3 ♦ State, State-System, and Citizenship in Germany

The development of national citizenship followed a longer and more tortuous path in Germany than in France. There was no German nation-state, and thus no political frame for national citizenship, until 1871. Moreover, there was no pivotal event in the history of citizenship, no moment of crystallization remotely like the French Revolution. Aspects of citizenship that, as a result of the Revolutionary crystallization, were closely integrated in France—egalitarian, democratic, nationalist, and statist aspects—developed independently of one another in Germany.

This is reflected in the German vocabulary of citizenship. In French and American English, *nationalité* and *citoyenneté,* "nationality" and "citizenship," are rough synonyms.[1] "Citizenship" has participatory connotations that "nationality" lacks and "nationality" has a richer cultural resonance than "citizenship," but the words are used interchangeably to designate the legal quality of state-membership. In German, formal state-membership, participatory citizenship, and ethnocultural nation-membership are designated by distinct terms: *Staatsangehörigkeit, Staatsbürgerschaft,* and *Nationalität* or *Volkszugehörigkeit* respectively. The semantic overlap in French and English reflects the political definition of nationhood and the fusion of the concepts of state, nation, and sovereign people in the French, English, and American political traditions, a fusion deriving from their founding revolutions.[2] The semantic differentiation in German reflects the independent and sometimes antagonistic course of state-building, nationalism, and democracy in Germany.

This is borne out by the institutional history of citizenship. One of the first formal codifications of state-membership in Germany—a law of 1842 that, like the Constitution of 1791 in France, served as the model for all subsequent citizenship legislation—codified the status of Prussian subject, not German citizen. This underscores the prenational, pre-

democratic quality of the citizenship *(Staatsangehörigkeit)* that developed in the individual German states in the second half of the eighteenth and first half of the nineteenth century. I use the word "citizenship" deliberately. The ideological antithesis of subject and citizen should not blind us to the underlying structural similarity between the codification of citizenship in Revolutionary France and the codification of "subjecthood" in Restoration Prussia. Citizenship, for my purposes, is a legal institution regulating membership in the state, not a set of participatory practices or a set of specifically civic attitudes. Its meaning, in this sense, is exactly captured by the German *Staatsangehörigkeit.* This chapter examines the early, prenational and predemocratic, development of this institution in Germany, focusing on the close connection between the development of citizenship and the development of the modern state and state-system.[3]

There is an apparent paradox in this state-centered approach to the development of German citizenship. The restrictiveness of German citizenship vis-à-vis immigrants, I have argued, reflects an ethnocultural understanding of nation-state membership, according to which *Staatsangehörigkeit* presupposes and expresses *Volkszugehörigkeit.* This argument, it would seem, posits the close integration of formal-legal state-membership and ethnocultural nation-membership. Historically, however, nation-membership and state-membership were much more closely integrated in France. German citizenship law developed without reference to German ethnocultural nationality in Prussia and other German states in the first half of the nineteenth century; French citizenship law was national from its inception, defining membership of the French nation as well as membership of the French state.

The paradox is only apparent. It is true that nation and state, nationality and citizenship have always been more closely integrated in France than in Germany. Yet precisely the early and stable fusion of nation and state shaped the French understanding of nationhood as an essentially political fact, unthinkable apart from the institutional and territorial framework of the state. French citizenship has been national, even nationalist, from its inception. Yet, as I shall argue in Chapter 5, the specifically political and statist quality of French nationalism has permitted, even required, a citizenship law that would transform immigrants into Frenchmen.

German citizenship was not originally national. Nation and state, German nationality and Prussian (or other subnational) citizenship were sharply distinct. Yet that very distinctness shaped the German under-

standing of nationhood as an essentially ethnocultural fact, prior to and independent of the state. In 1871 Germany became a national state and acquired a national citizenship. Yet on the ethnocultural understanding of nationhood, the Bismarckian state and its citizenship were only imperfectly national. Bismarckian Germany was called an "incomplete" *(unvollendeter)* nation-state.[4] From an ethnocultural point of view, its citizenship law too was "incomplete"—too statist, and insuffi ciently national. The ethnonational politics that emerged in the Wilhelmine period, as we shall see in Chapter 6, sought to nationalize and "ethnicize" the citizenship law of the Empire. The major revision of citizenship law enacted in 1913 gave an ethnonational infl ection to citizenship law, although an attenuated one by comparison with the vastly more radical "ethnicization" undertaken by the Nazis. The initial distinctness of nation and state—ethnic nationality and political citizenship—in Germany gave to the later nationalization of citizenship a specifi cally ethnocultural dimension that was muted, if not entirely absent, in France. With strong conceptual moorings independent of the territorial and institutional frame of the state, nationhood could furnish an independent, extrapolitical criterion against which German citizenship law could be measured; this was not the case in France.

Subsequent chapters examine the nationalization of citizenship in Wilhelmine Germany and the later vicissitudes of German citizenship law; they seek to explain why German citizenship law is based exclusively on *jus sanguinis* or descent. This chapter, by contrast, is concerned not with the content of citizenship law—the system of pure *jus sanguinis*—but with the development of citizenship as a legal institution regulating membership of the state. Its analytical focus is on the duality of citizenship, an institution at once inclusive and exclusive. In the last chapter we examined the ideological roots of this duality in French Revolutionary nationalism; here we discuss its institutional roots in the development of the Prussian state and German state-system. As a general, immediate, inclusive status, modern citizenship is the product of a long process of status *amalgamation;* as a formally defi ned, externally bounded status, it is the product of status *differentiation.* The former occurred within the developing territorial states; the latter occurred between different territorial states. The former was the product of rulers' drive toward unitary internal sovereignty, itself grounded in military competition among coordinate independent states; the latter arose from the dynamics of the early-nineteenth-century German state system, in which individual states sought to protect themselves against the increas-

ingly mobile poor. This chapter takes up in turn these two developments.

From *Ständestaat* to Territorial State: Overcoming Internal Boundaries

Citizenship and Sovereignty: An Ideal-Typical Sketch

As a general, inclusive, immediate status, citizenship is the product of the development of the modern state in the direction of unitary internal sovereignty.[5] This involved the monopolization of the powers of rule by a single central authority; the reconceptualization of the powers of rule, traditionally understood as a bundle of limited, discrete, particular rights, now conceived more abstractly as indivisible and unlimited; and the unifi cation of law and administration through the creation of a single, internally homogeneous, externally bounded legal and administrative space.[6] As a result, the intricate and multiform geometry of political and legal membership was starkly simplifi ed. Before the devel opment of unitary internal sovereignty, jurisdiction was based largely on personal status, not on territory. General law, valid for the entire territory, scarcely existed. (The very idea of general law, formulated in the early stages of rulers' drive toward sovereignty, was a revolutionary one.) Territorial rulers did claim specifi c regalian rights over their terri tories, but these were narrowly limited and impinged little on the lives of the inhabitants. Insofar as it shaped people's lives, "the law," for the most part, was neither state law nor territorial law but "special law," valid for a particular group of persons, not for a particular stretch of territory, and held as a matter of right by that group of persons, not on the discretionary sufferance of the state.[7]

Law was understood as a "strictly personal quality, a 'privilege' acquired by usurpation or grant, and thus a monopoly of its possessors who, by virtue of this fact, became 'comrades in law' *(Rechtsgenossen).*"[8] There was no general legal order, or at most a highly attenuated one. Instead there was a multitude of special legal orders, each valid only for members of particular status groups. The result, Max Weber notes, was "the coexistence of numerous 'law communities' *(Rechtsgemeinschaften),* the autonomous jurisdictions of which overlapped, the compulsory, political association being only one such autonomous jurisdiction in so far as it existed at all . . . The idea of generally applicable norms . . . remained in an undeveloped state; all law appeared as the privilege of

particular individuals or objects or of particular constellations of individuals or objects."[9] In this legal and political situation, the decisive instances of belonging were the special law communities. The territorial state, as it began to emerge, had only a secondary importance. What mattered, with respect to the legal (and thereby the social and economic) shaping of life chances, was that one belonged to a guild, or to a self-governing municipal corporation, or to the class of fi ef-holders.

This changed fundamentally with the development of unitary internal sovereignty. The state claimed to be the sole legitimate source of law. Ever more matters came under the direct and territorywide regulation of the state. Special law did not disappear, but special law communities lost their autonomy. Increasingly, special law lost its character as privilege, or private law, and took on the character of public law, emanating like general law from the state, special only in regulating a particular object domain. The general law of the land became increasingly important in the legal shaping of life chances. Corporate membership waned in legal signifi cance where it did not disappear entirely. Yet it was not replaced by membership in the state. No such status yet existed: the state was not yet formally structured as a membership association. The state was structured, rather, as a territorial fi eld of rule; all who came within that fi eld were subject to its jurisdiction. Territory replaced membership as the organizing principle of law. This cleared the way for the invention of a new sort of membership. The new membership would be general, rather than partial; it would comprehend in a single status all persons who belonged to the state and exclude only those who belonged to other states; it would be oriented to the state as the source of general law rather than to particular law communities and their special law; it would bring individuals into direct relationship with the state, as intervening organizations and corporations lost legal signifi cance.

The development of unitary internal sovereignty replaced the panoply of special law communities, valid only for their members, with a single general legal order, valid for the entire territory. Membership—personal belonging to an order, corporation, or association—was thereby suspended as an axial principle of social and legal organization; the state became a territorial organization, enforcing an order within a territory, indifferent to personal status. Yet the process through which territorial jurisdiction supplanted membership as a principle of law and social organization laid the foundation for a new, general, comprehensive form of membership.

The Unification of Administration: The Commissarial Bureaucracy

Central state authority developed in Brandenburg-Prussia around the standing army created in the mid-seventeenth century by Frederick William, the Great Elector. In this respect Prussia followed the common European pattern. Modern standing armies, paid, equipped, and effectively controlled by the state, emerged throughout Continental Europe in the seventeenth century, and were everywhere closely related to the development of the absolutist state.[10] Yet military and civil administration were uniquely intertwined in Prussia. The institutional link between the two was the commissarial bureaucracy that developed from an ad hoc instrument of military supervision into a permanent and general administrative apparatus.[11]

Like the French intendants, the Prussian commissaries were originally military envoys of the king, assigned to accompany and oversee royal armies on particular campaigns and to supervise their provisioning. To this end they were given broad police powers over the general population as well as over the army. With the development of the standing army, the commissaries became permanent bureaucrats, retaining broad police powers as a means of carrying out their military responsibilities. Since the standing army depended on regular tax collection, these new agencies assumed administrative responsibility for taxation; and since the extraction of tax revenue depended on general economic conditions, they assumed broad responsibility for the regulation of economic life as well. "Thus military administration became inseparably entangled with civilian and police administration; the whole internal police system that gradually developed from this bore a militaristic cast."[12] On this basis there developed an elaborate, hierarchical, centralized commissarial bureaucracy with general and far-reaching administrative responsibilities over the whole of social and economic life.

The commissaries stood outside the older system of administrative offices. Originally they were specifically extraordinary positions, justified by the urgent demands of extraordinary circumstances such as war or civil unrest. They also stood outside the law, in the sense that there was no generally acknowledged legal basis for their powers. Unlike regular officials, who were empowered by public, duly registered edict, commissaries had no "legal, publicly recognized foundation; they got the principles for their actions from secret instructions, disclosed neither to the province at large nor even to the old [official] agencies."[13] Their

extraordinary, extralegal character gave them the flexibility that suited them to the emerging pattern of absolutist rule. The older, inflexible, particularistic, status-differentiated *Rechtsstaat* was bypassed by the emerging absolutist *Polizeistaat.*[14] The older offices survived, but they were overlaid and progressively eclipsed by new agencies that developed out of the war commissaries: "These agencies had no roots in the old provincial constitution and law. Their attitude toward the old order of public life was unsympathetic, indeed decidedly hostile. They became the chief implements for destroying the old system of government by Estates and for building the new absolutist military state . . . The whole apparatus . . . ran counter to the Estates and territorial custom in myriad ways . . . The old authorities . . . saw this daily increasing and encroaching power as an illegal usurpation, although they recognized that behind it was the irresistible will of the sovereign as military chief."[15]

Although the commissarial bureaucracy was extralegal in one sense, having no basis in the traditional common law, it was at the same time the vehicle for the development of a new type of law, a monarchical administrative law that ultimately developed into modern public law. Initially, however, this new administrative law was not really "law" at all, in the sense of a publicly known and publicly validated set of rules; it was, rather, a set of secret monarchical decrees and administrative rules known only to the commissarial authorities themselves. This is why the absolutist state can be characterized as a *Polizeistaat,* breaking with the older status-differentiated *Rechtsstaat,* and only later, in the age of enlightened absolutism and modern constitutionalism, becoming a *Rechtsstaat* itself. In the absolutist interlude, "this new princely administrative law fundamentally restructured all of political and legal life."[16]

One aspect of this "fundamental restructuring"—the aspect that concerns us here—was the restructuring of political and legal membership. The commissarial bureaucracy, with its territorywide reach and broad administrative mandate, centrally directed through the emerging monarchical administrative law, gradually transformed the Hohenzolleren territories from a congeries of disparate jurisdictions into a unitary administrative field.[17] All inhabitants of the territory, independently of the special law communities to which they belonged, were gradually drawn into this administrative field as objects of central bureaucratic authority. To an initially small but gradually increasing extent, the legal framework for their lives was set by monarchical administrative law, through the commissarial bureaucracy.

State penetration of society through centralized bureaucracy and ad-

ministrative law contributed to the development of modern citizenship by bringing all inhabitants of the territory into direct and immediate relationship to the state. But not into an *equal* relationship to the state. The *Verstaatlichung*[18] of administration under the Great Elector and especially under King Frederick William I (1713–1740) occurred at the expense of the *ständisch* polity, but not at the expense of the *ständisch* social order. The legal foundations of that social order were undisturbed—"hereditary subjection of peasants . . . , sharp [legal] separation of town and country, social privileges of the the nobility, exclusive noble right to the possession of *Rittergüter,* tax exemption for the nobility in many provinces, preference for the nobility in the upper civil and military administration."[19] The absolutist state accepted, even confi rmed, these foundational legal inequalities. Legal equality—a second component of modern citizenship—began to develop only under Frederick the Great, in the second half of the eighteenth century.

Toward the Unifi cation of Law: The Allgemeines Landrecht

The fi rst major, though limited, step toward legal equality occurred with the *Allgemeines Landrecht* (ALR), the legal code that was prepared under Frederick the Great and enacted under his successor in 1794. The ALR is a richly contradictory document, at once individualist and corporatist, liberal and authoritarian, progressive and conservative, sweepingly general and minutely particular. In its philosophical underpinnings and general formulations, it looked beyond the corporate society and authoritarian polity that its detailed provisions nonetheless confi rmed.[20] Its chief architect, Karl Gottlieb Suarez, trained in natural law jurisprudence, championed personal freedom, civil equality, judicial independence, and limited state power. Yet Frederick the Great's commitment to the *ständisch* social order, and to the privileges of the nobility in particular, set limits to Suarez's work from the outset, while the political reservations of the more conservative government of Frederick William II occasioned substantial emendations of the original version.[21] The result was a document at war with its expressed intentions. The introduction proclaimed the equality of all before the law, without regard to their *Stand*,[22] yet the law codifi ed *ständisch* inequalities. The title promised general law; the text articulated a mass of special law.[23] The ALR described peasants as "free citizens of the state" yet confi rmed their hereditary subjection to rural lords.[24] It invoked membership of the state, but codifi ed membership of the *Stände.*

These contradictions notwithstanding, the ALR furthered the development of citizenship in three ways. First, it gave public legal form to the military-administrative state. Previously the state had been constructed, organized, and run largely through the medium of secret monarchical decrees; now it had something like a public constitution, a body of public law that was truly public. This "legalization" of the state laid the groundwork for the later legal defi nition of state-membership; it constituted the state as a legal entity of which one could be a member. It did not do so directly and explicitly. Despite its quasi-constitutional character, the ALR was not a constitution, and it did not formally "constitute" the state as a constitution would. But by repeatedly invoking "the state" in various substantive contexts and detaching it from the person of the monarch, the ALR in effect constituted it as an impersonal, legal, distinctively public entity. In so doing it gave legal expression to the political philosophy of enlightened absolutism, as epitomized in Frederick the Great's famous self-characterization as "the fi rst servant of the state."[25]

Second, to the legalization of the state corresponded a *Verstaatlichung*—an increasing state-centeredness—of law and membership. The ALR did not transform Prussian territories into a unitary state, governed by a single generally valid law. But it did establish a general, statewide legal frame within which legal unity could be realized gradually. For political reasons, Frederick the Great was unwilling to abolish *ständisch* privileges or regional particularisms, so long as they did not affect the security or strength of the state. Unlike his father, Frederick William I, Frederick the Great was not engaged in a perpetual battle with the nobility. He had successfully "Prussianized" the nobility, transforming them into a statewide service nobility, which monopolized the offi cer corps of the army and the high positions in the administration. The achievement was remarkable: the various provincial nobilities, fi erce opponents of the centralizing military-bureaucratic state under the Great Elector and Frederick William I, were not only reconciled to that state under Frederick the Great, but, through the medium of the offi cer corps, were welded into a single, supraprovincial, statewide nobility, and as such became the social carriers of a statewide Prussian patriotism and nationalism.[26] Yet the achievement had a price. Having coopted the nobility, Frederick the Great was unwilling to challenge their social or legal privileges, or to impose legal unifi cation on the provinces. In the domain of private law, therefore, the ALR was intended systematically to unify existing law, insofar as a common denominator could be found,

not to create new law. In most private law matters, where the ALR diverged from prior law or established rights, the latter took precedence. Yet despite these limitations on the validity—and thus on the generality—of the "general law of the land," the ALR furthered the development of citizenship even in its capacity as a private law codifi cation. For the continued—and in the domain of private law superordinate—validity of provincial law, special statutes, and other established rights now depended on express state confi rmation.[27] Even if the state did not claim an exclusive or overriding validity for state-made, statewide law, it did claim the exclusive right to *validate* law. The autonomy of substate "law communities" was thereby denied, and the state's legislative sovereignty affi rmed, even if not fully exploited.[28] The legal prerequisites of "unitary internal sovereignty" were established, even if the territory was not yet transformed into a single, internally homogeneous legal space.

Third, the ALR codifi ed *Stand*-membership and assigned particular rights and duties to the members thus defi ned. This seems the direct antithesis of modern citizenship. Yet if we think historically and comparatively of citizenship as a "conceptual variable,"[29] we can see how the codifi cation of *Stand*-membership in the ALR furthered the development of modern citizenship. In the middle ages the *Stände,* corporations, guilds—what Weber called special law communities—were autonomous. They possessed privileges, exercised internal jurisdiction over their members, and defi ned their own membership as a matter of autonomous, quasi-private right. These rights were not integrated into or derived from any overarching public legal order; no such public legal order existed. This very lack of integration gave the medieval "legal order" its specifi c complexity: it was not a single legal order at all. Administrative absolutism had undermined the autonomy of the *Stände*; the ALR abolished it. It transformed the *Stände* into state-defi ned and state-regulated corporations, differentiated by their function in the total political economy of the state and assigned specifi c rights and duties corresponding to that function. The *Stände* thereby became *"staatliche Berufstände,"* state-chartered vocational orders.[30] The ALR formulated explicit rules defi ning membership in the *Stände,* using a combination of ascriptive and functional criteria.[31] As a result, the *Stände* were no longer purely hereditary; they depended on occupation and state recognition as well as birth. Moreover, the *Stände,* previously provincial bodies, were now defi ned as statewide corporations—a step toward a more generalized, wider membership.

A further move in this direction was the defi nition of the *Bürgerstand.*

As a *ständisch* category, *Bürger* previously meant *Stadtbürger,* the holder of municipal citizenship rights in a town. Every town had its *Stadtbürgertum,* or citizenry, which did not coincide with the urban population as a whole, but represented a legally privileged subgroup. The ALR retained this traditional definition for some purposes. But it was overlaid by a new and more general *Bürger*-concept. This new *Bürgerstand* was defined on a statewide basis, rather then within the limits of a particular town; and it was residually rather than positively defined. It was no longer constituted by persons possessing specific urban privileges, but rather by all persons not belonging to the noble or peasant *Stände.*[32] Numerically this was a small fraction of the state's population. But conceptually it was a move toward general citizenship.[33] Should legal privileges of the nobility or the legal disabilities of peasants be lifted—as they were, to a large extent, during the reform period of the early nineteenth century—then nobility and peasantry would collapse into this more general legal category of *Bürger,* which would become a general citizenship status.

The transformation of the *Stände*—from autonomous urban and provincial bodies into statewide, state-constituted, state-regulated corporations—prepared the way for a more general state-membership. Membership was now defined *by* the state and *for* the state as a whole (rather than for particular provinces and towns). Membership *of* the state remained undefined in the ALR. *Stand*-membership was codified; state-membership was not. Yet if general state-membership was not codified, it was nonetheless repeatedly invoked in the ALR, along with other comprehensive *Stand*-transcending concepts.[34] For the ALR contained general *Landrecht* as well as particular *Standrecht.* While the latter was addressed to persons in their particular capacities as members of a *Stand,* the former was addressed to persons in their general and common capacity as inhabitants *(Einwhohner),* subjects *(Untertanen),* or members of the state *(Mitglieder des Staates).* The ALR neither defined these nor consistently distinguished between them. But their assimilative, inclusive, generalizing function is clear. Through such constructions, the state could deliberately abstract from *ständisch* qualifications and disqualifications. This abstraction is a crucial element of the developmental history of citizenship. The legal historian Rolf Grawert has aptly characterized modern citizenship as an *"Abstraktionsleistung,"* a work of abstraction.[35] By abstracting from *ständisch* privileges and liabilities in this manner, the ALR staked out an egalitarian legal space, an extra-*ständisch* zone of legal equality and generally valid law, a region of

general citizenship. This region was not yet substantively signifi cant, but it was capable of substantive enrichment.[36]

Toward Legal Equality: The Prussian Reform Legislation

Our understanding of citizenship is based largely on the theory and practice of the French Revolution. As a result, we tend to think of citizenship as developing against the *Stände* and against the absolutist monarchy. In Prussia, however, the foundations of citizenship were established *by* the absolute monarch and *through* the *Stände.* Citizenship emerged gradually, through the *Verstaatlichung* and generalization of the *Stände,* not through their outright destruction, as in France. It was imposed piecemeal from above, rather than conquered integrally from below.[37] The Prussian state destroyed the autonomy of the *Stände,* transforming them into state-constituted, state-defi ned, state-regulated corporations. And it defi ned the *Stände* in an increasingly general fashion, both by stretching their territorial frame to fi t that of the state as a whole, and by defi ning one *Stand*—the *Bürgerstand*—in residual rather than positive terms, marking it as a relatively general and inclusive status in contradistinction to the special statuses of noble and peasant.

From this point, the development of citizenship involved two further steps. The fi rst was the emergence of a region of legal equality. In France this occurred once and for all in the Revolution; in Prussia it was effected piecemeal. The early-nineteenth-century reform legislation did not abolish the *Stände* and their privileges outright. The most glaring survival was that of the *Stand*-specifi c courts. Nobles and the high state bourgeoisie came under the jurisdiction of special state courts, while many peasants continued to be subject to the patrimonial justice of rural lords.[38] But in the economic domain, most *Stand*-specifi c privileges and obligations were abolished. Peasants were freed from hereditary subjection, service obligations, and the exit fees formerly levied on those who moved out of the local judicial district. Nobles were free to enter formerly "bourgeois" occupations—and to incorporate previously protected peasant holdings into their own. Bourgeois were free to buy formerly noble estates. Guild monopolies were dissolved, and complete freedom of occupation introduced. These reforms amounted to an abolition of the *Stände* as economically signifi cant categories.[39]

In the economic domain, then, persons met as free and equal individuals. But not as citizens. To be sure, citizenship presupposes legal equality, and legal equality was realized in the economic domain. Internal

boundaries between persons (*Stand*-specifi c rights and obligations) and between regions (tolls and taxes on the movement of goods and persons) were abolished. The result was a unitary, homogeneous space, within which all persons were formally free and equal economic actors. But this state of affairs has an ambiguous relationship to citizenship. For citizenship is an externally bounded as well as an internally egalitarian status. This external boundedness did not yet exist. A region of legal equality had been created. But this region was territorially bounded, not personally circumscribed. The equality of citizenship, however, is a personal, not a territorial equality; it obtains among citizens of a state, not among inhabitants of a territory. In this sense, the equality of citizenship is a *ständisch* equality; citizenship is a *Stand,* a status. It is a general, inclusive status, embracing virtually the entire population of the state. This distinguishes modern citizenship sharply from ancient and medieval municipal citizenship and from the welter of special, partial statuses that together comprised the population of the early modern state. But citizenship is nonetheless a personal status. This is what links citizenship and membership. A purely liberal economy—or a purely territorial state—is indifferent to membership, to status. It is indifferent to the old *ständisch* distinctions, but equally indifferent to citizenship. To abolish *ständisch* inequalities, then, was not *ipso facto* to create citizenship. It was to suspend membership as an organizing principle of social life, while the development of citizenship involved the reconstruction of membership as an organizing principle. This was the second step I alluded to. The reconstructed membership was a statewide, inclusive, general, immediate membership of the state. It replaced the regional (or local), exclusive, particular memberships of the *Stände* that had yielded state-membership only in a mediated fashion. But modern citizenship shared with the old *Stände* the quality of being a membership status, and thereby an instrument of social closure. This is too often forgotten or ignored in discussions that focus on the internal political development of citizenship at the expense of the *Stände.* Such discussions emphasize the inclusive, egalitarian aspect of citizenship, but neglect its external boundedness. Yet, as we saw in Chapter 1, the external boundedness of citizenship is essential to the modern state.

As a territorial organization, the modern state is largely indifferent to citizenship (and to personal status in general). Committed to establishing its authority throughout a territory, the state tolerates neither territorial enclaves where its writ does not run nor personal immunities from its jurisdiction. Its jurisdiction is territorially, not personally circum-

scribed. Yet the modern state is also a membership organization, with citizenship as its axial principle. The state has special claims on its citizens (claims to loyalty, for example, or to military service), and they have special claims on the state (rights of entry and residence, for example, or rights to political participation, or claims to diplomatic protection abroad). These claims have a personal, not a territorial basis.[40] They are rooted in membership, not in residence. They are not generated by passing or extended residence, nor do they lapse with temporary or prolonged absence. These claims presuppose the boundedness of citizenship, the distinction between citizens and foreigners.

How did this distinction emerge? Or rather, since the distinction is an ancient one, how was it rationalized and codifi ed? How did citizenship come to be defi ned as a status that was not only general and internally inclusive but bounded and externally exclusive? The ALR, I have noted, used the language of membership, addressing the "members of the state" *(Mitglieder des Staates).* But it did not distinguish residence from membership, *Einwohner* from *Mitglieder.* Resident foreigners were expressly included among the *Mitglieder.* The ALR is an inward-looking document, wholly concerned with the internal social and legal order of the Prussian state. It was concerned to redefi ne this order by making the state its central and pervasive point of reference, by effecting a *Verstaatlichung* of the legal order. The language of state-membership must be understood in this context. In the expression "members of the state," the emphasis was on the state, not on membership. Membership of the state was not set against nonmembership; it was set against membership of the *Stände.* The rhetoric of state-membership was an instrument of *Verstaatlichung;* it did not announce the development of a bounded state-membership. It was connected to the development of the state as a territorial organization, with a unitary *Staatsgebiet* or territory, not to the development of the state as a membership organization.

Nor did the liberalizing economic legislation of the Reform period create an externally bounded citizenry; it was essentially indifferent to personal status and thus to membership. This indifference, however, led indirectly to the codifi cation of citizenship in 1842. The new economic openness ultimately required political closure; the destruction of the internally closed *Stände* required the construction of an externally closed citizenry. The connecting link was migration, more precisely the migration of the poor. Prussian state-membership was codifi ed as a means of shielding the state against foreign poor, while preserving freedom of movement within the state.

Migration and Membership: Defi ning External Boundaries

Closure against the migrant poor had been an essential part of municipal politics throughout the early modern era.[41] The late fi fteenth and six- teenth centuries had marked a fundamental transformation in the theory and practice of poor relief. Responsibility for and control of poor relief were secularized, politicized, and rationalized. Everywhere, towns asserted secular jurisdiction over the poor. Begging, central to the medieval pattern of poor relief, was strictly regulated and limited to the local poor, who were registered and issued special permits. "Foreign" beggars—those that did not "belong" to the city—were barred. With municipal control went municipal responsibility. Imperial legislation of 1530 required "every town and [village] commune to nourish and lodge its poor."[42] But who were "its" poor? About towns' responsibility for those who legally "belonged" to them—either as full municipal citizens or as less privileged *"Beisassen"*—there was no doubt.[43] But urban populations always included various categories of nonmembers as well. And now that they were obliged to support their own poor, towns had an incentive to defi ne membership more restrictively. Previously, de facto domicile had suffi ced to establish membership (though not full munici- pal citizenship). Now towns increasingly made membership contingent on formally approved domicile. In this way local authorities could prevent the poor—or persons who might become poor—from establishing municipal membership and thereby a claim to municipal support. Municipal closure against the poor, then, had a double edge: "foreign" poor were excluded from the town, and the potentially poor were excluded from municipal membership.[44]

In the wider perspective of the territorial state, responsible for maintaining order throughout a territory, municipal closure against the migrant poor was problematic. The state could not permit towns to externalize poverty, to export their unwanted at will. This would endanger the peace and order of the wider state. Destitute persons expelled from one town would have to be accommodated elsewhere. To limit "homelessness"—the legal condition of those who lacked a legal home or *"heimat"* in which they had secure residence rights—states began to interfere in the politics of communal membership in the seventeenth and eighteenth centuries.[45] Communal membership was no longer determined autonomously by the towns but, at least to some extent, heteronomously by the state. The aim of the state was to coordinate membership policies so as to ensure the "full coverage" of the population;

ideally, everyone would be a member of some town or village commune. Towns would thus have to accept some poor as members—not necessarily as full citizens, but at least as members with rights of residence and support.

The autonomous regulation of municipal membership was only one of the many aspects of municipal autonomy that were challenged and curtailed by the developing territorial state. Yet the conflict over the control of membership was particularly revealing. It brought into sharp and poignant focus the tension and ultimate incompatibility between the rich bonds and narrow horizons of municipal citizenship and the weaker, more abstract bonds and wider horizons of the emerging state citizenship.[46] The conflict was protracted; it was still being played out in the nineteenth century. In fact it reached a peak of intensity in the early nineteenth century. Before that time states had moved cautiously, asserting in principle their ultimate right to regulate membership, but respecting in practice, to a considerable extent, the traditional autonomy of the communes, abridging this autonomy only at the margins.[47] In the early nineteenth century, however, the liberation of the peasants and the opening of all occupations to all comers, coupled with a growing state interest in the free movement of persons, supported by the newly influential economic liberalism, brought the conflict to a head.[48] It was particularly sharp in Prussia, where the state was most strongly committed to freedom of movement. From the point of view of the Prussian state, the communes were essentially "subdivisions of the territory and citizenry of the state, organized so as to facilitate the execution of the laws." On this understanding, it was unacceptable that the "communes close or make inaccessible to the state a part of the state's territory or a portion of its citizenry."[49] Yet from the municipal point of view, if the state were to deprive communes of the right to control entry and membership, "one would have to renounce the attempt to maintain any community of meaning [*Gemeinsinn*] in the communes [*Gemeinde*] . . . To maintain their personality, communes must have the decisive say in the choice of their members. To force them to accept everyone would destroy their common spirit [*Gemeingeist*]."[50] Although the legislation that was eventually enacted in 1842 did not require the communes to accept everyone, it sharply curbed municipal autonomy and established freedom of movement for all but the actually destitute. Towns could deny entry only to persons currently in need of public support, not to persons whom the town feared might need such support in the future. By divorcing the right to residence and welfare from communal citizenship, and sharply

limiting communal rights of exclusion and expulsion, the state reduced communal citizenship to insignifi cance.[51] Other states, more responsive to towns' fears of an infl ux of the migrant poor and less committed to freedom of movement, did not go so far. But they did enact *Heimatgesetze* fi xing the criteria of communal citizenship, and assuring that everyone had a communal home or *Heimat* in which they would have secure residence rights and the right to support in case of need. States allowed communes to restrict the settlement of persons not possessing the local citizenship or *Heimatrecht,* and to expel such persons for broadly defi ned reasons.[52] Yet if municipal closure against the migrant poor thereby remained vigorously in force outside Prussia, it was now heteronomously regulated by the states, not autonomously by the communes themselves.

So long as one focuses on movement of the poor—or potentially poor—across *communal* boundaries, then state citizenship appears essentially inclusive, municipal citizenship essentially exclusive. But the matter appears otherwise when one considers movement across *state* boundaries. The state response to the interstate mobility of the poor, like the communal response to their intercommunal mobility, involved closure against nonmembers and the restriction of access to membership.

Territorial states' closure against the migrant poor was much more rudimentary than municipal closure in the early modern period. Like municipal ordinances, territorial police ordinances and laws barred foreign beggars from the territory.[53] But the concept of the foreigner was much more nebulous on the level of the territorial state than on the level of the city. Municipal membership was codifi ed and formalized; state-membership was not. Towns knew exactly who their members were; states did not. More fundamentally, the town was a membership association; the state was not. It was a territorial organization exercising authority over persons in a number of different domains, and distinguishing, for a number of specifi c purposes—emigration, poor support, eligibility for offi ces, military service, taxation, inheritance—between insiders and outsiders, between bearers and non-bearers of specifi c rights and obligations. There were a number of context-specifi c insider statuses; but there was no general status of state-membership.[54] About the status of persons born, raised, and settled in the territory, there was seldom any doubt. But the status of the vagabond, the itinerant, the immigrant, was uncertain.[55] This lack of precision on the state level should come as no surprise. In relation to the scope of its jurisdiction, municipal administration was much more dense, much more intensive, than territorial state administration. As a result, towns could control

residence and membership much more effi ciently than states. Membership was routinized—that is, integrated into administrative routines—in the towns, but not in the states. The rationalized, formalized, bureaucratized administration of membership on the scale of the territorial state required administrative resources—infrastructural power, in Mann's phrase—that the state did not yet have.[56]

It also required incentives that the state did not yet have. Towns had to be able to ascertain membership status precisely. For membership status was crucial in a number of routines of municipal life. The right of permanent residence, the right to pursue a "*bürgerlich*" trade, the right (and obligation) to hold offi ce and to participate in municipal politics, the right to own certain types of real property, the right to municipal support in case of need—all of these were membership rights. "The commune was a Bürgergemeinde of citizens, not an Einwohnergemeinde of inhabitants. Simply living in the town space did not confer membership rights."[57]

If membership was crucial in the municipal context, it was marginal to the business of rule in the territorial state. Legal status of course mattered to the state, but what mattered was status within the state, not membership of the state: *Stand*-membership, not state-membership. And as absolutist legislation took an increasingly general form, deliberately bypassing *ständisch* distinctions, then the state became an *Einwohnergemeinde* of inhabitants, not—yet—a *Bürgergemeinde* of citizens.[58] The territorial state was just what its name implied: a territorial, not a membership organization. State-membership was not, as it was later to become, a prerequisite for public rights and duties.[59] The state did not discriminate systematically between foreigners and subjects; it tended rather to assimilate resident foreigners to subjects, treating the foreigner as a *subditus temporarius,* a temporary subject.[60] As such, the foreigner was treated the same way as other subjects, except that he had somewhat more freedom than permanent subjects—most important, the freedom to emigrate, to leave the territory of the state without obtaining special permission or paying a special tax.[61] In the era of mercantilism, state-membership was less a barrier to entry than to exit. If the foreigner were a skilled worker, he might benefi t from other privileges granted by the mercantilist state as a means of promoting immigration.[62] To be a foreigner, in short, was not to be systematically outside the political or legal community of the territorial state. Insofar as the status of foreigner had legal consequences, these were privileges as often as liabilities.

A new situation developed in the early nineteenth century with the

breakup of the *ständisch* social order. The liberation of the peasants and the opening of all occupations to all comers coincided with massive rural overpopulation. This was a joint result of rapid population growth since the late eighteenth century and the slow tempo of industrialization, which did not begin to absorb this surplus population until the middle of the nineteenth century.[63] The combination of rural overpopulation, the sudden lifting of restrictions on freedom of movement and occupation, the concomitant dissolution of estate-based poor relief, and the lifting of restrictions on the incorporation of peasant land into noble (or formerly noble) estates engendered a massive, uprooted class of migrant poor. It made pauperism the "most burning social problem of the time."[64]

Pauperism, to be sure, was nothing new. Early-nineteenth-century pauperism was not, as some contemporary observers believed, a consequence of industrialization; it was rather the "last instance of the old, pre-industrial poverty."[65] But the political context of migrant poverty differed from that of the early modern period. Responsibility for the poor had shifted, in principle, from the commune to the state. This was expressed in the ALR, which formally guaranteed every poor "Bürger" the right to state support. The actual practice of poor relief was not carried out by the state, except in the last instance, for those few poor for whom no other body was responsible. The state had neither the fi nancial nor the institutional resources to take over day-to-day responsibility for poor relief. It continued to hold families, guilds, corporations, rural lords, and municipalities responsible for supporting "their" poor. But this responsibility was now formally fi xed and assigned by the state, which assumed overall responsibility for organizing the system of poor relief.[66]

This shift in overall responsibility for the poor from commune to state, in conjunction with the breakup of the *ständisch* social order and its restrictions on freedom of movement, confronted the state with problems of membership like those formerly confronted by the towns. "Like the town before it, the state now had to defi ne who 'its' poor were." The communalization of poor relief in the fi fteenth and sixteenth centuries had given rise to intercommunal disputes over responsibility for the support of the migrant poor. Such disputes persisted throughout the early modern period; indeed they persist to this day. But with the *Verstaatlichung* of poor relief, interjurisdictional disputes over responsibility for the poor assumed a new form: interstate disputes emerged alongside the older intercommunal disputes. No more than the town

could the state exclude or expel the poor or otherwise unwanted at will. Constraints on the town were imposed by the state, constraints on the state by other states. The problem was the same in both instances: what was expedient for a single jurisdiction—the exclusion or expulsion of the unwanted poor—imposed unacceptable costs on neighboring or encompassing jurisdictions.[67] It was the attempt to limit these costs that led states, initially on a bilateral, later on a multilateral basis, formally to assign persons to states and thereby to create an embryonic institution of citizenship.

Numerous bilateral treaties designed to foster freedom of movement between German states had been concluded in the early nineteenth century. With the establishment of the German Confederation in 1815, these provisions were extended to cover all member states. Yet the free-movement clauses were far from absolute. They abolished controls on exit but not on entry. A person could leave any state without obtaining special permission or paying the traditional exit fees, but could settle in another state only with its permission.[68] States retained the right to exclude and expel unwanted immigrants. Doubtless there would be many more such immigrants than there had been in the past. In conjunction with the liberation of the peasants, the growth of an uprooted rural proletariat, and the establishment of freedom of occupation, the provisions facilitating freedom of movement were bound to occasion a dramatic increase in interstate migration. How were the expulsions of the unwanted to be handled?

Traditionally, expulsions had been a unilateral affair. As late as 1827, a document of the Prussian Interior Minister candidly admitted that "the expellee is often brought secretly over the border without notifying foreign offi cials," with generally unsatisfactory results, in that the expellee "either returns to Prussia or joins with other expelled criminals in bands of thieves or robbers."[69] If such unilateral expulsions were unsatisfactory to the expelling state, they were much more so to the receiving state. With the problem threatening to get much worse as a result of increasing mobility, states sought to coordinate and rationalize their expulsion practices. Numerous early-nineteenth-century treaties articulated two basic principles: that a state could expel into the territory of another state only a member *(Angehöriger)* of the second state; and that a state was bound to admit into its territory its own members when they were expelled from other states. And since state-membership was not yet codifi ed, the treaties even spelled out who were to count as the state-members *(Staatsangehörige)* whom the individual states were

obliged to admit.[70] Thus citizenship, as a formally defi ned, externally bounded membership status, was not the product of the internal development of the modern state. Rather, it emerged from the dynamics of interstate relations within a geographically compact, culturally consolidated, economically unifi ed, and politically (loosely) integrated state system.

The term and concept of *Staatsangehörigkeit* appeared for the fi rst time in bilateral treaties enacted to regulate and coordinate expulsion practices. Initially this was a functionally specifi c concept, limited to the domain of entry, residence, and poor relief. As such it took its place amidst the welter of concepts that made up the membership vocabulary of the late eighteenth and early nineteenth century: native, resident, state-citizen *(Staatsbürger),* subject, member of the state. But because of the fundamental importance of the right of entry into and secure residence in the territory of a state—a presupposition for the effective exercise of other rights—this originally functionally specifi c status gradually became a general membership status, to which legal consequences in various domains (military obligations and political rights, for example) were attached.[71]

There is one further respect in which migrant poverty occasioned the rationalization and codifi cation of state-membership. In the early modern period membership and residence were not sharply distinguished. But to the extent that they were distinguished, residence, more precisely domicile, was the more fundamental category, while membership, that is, subjecthood, was understood to follow from it. *Domicilium facit subditum*—domicile makes the subject—was a universally accepted maxim.[72] Membership had a territorial base. In the face of migrant poverty, just this was problematic. It left the state open to the accession of new members by osmosis, as it were, through entry and settlement in its territory, even without its knowledge or approval. Moreover, it was uncertain just when one became or ceased to be a subject; and this unclarity was increasingly problematic.[73] Effective closure against the migrant poor required a sharper separation of membership and residence, and a reversal in their causal relationship.[74] Domicile should be contingent on membership, not membership on domicile. Membership, defi ned independently of residence, should be the fundamental category.

Such a transformation was effected in the 1842 "Law on the acquisition and loss of the quality of Prussian subject." This was one of a trio of laws enacted on the same day; the others governed freedom of

movement within the Prussian state and the conditions under which communes were obliged to admit intrastate migrants. There was a close connection between these laws on internal migration and the codification of state-membership. The law on internal freedom of movement was explicitly addressed to Prussian subjects alone, on the grounds that this would permit the state to "exclude unwanted—that is, poor—foreigners and in so doing to keep under control the stream of foreign migrants that had been stimulated by the new freedom of occupation."[75] To this end it was necessary to defi ne precisely who was a foreigner and who a subject. The increased interstate mobility of the poor had given the state the incentive it formerly lacked to defi ne membership systematically and precisely as a legal quality independent of residence. The quality of Prussian subject, according to the new, explicit defi nition, is founded on descent, legitimation, marriage, or bestowal (naturalization), not—and this is explicitly highlighted in the text—on domicile, which "shall not in the future by itself establish the quality of Prussian [subject]."[76] The inclusion of this purely negative provision, together with its wording ("in the future"), is signifi cant. The state now appeared (and was legally defi ned) as a membership association; it was no longer merely a territorial organization. Membership was no longer simply a refl ex of residence. Defi ned independently of residence, state-membership could now serve as an instrument of closure against the migrant poor.[77]

As a legal institution regulating membership of the state, citizenship was now established. Citizenship had crystallized as a formally defi ned and assigned status, distinct from residence. The citizenry was externally exclusive as well as internally inclusive. Citizens, regardless of *Stand,* town, or province, stood in an immediate relationship with the state. Citizenship could henceforth serve as the legal point of attachment for certain common rights and obligations in the domain of immigration law, military service, or (later) political rights. It could serve as an instrument and object of closure.

As we have seen, the development of citizenship is inextricably bound up with that of the modern state and state system. Two phases of this dual development have been outlined. In the fi rst, the construction of unitary internal sovereignty at the expense of *ständisch* and regional inequalities, itself grounded in military competition among coordinate territorial states,[78] laid the foundation for modern citizenship as a general, internally inclusive, immediate status. In the second, state closure

against the migrant poor in the context of an increasingly integrated state system laid the foundation for citizenship as a formally defi ned, externally exclusive status distinct from domicile.

The emergence of the institution of citizenship cannot be understood apart from the formation of the modern state and state system. But the converse is equally true: the formation of the modern state and state system cannot be understood apart from the emergence and institutionalization of citizenship. Conceiving the modern state as a territorial organization and the state system as a system of territorial states, political sociology has for the most part neglected citizenship and membership. It has made too little of the fact that the state is a membership association as well as a territorial organization; that the state constitutes itself, and delimits the fi eld of its personal jurisdiction, by constituting its citizenry; and that political territory, as we know it today—bounded territory, within a system of territorial states, to which access is controlled by the state—*presupposes* membership, presupposes some way of assigning persons to states, and distinguishing those who enjoy free access to a particular state territory from those who do not. The emergence of the institution of citizenship therefore marks a crucial moment in the development of the infrastructure of the modern state and state system.

The dual developmental history traced in this chapter refl ects the intrinsic duality of modern citizenship, a status at once universal and particularistic, internally inclusive and externally exclusive. The literature on citizenship has emphasized its universality and inclusiveness. But citizenship is inherently bounded. Exclusion is essential both to the ideology of national citizenship (as we have seen in the discussion of French Revolutionary nationalism) and to the legal institution (as we have seen in the discussion of migration and membership in Germany).

Yet if all states control access to citizenship, the manner in which they do so varies widely. French citizenship is attributed, and has been attributed since 1889, to most persons born on French territory. As a result, a substantial fraction of postwar French immigrants has French citizenship. German citizenship has always been attributed only to descendants of German citizens. As a result, a negligible fraction of postwar German immigrants—except for ethnic Germans from Eastern Europe and the former German Democratic Republic—has German citizenship. The following chapters seek to explain this sharp and consequential difference in the legal defi nition of citizenship.