental codes of how to behave in bars?

In a stimulating book about civic education in American society, Stephen Macedo powerfully argues that liberal democracies need *not* be neutral towards what he calls basic "civic liberalism." In order to protect freedoms and liberties, liberal states need to promote a shared citizenship based on basic civic morality and common civic culture.<sup>209</sup> To "keep Sydney from becoming Sarajevo, or Boston from becoming Beirut," liberal states must not be neutral.<sup>210</sup> Liberalism is a "moral public project," with a philosophical mission statement. In order to preserve the mission, citizens must support "fundamental institutions and principles," because, at the end, "citizens, not courts or legislatures, are the ultimate custodians of our public morality."<sup>211</sup> Macedo warns that we should not take liberalism for granted, and

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209. See STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN MULTICULTURAL DEMOCRACY* 21 (2000).

210. *Id.* at 26-27, 31-36.

211. *Id.* at 164-65. Macedo notes that "future citizens [should] acquire the character traits, habits, and virtues they must have if the liberal political project is to survive and thrive." *Id.* at 20.

need not assume that people living in liberal democracy are “good liberal democrats.”<sup>212</sup>

Macedo’s argument is powerful.<sup>213</sup> However, on the normative level, one might ask what degree of threat justifies what measures, and for what purpose. It is doubtful whether a questionnaire on how to behave in bars or on nudism and women’s dress codes falls under “basic civic liberalism.”<sup>214</sup> Liberalism also contains the freedom to choose not to be liberal, as long as one’s way of life is democratic and legal. On the empirical level, a further question is whether European democracies are currently under threat, what kind of threat, and whether cultural immigration restrictions help to minimize this threat.

It is possible to argue that liberal states have different duties of neutrality towards citizens compared to noncitizens. In order to follow this road, it is necessary to ask where the grounds of the neutrality requirement come from, an issue that I do not discuss here. Instead, I argue that the relevancy of neutrality in the European case is to the state’s citizens. With almost no exceptions, European policies on admission and naturalization apply across the board, including family members of citizens. Citizens have an interest, and often a right, such as family life or equal protection, in the admission of spouses and children. Liberal democracies must at least be neutral toward their own citizens.

The second concern relates to what Neuman calls the “paradox of liberal toleration.”<sup>215</sup> Neuman analyzes ideological exclusion in America under different normative models of citizenship. He asserts that ideological qualifications for citizenship, under a communitarian view, can be defensible in cases where ideological beliefs are at odds with national identity. Nevertheless, Neuman mentions two grounds for questioning this proposition. First, while some ideological ideas, such as communism, were held to be “un-American,” these ideas were in fact held by “earlier generations of Americans.”<sup>216</sup> Second, and more important, Neuman wonders whether ideological exclusion is not in itself “un-American,” in light of the centrality of free speech in America: “One might ask whether freedom of thought is not itself so central to the American national identity that profession of a belief can never render its holder ‘un-American.’”<sup>217</sup> Consider the Nether-

212. *Id.* at 5, 9-10.

213. The question whether liberal states should be neutral regarding concepts of ways of life is controversial. For a different view, see RONALD DWORIN, *A MATTER OF PRINCIPLE* (1985).

214. In order to protect civic liberalism, Macedo suggests that liberal democracies must directly “shape the ways that people use their freedom.” MACEDO, *supra* note 209, at 13.

215. Neuman, *supra* note 188, at 261.

216. *Id.*

217. *Id.*

lands. The country has significant Moroccan and Turkish communities. Had the Dutch wanted to preserve their culture, they should have taken into account the Moroccan and Turkish culture as well. Denying the minority communities' culture might be regarded "un-Dutch" in itself, because diversity and pluralism are central elements of Dutch culture.

The third concern touches upon the distinction between immigration law and domestic law. Liberal democracies, especially multicultural societies, are characterized by ongoing social tensions. Immigration laws are not the appropriate means for resolving these tensions, because other less intrusive alternatives are available, such as educational systems or social institutions. If, for instance, it is forbidden to wear a burqa in French public schools' classrooms, it must not lead to the conclusion that a person who wears a burqa should be disqualified from French citizenship. The reason is that immigration law is not the appropriate method by which to control a person's religiosity. If she violates the law, civic and criminal sanctions exist.

To be clear: I do not claim that European policies are illegal, but only that they are badly managed in the way that challenges their being liberal under some subsets of liberalism. One typology that may help to clarify matters is based on a distinction between questions that *must* be asked as a prerequisite to join liberal democracy, questions that *can* be asked, and questions that *must not* be asked. This Part explains why it is wrong, in liberal terms, to focus on moral attitudes, political agendas, or ideological beliefs. In the next Part, I explain the desired content that should be included in the immigration process. In between, there is an area of discretion. Examples include questions about rivers and oceans, symphonies of Beethoven and Wagner, or paintings by Caspar David Friedrich. Asking about these matters is not, in itself, illiberal. This information might be very important, but it would be better to supply it to newcomers as an orientation material, rather than a mandatory knowledge that migrants need to be tested on.

#### IV. A TWO-STAGE SOLUTION: ADMISSION AND NATURALIZATION

##### A. *Admission and Political Liberalism*

Is it legitimate to exclude immigrants from admission based on their cultural background? In liberal theory, political liberalism diverges from other subsets of liberalism in various aspects. One aspect is that political liberalism, at least its Rawlsian version, is not a comprehensive conception of moral goods, that is, it contends that the state has to be generally neutral on conceptions of the good.<sup>218</sup> Indi-

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218. See John Rawls, *The Idea of Public Reason Revisited*, in *THE LAWS OF PEOPLES* 129-75 (1999).

viduals compete for different conceptions of the good, yet there is an “overlapping consensus,” i.e., an area of agreement. Overlapping consensus focuses on issues such as freedom, equality, tolerance, and justice.<sup>219</sup> This is basically an agreement on concepts of justice and fairness. This structure is independent of any comprehensive morality.

Political liberalism is a *system of principles* governing human behavior. Let’s take an example. When an American comes to France, she does not have to take driving lessons before being permitted to drive in France if she has an American driving license. The situation would be different if she did not have a driving license, or if she comes from a country where the very basic traffic laws differ from those in France. Under these circumstances, it would be legitimate to demand that she take driving lessons before letting her drive. Refusing to accept these principles, or failing to pass tests demonstrating knowledge of the principles, will legitimately enable France to prevent her from driving. If she consistently violates the traffic laws, France can legitimately ask her to take more driving lessons and, if necessary, rescind her license and prohibit her from further driving.

The point is that if living in a liberal democracy means obeying certain structural principles, the state can require the acceptance of these principles as a prerequisite to admission. In addition, states can implement appropriate means to ascertain a person’s (at least declared) acceptance, and deny admission otherwise.<sup>220</sup> These principles obligate every person who voluntarily migrates to Europe, irrespective of visa status,<sup>221</sup> though different visas may lead to different levels of scrutiny.

Obeying this framework of principles is justified because the principles themselves are considered just. In *A Theory of Justice*, John Rawls elaborates on the concept of natural duties. He notes that “if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everybody has a natural duty to do his part in the existing scheme.”<sup>222</sup> Rawls’s premise assumes that the principles are just in themselves, but he leaves room for localization by noting that the principles have to be just “in the circumstances.” Accordingly, if the minimal framework of political liberalism is just in Europe’s circumstances, every migrant should be required to accept those principles. It does not follow that migrants must adopt any particular culture, only that they agree to some framework and procedures. This framework is a precondition of freedom because

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219. See JOHN RAWLS, *POLITICAL LIBERALISM* 147-48, 164-68 (1995).

220. I here avoid the question of the legitimate means (citizenship tests, oaths of allegiance, integration contracts, etc.).

221. Refugees are a different case, which I do not discuss here, because their movement is not purely voluntary.

222. See JOHN RAWLS, *A THEORY OF JUSTICE* 115 (1971).

freedom “depends on options which depend on [the] rules which constitute those options.”<sup>223</sup> Immigrants should agree, for example, that in a system of the rule of law, people should obey the law whether they like it or not,<sup>224</sup> obey court decisions, and resolve conflicts by peaceful means. Immigrants are compelled to recognize that in a liberal democracy some laws may contradict their private beliefs, but that they are nonetheless obliged to obey them, and accept people’s right to live according to these laws.

Exclusion may be legitimate when an immigrant does not accept the principles of political liberalism, or when there are reasonable expectations to assume that this will be the case. It reflects the idea that some forms of intolerance are intolerable. Raz notes that “some cultures, or aspects of some cultures, are unacceptable”; hence, states should tolerate them only when it is “possible to neutralize their oppressive aspects.”<sup>225</sup> This idea appears in Rousseau’s *Social Contract*:<sup>226</sup>

There is therefore a purely civil profession of faith of which the Sovereign should fix the articles, not exactly as religious dogmas, but as social sentiments without which a man cannot be a good citizen or a faithful subject. While it can compel no one to believe them, it can banish from the State whoever does not believe them—it can banish him, not for impiety, but as an anti-social being, incapable of truly loving the laws and justice [ . . . ]

It is impossible to live at peace with those we regard as damned . . . we positively must either reclaim or torment them . . . tolerance should be given to all religions that tolerate others, so long as their dogmas contain nothing contrary to the duties of citizenship. But whoever dares to say: Outside the Church is no salvation, ought to be driven from the State, unless the State is the Church.

In Rousseau’s view, members of an intolerant religion should be excluded from the community, and only tolerant religions should be tolerated by joining the social contract. Thus, for example, if there is tangible evidence that a migrant is a fascist, it would be legitimate to keep her out. This practice might still stand if the migrant does not want to accord rights to Blacks, Jews or minorities. The circumstances may be less clear, however, if he or she is merely against the state’s desired way of life. In this case, it is necessary to explore to

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223. Raz, *supra* note 40, at 155-60.

224. I do not discuss cases of civil disobedience based on unjust or oppression laws.

225. Raz, *supra* note 40, at 169.

226. ROUSSEAU, *supra* note 179, at book IV(8).

what he or she objects. Here, different answers would lead to different conclusions.<sup>227</sup>

### B. *Naturalization and National Constitutionalism*

Liberal principles say nothing about Dutchness, Frenchness or Britishness. They do not establish a special relationship between immigrants and a specific country. This relationship may be required, for becoming a citizen means joining a concrete, well-defined community. This relationship should take into account the locus of political liberalism, the fact that liberalism applies “here and now.”<sup>228</sup>

There are a number of schools to be considered. From a liberal-nationalist perspective, a state can require immigrants to conform to some elements of national liberalism. Will Kymlicka notes that immigrants have to integrate into a “societal culture.”<sup>229</sup> This idea includes a thin concept of linguistic integration and national history. Kymlicka’s notion of societal culture focuses on the “mainstream culture,”<sup>230</sup> i.e., “the national culture.”<sup>231</sup> Margalit and Halbertal go further. They assert that immigration laws are natural measures taken by dominant groups to protect their culture. The majorities’ monopoly over immigration law is their central justification for granting specific privileges to minorities.<sup>232</sup> Margalit and Raz, likewise, argue that one characteristic of self-determination is a group’s common culture and that group membership requires a certain degree of cultural integration. “Membership is a matter of belonging, not of achievement”; “qualification for membership is usually determined by nonvoluntary criteria. One cannot choose to belong . . . one can come to belong to such groups but only by changing, e.g., by adopting their culture, changing one’s tastes and habits accordingly.”<sup>233</sup> While these scholars may not support the current version of forced integration in Europe, they nonetheless agree that culture should play a role in the process.

I follow a similar, though different, direction. My approach is divorced from concepts of societal and national culture and focuses on what I call *National Constitutionalism*. Under this concept, immigrants would have to be familiar with, and accept, a state’s essential

227. A difficult question, which I do not discuss here, is what kind of intolerance should be excluded: is the concern about intolerant attitudes, utterances or behaviors?

228. Raz, *supra* note 40, at 155.

229. See WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP* 51-54, 155-74 (2001).

230. See WILL KYMLICKA, *MULTICULTURALISM CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 114 (1995).

231. *Id.* at 80.

232. See Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 *Soc. Res.* 491 (1994).

233. See Avishai Margalit & Joseph Raz, *National Self-Determination*, 87(9) *J. Phil.* 439, 443-47 (1990).

constitutional principles before becoming citizens—as long as these principles are just considering the state's circumstances. This formula is constructed of four elements: it refers to *constitutional* principles, factors *essential* for citizenship, which are *just given the circumstances* of a respective state, and need to be *accepted* by the immigrants. It allows states to strive to preserve their national constitutionalism by means of naturalization laws, yet it is not generally culturally-oriented.

Every state has a constitutional uniqueness reflecting its history, development, traditions, and contextual background. In order to understand its basic constitutional principles, one should look at the state's formative documents, such as its constitution, its preamble or its declaration of independence.<sup>234</sup> These documents reflect the constitutional trademark, what George Fletcher calls “constitutional identity.”<sup>235</sup> Consider Germany: German national constitutionalism is embodied in concepts of human dignity and Kantian morality. Other countries, such as Israel, have a constitutional conception of human dignity, but it differs from the German *unantastbar* dignity.<sup>236</sup> Similarly, the rule of law is a universal concept, but the German *Rechtsstaat* is quite different from the Anglo-American rule of law concept; it requires substantive and procedural fairness, an idea closer to American due process.<sup>237</sup> A Social State too is a widely shared concept but, again, the German *Sozialstaat* has a local meaning—it requires affirmative acts to promote the public weal, similar to the American concept of general welfare.<sup>238</sup>

Admission criteria, anchored in political liberalism, and citizenship criteria, anchored in national constitutionalism, resemble one another: both are variants of political liberalism and not culturally specific. Yet national constitutionalism is a broader concept that leaves room for constitutional exceptionalism, with each nation retaining its own story and constitutional identity. True, one may claim that there is nothing intrinsically German about abortion being illegal, as it is illegal in other states as well, such as Portugal. Similarly, there is nothing characteristically German about Holocaust denial being a crime, because it is a recognized crime in other states too, such as the Britain and Israel. One may even claim that being a German cannot be based on speaking German if Austrians and Swiss

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234. Constitutional principles are not necessarily derived from a formal, written constitution. They are often embodied in other constitutional means such as case-law, especially in common law states, or civil codes, especially in civil law states.

235. See George P. Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737 (1993).

236. See EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 41-45 (2001).

237. See DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 1-32 (1994).

238. *Id.*

speak it as well. This pattern abides when looking at every constitutional principle separately. However, to build on Frank Michelman's constitutional essentialism, we need to look at the system *as a whole* and not at each of its individual elements separately.<sup>239</sup> What makes the German Constitution *German* is not any single constitutional principle, but the entire Constitution, the whole package, and the particular way the Germans express these principles, and implement these principles.

National constitutionalism builds on Habermas's Constitutional Patriotism, but in a slightly different direction.<sup>240</sup> In both, the object is the Constitution—neither the French *Communauté* nor a German *Kulturnation*. Both leave room for constitutional particularity and both are divorced from romantic conceptions of citizenship. In both, no single constitutional principle has to be justified, but the constitutional system as a whole, and both include what Michelman calls as a constitutional essential.<sup>241</sup> Yet, national constitutionalism differs from constitutional patriotism. The motivation for national constitutionalism is not the creation of “a just constitutional regime” that “expresses universal norms of justice and fairness in specific contexts.”<sup>242</sup> Its *raison d'être* is to protect core constitutional principles because they are *ours* and because *we*—the French, the German, the Dutch, etc.—have an interest in preserving them. National constitutionalism is thus less universal, *inter alia* because it applies to naturalization, the second stage, whereas universal principles apply to the first stage, that of admission. Furthermore, national constitutionalism does not require emotional connectedness nor allegiance; there is no need for patriotism nor for devotion to any principle. In effect, it is a necessary stipulation for a legal, non-emotional belonging in a particular political body.

National constitutionalism is justified for at least two reasons: first, it is based on consent. The decision to become a citizen of a specific country implies agreement with the constitutional essentialism of that country.<sup>243</sup> Second, it is based on fairness.<sup>244</sup> Persons who become citizens of a state enjoy its benefits, resources, and protection.

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239. See Frank I. Michelman, *Morality, Identity and “Constitutional Patriotism,”* 76 DENVER L. REV. 1009, 1015 (1998) (constitutional essentialism “is not meant for application on an act-by-act or law-by-law basis. It is rather meant for application to the *system of lawmaking*.”).

240. See Jürgen Habermas, *The Postnational Constellation and the Future of Democracy*, in *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* 58-112 (Max Pensky ed., 2001).

241. Michelman, *supra* note 239, at 1015-17.

242. See JAN-WERNER MÜLLER, *CONSTITUTIONAL PATRIOTISM* 58-60 (2007).

243. See David Martin, *Membership and Consent: Abstract or Organic*, 11 YALE J. INT'L L. 278 (1985).

244. See Jeremy Waldron, *Special Ties and Natural Duties*, 22(1) PHIL. & PUB. AFF. 3, 5-11 (1993).



It's only fair to ask them to accept its constitutional essentials in return.

Let me turn now to a brief description of the naturalization laws in Europe in light of various dimensions of national constitutionalism. I start with the first dimension of accepting constitutional principles and then discuss other dimensions of constitutional essentialism. I argue that, from a liberal perspective, European policies have gone too far, and thus suggest a way to modify them in a more liberal direction.

### 1. "Recognize, Respect, Accept" and "Adhere, Identify With"

The first issue touches on the Kantian distinction between "recognize, respect, accept" and "adhere, identify with."<sup>245</sup> The former are legal commitments; the latter are moral obligations. Only the first should be involved in the processes of naturalization. Take the *Länder* tests: it is fair to inquire if would-be Germans respect Germany's constitutional principles, such as human dignity and social state, but the questions should be framed so as to ignore internal perceptions, and they should focus on the external respect for these principles. Thus, it is better to ask if one respects gender equality than if he "considers gender equality to be a progressive concept." Or, instead of asking whether polygamy is "acceptable," it is better to ask if one respects the fact that polygamy is unacceptable under the German Constitution. Similarly, a person's "opinion about homosexuals holding public office" in Germany is less essential to citizenship; what is more essential is the applicant's acceptance of same-sex marriages being legal in Germany. In the Netherlands, integration courses embarrass religious scholars by forcing them to see nude women and homosexuals. Yet the purpose of raising the issue should not be to inquire into the migrants' personal appreciation of nudism and homosexuality, but whether they are willing to respect them if openly displayed, and to recognize other people's desire to live accordingly.

Under national constitutionalism, an immigrant seeking citizenship must be familiar with the state's essential constitutional principles, and accept them. The immigrant is not required to morally agree with them, only to accept and respect them as the law of the land. This does not mean to respect solely values such as "all men are created equal." Rather, in the Dutch case, it means respecting the high degree of same-sex and gender equality, which is part of the Dutch constitutional tradition. To borrow an American term, immigrants should exhibit "attachments to the principles of the

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<sup>245</sup> See Pauline Kleingeld, *Kantian Patriotism*, 29(4) PHIL. & PUB. AFF. 313 (2000).

Constitution.”<sup>246</sup> These attachments, required of any person requesting American citizenship, are to the *U.S. Constitution*.<sup>247</sup> To be clear, national constitutionalism does not imply national culture, but it may include some cultural elements as far as essential constitutional principles become part of the nation’s culture. National constitutionalism focuses on the constitution. It is not identical with concepts of creed, mores or national identity.

Under legal concepts of recognize, respect and accept it should not be possible to ask about everything. There are some substantive limitations to these concepts as well. An example is the German question regarding an applicant’s reaction to the discovery that his son is homosexual. This question is tricky: a person may dislike the fact that his or her son is homosexual, or dislike homosexuality in general, but are these feelings pertinent to the issue at hand? Would it not be better to explore whether the applicant’s reactions be legal—namely, whether he would accept that people in Germany can live according to their sexual preferences? As currently put, the question may represent an invasion of privacy, which may be illegal because it violates Germany’s concept of human dignity and the right of free development of personality, enshrined in the *Grundgesetz*.<sup>248</sup> In addition, different levels of recognition can be required for separate constitutional principles. The highest level of acceptance may be demanded, for example, for essential constitutional principles that cannot be changed by amendment, such as Germany’s identity as a democratic and social state.<sup>249</sup>

## 2. Constitutional Essentialism

The second and third issues relate to the constitutional principles essential for obtaining citizenship. What does it mean to belong to the French *communauté*, German way of life, or to embrace Dutch values? What values are essential for becoming French, or German, or Dutch?

Consider Britain: the UK’s preparation book for the citizenship test, and the test itself, includes content that is broader than British national constitutionalism. The test includes questions on leisure culture, TV licenses, horse races, and dog owners. Other questions focus on peculiar issues. An example is the question “according to *Life in*

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246. The requirement of attachments to the Constitution has been interpreted to exclude internal beliefs. *See, e.g.*, *United States v. Rossler*, 144 F.2d 463, 465 (2d Cir. 1944) (“Attachment is not addressed to the heart, demands no affection for or even approval of a democratic system of government, but merely an acceptance of the fundamental political habits and attitudes which here prevail, and a willingness to obey the laws which may result from them.”).

247. *See* § 316(a) of the Immigration and Nationality Act (INA), 8 U.S.C.A. § 1182.

248. Wolfrum & Röben, *supra* note 206.

249. *See* art. 20 to the German Constitution.

*the UK*, where does Father Christmas come from?" The possible answers are Lapland, Iceland, and the North Pole. The answer to this question, which is more about mythology than history, is controversial. When I presented my paper at Harvard Law School, some people answered Lapland while others said the North Pole. Various societies have different tales. Because the question explicitly refers to the handbook, the correct answer is North Pole. The real question, however, is whether this information is essential for settling in the United Kingdom. The answer derives from the title of the test—it is a test about *Life in the UK*. Thus, while the common law tradition and commentators do not seem to be essential for daily life in the United Kingdom,<sup>250</sup> information about housing, childcare and leisure may be. This information is well-provided if one believes, as Trevor Phillips asserts, that British national identity is "about what people do . . . British is as British does."<sup>251</sup> Indeed, it is important information for newcomers, but citizenship tests are not information.com for life in the United Kingdom. Rather they should set down the threshold needed to become British; this threshold needs to check whether migrants know and accept British national constitutionalism, and not whether they can spit back trivia about the Grand National or the Notting Hill Carnival.

It is difficult to draw the line between constitutional essentials and life in the United Kingdom. Is Doris Miller, who was the first African-American in the U.S. Navy, part of American constitutionalism? What about Paul Revere or Lincoln's Gettysburg Address? While these questions can be disputed, it seems self-evident that neither the Yankees nor Elvis Presley are part of the American constitutionalism. At the very beginning, national constitutionalism excludes values, principles, figures or events that have a tenuous factual connection to the Constitution. Michael Jordan, Elvis Presley, and Cricket are examples. Mountains and rivers are other examples. Next, the question is whether such information has a normative significance, essential to citizenship in a specific state. Here, different states may reach different conclusions. Franklin has a constitutional significance in the United States, the same as Kant does in Germany, Grotius in the Netherlands, and Rousseau in France. If, then, a certain river has a constitutional significance, for factual or normative reasons, and this knowledge is essential for becoming a citizen of a specific state, it may be legitimate to require this knowledge. So, the question becomes what essential really means. Under national constitutionalism, what is essential is not a moral judgment nor a catch-

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250. Interestingly, the handbook does not include any reference to British history or British constitutional documents—the Magna Carta, the 1689 Bill of Rights and the Petition of Right—or common law commentators, such as Edward Coke and William Blackstone. These sections had been omitted in the legislative process.

251. Phillips, *supra* note 120, at 42.

all term to include the whole national package. Rather, it seeks to identify the *sine qua non* principles and values necessary for obtaining citizenship of a particular liberal democracy.

Under national constitutionalism, different states can ask different questions according to their essential contextual constitutionalism. The crucial factor is not whether monogamy, for instance, is a core liberal value, but whether this value is an essential constitutional principle in the respective state. Thus, state Z may demand a different answer than does state X. Protecting and improving the environment may be an essential constitutional principle in the Netherlands,<sup>252</sup> while it may not be in other states. In addition, states may require immigrants to respect the same constitutional principles in diverse modes. An immigrant in the Netherlands may be legitimately required to respect the legality of abortion under Dutch constitutionalism, whereas she may be legitimately required to respect its illegality under German constitutionalism.<sup>253</sup> The controlling factor is the specific constitution. Hence, it would be appropriate to ask about history so long as it is a constitutional history essential for obtaining citizenship, i.e., not the history of France but the history of the French Constitution. In the Netherlands, it would be legitimate to ask about constitutional monarchy, pillarization, and social tolerance, but less so about Rembrandt, Huygens, and Anne Frank. In Germany, it would be legitimate to ask about Bismarck's 1871 Constitution, the Weimar Republic, and World War II, but less so about Beethoven, Kant, Karl Benz, and how Germans celebrate Easter.<sup>254</sup> The challenge is to separate the less-legitimate national history from the more-legitimate items of constitutional history.<sup>255</sup> And because EU states' citizenships entail a European citizenship, it would be legitimate to ask would-be citizens to recognize and accept essential principles of European constitutionalism, to wit, EU constitutional principles and institutions.

## CONCLUSION

Immigrants have long ceased to be merely an immigration issue. They shape global politics, participate in the economy, and redefine national identity. While immigration creates new opportunities, it also raises concerns. Immigrants do not come alone. They travel with

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252. See art. 21 of the Dutch Constitution.

253. See *Entscheidungen des Bundesverfassungsgerichts*, BVerfGE 39, 1 (1975).

254. The former questions appeared in the Hessian test; the latter question appears in the federal test.

255. The American case is easier than the European because the history of the United States is the history of its Constitution. In Europe, however, it is harder to separate the Nation from the State (and its Constitution) since the history of European nations is deeply rooted in events, principles, and values which sometimes do not relate to the Constitution.

their language, lifestyle, dress code, and attitudes on sex and sexuality. Some people are uncomfortable with this situation. They feel strangers in their own land. They see diversity as a threat to their culture. From this position, it is often easy to leap to the conclusion that the government should either assimilate the immigrants—that is, compel them to become “like us”—or keep them out. Coping with this predicament is a challenge in and of itself: how can nations protect liberal values while, at the same time, refrain from violating the very values they wish to protect?

This Article seeks to help resolve these jurisprudential issues by providing a theoretical and comparative analysis and critique. It shows how EU Member States are struggling to define what it means to be a citizen in a liberal democracy and, more importantly, in a particular liberal democracy. It describes how Europe is raising a ‘cultural wall’ on its road to citizenship by means of culture-based courses, tests and contracts. The Article argues that this wall is illiberal if it disqualifies people from citizenship on the grounds of their political beliefs and moral convictions. It demonstrates how states that seek to protect liberty can eventually produce exactly the opposite result. And it suggests a way to modify immigration policies in Europe in a more liberal direction.

