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Demos, Telos and the German Maastricht Decision

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EUI Working Paper RSC No. 95/19

European University Institute, Florence



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BADIA FIESOLANA, SAN DOMENICO (FI)

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Printed in Italy in November 1995
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy**

The State "über alles"
Demos, Telos and the German Maastricht Decision

by

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I. Introduction

It is already difficult to recall the drama attendant on the protracted, unexpected, tortured but thus welcome national debates and processes of ratification of the Maastricht Treaty. The practical outcome -- approval by all twelve Member States -- has become an uneventful, "retrospectively predictable", historical datum. Abiding interest in the ratification saga rests instead in the lessons that can be gleaned about political processes, social sensibilities and institutional and public attitudes in the various Member States.

Germany is particularly interesting from this perspective for there the ultimate word in the national debate belonged to the Federal Constitutional Court possessing a deliberative, measured and articulate voice distinct from, say, the rowdiness of the British House of Commons, or the passions of the French and Danish hustings. The "Maastricht decision" of that Court² has been, naturally, the subject of extensive commentary.³ The decision is so well known as to obviate description. Despite the

² BVerfGE 89, 155.

³ Bleckmann, Albert/Pieper, Stefan Ulrich, Maastricht, die grundgesetzliche Ordnung und die "Superrevisionsinstanz". Die Maastricht-Entscheidung des Bundesverfassungsgerichts, RIW 1993, 969; Frowein, Jochen A., Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit, ZaöRV 54 (1994), 1; Götz, Volkmar, Das Maastricht-Urteil des Bundesverfassungsgerichts, JZ 1993, 1081; Häde, Ulrich, Das Bundesverfassungsgericht und der Vertrag von Maastricht - Anmerkung zum Urteil des Zweiten Senats vom 12.10.1993, BB 1993, 2457; Herdegen, Matthias, Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union", CMLR 31 (1994), 235; Ipsen, Hans-Peter, Zehn Glossen zum Maastricht-Urteil, EuR 1994, 1; König, Doris, Das Urteil des Bundesverfassungsgerichts zum Vertrag von Maastricht - ein Stolperstein auf dem Weg in die europäische Integration?, ZaöRV 54 (1994), 17; Lenz, Carl Otto, Der Vertrag von Maastricht nach dem Urteil des Bundesverfassungsgerichts, NJW 1993, 3038; Meessen, Karl M., Maastricht nach Karlsruhe, NJW 1994, 549; Schröder, Meinhard, Das Bundesverfassungsgericht als Hüter des Staates im Prozeß der europäischen Integration - Bemerkungen zum Maastricht-Urteil, DVBl. 1994, 316; Schwarze, Jürgen, Europapolitik unter deutschem Verfassungsvorbehalt. Anmerkungen zum Maastricht-Urteil des BVerfG vom 12.10.1993, NJ 1994, 1; Steindorff, Ernst, Das Maastricht-Urteil zwischen Grundgesetz und europäischer Integration, EWS 1993, 341; Streinz, Rudolf, Das Maastricht-Urteil des Bundesverfassungsgerichts, EuZW 1994, 329; Tomuschat, Christian, Die Europäische Union unter Aufsicht des Bundesverfassungsgerichts, EuGRZ 1993, 489; Weber, Albrecht, Die Wirtschafts- und Währungsunion nach dem Urteil des Bundesverfassungsgerichts, JZ 1994, 53; Wieland, Joachim, Germany in the European Union - The Maastricht Decision of the

formal "approval" of the Treaty clearing the way for German ratification, and, indeed, the entry into force of Maastricht, the decision is mostly noted for the trenchant and at times defiant positions adopted by the Court vis-à-vis some of the hallowed constitutional precepts and doctrines articulated by the European Court of Justice such as Judicial Kompetenz-Kompetenz ie which Court has ultimate authority to pronounce on the limits to Community competences⁴, withdrawal from the Community and Union⁵ and the like. Naturally, there has been no dearth of critical comment, on these issues and others mostly written by German constitutional scholars.⁶

Bundesverfassungsgericht, EJIL 5 (1994), 259.

⁴ The position of the Court of Justice has been that in the interest of a coherent legal system it alone has the power to review and annul Community measures on any grounds, including lack of competences. See Case 314/85 *Firma Foto Frost v. Hauptzollamt Lübeck-Ost*, [1987] ECR 4199: the German Court, delicately but firmly, has rejected this position: BVerfGE 89, 155 (188).

⁵ For the debate concerning unilateral withdrawal see, e.g. Weiler, J.H.H., *Alternatives to Withdrawal from International Organizations*, 20 *Israel Law Review* 282 (1985). The German Court insists on Member State right to unilateral withdrawal: BVerfGE 89, 155 (190).

⁶ A variety of issues have been strongly criticised. One point of major critique is the Bundesverfassungsgericht's broad notion of Article 38 Basic Law, see e.g. Ipsen, *supra* note 3, at 2; König, *supra* note 3, at 19-20, 26-29; Schwarze, *supra* note 3, at 1-2; cf. Schröder, *supra* note 3, at 319. The Bundesverfassungsgericht's assertion that ultra-vires-acts of European Community organs would not be binding within German territory and that German State institutions would be prevented from applying such legal instruments in Germany is heavily attacked, e.g. by Tomuschat, *supra* note 3, at 494; Frowein, *supra* note 3, at 8-10; Schröder, *supra* note 3, at 323-324; Schwarze, *supra* note 3, at 3; Meessen, *supra* note 3, at 552-553. Several scholars are, in addition, worried about the relationship between the European Court of Justice and the Bundesverfassungsgericht: e.g. Tomuschat, *supra* note 3, at 495; Schröder, *supra* note 3, at 323-324; Frowein, *supra* note 3, at 1-3; Ipsen, *supra* note 3, at 9-12. Finally, the way the Bundesverfassungsgericht addresses the question whether Germany could leave the European Union meets with disapproval: e.g. Frowein, *supra* note 3, at 10-12; Götz, *supra* note 3, at 1085; Ipsen, *supra* note 3, at 15-17; König, *supra* note 3, at 33-35; Schwarze, *supra* note 3, at 4; Tomuschat, *supra* note 3, at 494-495. Occasional critique has been put forward concerning the following points: The new Article 23 Basic Law which was tailored to the Maastricht Treaty was not sufficiently recognised as constituting the *sedes materiae* (Tomuschat, *supra* note 3, at 492-493), and the newly created notion of "Staatenverbund" - "compound of States" (Frowein, *supra* note 3, at 7; Ipsen, *supra* note 3, at

I wish to add an "outsider's" view to this on-going critical reflection. The specific doctrinal points are of lesser interest to me. I will, instead, focus on the constitutional Weltanschauung of the German Court as reflected in this decision. A decision of a Court at this level to an issue of such magnitude is always more than a simple doctrinal elaboration of positive law and its application to some set of facts. It inevitably involves a construction of deeper principles and displays the constitutional ethos and sensibilities of the Court and its judges.⁷ The extent to which the decision reflects broader societal attitudes in Germany is incapable of precise answer.

In its critical stance towards the future of the European construct the German Court avoids the crass language of nationalism and the overt vocabulary of chauvinism which has characterized much political opposition to Maastricht. Instead, the positions it adopts are presented as necessary so as not to undermine the democratic nature of the polity guaranteed by the German Constitution which it is the duty of the Court to uphold. Thus, the German Court presents itself as a guarantor of the universal values of democracy rather than as a guarantor of German particularism.

My critique focuses on this aspect of the decision and relates to the Court's explicit and implicit assessment of the present (pre- and post- Maastricht) stage of European integration as well as its more distant future. Not to mince words, for reasons which I shall elaborate I consider the Court's decision as regards the existing Community embarrassing; as regards its future evolution I find the decision sad, even pathetic.

It is embarrassing since while the Court holds itself out as the guarantor of democracy for the future it is forced, for political and other reasons,⁸ to accept and "whitewash" the Community and Union of today which suffer, as I think is widely accepted, from very serious democratic deficiencies. To achieve this feat the Court is pushed to a position which implies that the Community's existing problems of democracy are and have been mediated through Member State structures and

8-9; Weber, supra note 3, at 60; Steindorff, supra note 3, at 344-345).

⁷ There are no concurring or dissenting opinions. But note that the usual remark that the decision was taken unanimously is missing.

⁸ See infra, text to note 44.

processes.⁹ But this position merely increases the embarrassment. For, on the one hand, it undermines the pressing need to substantially increase the democratization of the present day Community/Union decision-making processes both at European and Member State levels -- a cause consistently and laudably supported by the German government in recent years. If a constitutional court of such prestige, a court which explicitly adopts the criterion of democracy gives the present Community a passing bill of health (despite some critical rhetoric), why tamper with its basic institutional structures and decisional processes? On the other hand, if the Bundesverfassungsgericht truly believes that State structures and processes have mediated the democratic deficiencies of the Community, this must undermine our confidence in its own democratic sensibilities and in its ability and commitment effectively to offer guarantees for the future.

It is a sad, even pathetic decision for more profound reasons.

Democracy does not exist in a vacuum. It is premised on the existence of a polity with members -- the demos -- by whom and for whom democratic discourse with its many variants takes place. The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a demos. Thus, even if the surface language of the decision is democracy, its deep structure inevitably will reveal the explicit and implicit, conscious and subconscious, understanding of the Court and its judges as to the very nature of polity and the criteria of membership therein. Since the German Constitution itself, like many others, does not give comprehensive answers to these issues, the Court and its judges had to grasp for deeper strata beyond the express language of the constituent document. These deeper strata are, at times, unstated, simply assumed. They appear, like language itself sometimes does, so "natural" and "neutral" as to explain the relatively scant attention accorded to them in the extensive German commentary on the decision.¹⁰ These issues of who belongs, and who does not belong, of membership and authority, of demos and ethnos, have loomed large in the violent history of Europe this century and have shaped much political debate since the end of World War II. They have come centre-stage again in the period since the fall of the Berlin Wall, with the ugly rise of national and ethnic strife and "ethnic cleansing" within the old-new states of Eastern Europe and the former Soviet

⁹ See note 42 *infra*.

¹⁰ But see Tomuschat, Schwarze, *supra* note 3, at 496.

empire and with the troubling rise of xenophobia, racism and anti-semitism even in Western Europe. There is a need for intellectual and moral leadership on these issues which politicians, ever sensitive to populist electorates, cannot always supply. We may expect our Courts, without straying from the province of judicial propriety, to be part of that leadership. The European Community/Union offers no magic recipes to address these ills but it does, at a minimum, offer the possibility of a rethinking in creative ways the concepts of polity and membership -- of demos: thinking which may still preserve that which is valuable in, say, the classical European nation-state and yet guard against its excesses.

How sad, then, to observe the Bundesverfassungsgericht, faced with the need, and historical opportunity, to rethink these issue in the context of Community and Member State, looking backwards, like Lot's Wife, to a polity based on the tired old ideas of an ethno-culturally homogeneous Volk and the unholy Trinity of Volk-Staat-Staatsangehöriger as the exclusive basis for democratic authority and legitimate rule-making. There is perhaps a merciful subtle streak of shame or, at least, unease which calls for legitimation in the Court's construct. Why else choose Hermann Heller, Socialist, Anti-fascist, Jew, critic of Schmitt, as the only authority for the proposition of homogeneity of Volk? Does this not suggest a certain concern to find, shall we say, a Kosher seal of approval for this late Twentieth Century version, albeit anemic and racially neutral, of what in far away times fed the slogan of Blood (Volk) and Soil (Staat)?¹¹ But it is still sad for German

¹¹ I do not wish to call into question the overall good faith of the German Constitutional Court but this citation is rather strange. As we shall see, when it gets to the most delicate passages laying down its understanding of Volk and the necessity for homogeneity the Bundesverfassungsgericht, quotes Hermann Heller: "Die Staaten bedürfen hinreichend bedeutsamer eigener Aufgabenfelder, auf denen sich das jeweilige Staatsvolk in einem von ihm legitimierten und gesteuerten Prozeß politischer Willensbildung entfalten und artikulieren kann, um so dem, was es - relativ homogen - geistig, sozial und politisch verbindet (vgl. hierzu H. Heller, *Politische Demokratie und soziale Homogenität, Gesammelte Schriften*, 2. Band, 1971, S. 421 [427 ff.]), rechtlichen Ausdruck zu geben." (BVerfGE 89, 155 [186]). Whether or not Heller's concept of social homogeneity really sustains the No Demos thesis (it could actually support the opposite), it would seem that the writings of other scholars would have been much more apt to be quoted in support of the position of the Bundesverfassungsgericht, e.g. Isensee (concerning the notion of Volk before and after 1933 cf. Lepsius, Oliver, *Die gegensatzaufhebende Begriffsbildung. Methodenentwicklungen in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaft unter dem Nationalsozialismus*, München 1994, pp. 13 et seq.); even Schmitt himself, cf. Schmitt, Carl, *Verfassungslehre*, München/Leipzig 1928, p. 231. I cannot help thinking that given the

constitutionalism¹² if, in the face of the big challenges which face it in dealing with its own communities of "migrant workers", its own brand of rising xenophobia and renewed anti-semitism et cetera, and in the face of its new position of international leadership, of all the rich currents in the German national debate on polity and membership the Bundesverfassungsgericht had to pick up this one. The decision is pathetic in the attempt of the Court to project, even impose, these problematic conceptualizations on the Community/Union itself, not simply undermining but, as shall emerge, actually foreclosing the possibility of democratization at the European level and implicitly grafting on to the Community a telos which is alien to the foundational purposes of European integration.

In this essay I shall try both to spell out in greater detail the nature of my critique and also offer some alternative ways of thinking about Community/Union and the Member State.

II. Europe: The No Demos Thesis

One of the chief concerns of the German Court is the danger which the evolving process of European integration, particularly some potentials in the Maastricht

biography and intellectual positions of Heller, the Bundesverfassungsgericht found it more convenient to cite him. (Note that Heller's article, which originally appeared directly after Schmitt's article "Der Begriff des Politischen" in: *Politische Wissenschaft, Heft 5: Probleme der Demokratie*, Berlin 1928, in the very beginning critically refers to Schmitt). On Heller generally see Müller, Christoph, Hermann Heller, in: *Kritische Justiz* (ed.), *Streitbare Juristen: eine andere Tradition*, Baden-Baden 1988, pp. 268-281. I do not think that I am alone in this sensibility, cf. Ipsen, supra note 3, at 17. This strategy of referring to authorities who actually stand for different or even opposite concepts, thereby subtly suggesting additional legitimacy and consensus with regard to the Bundesverfassungsgericht's own statements applies also in the "citation" to Zuleeg: BVerfG 89, 155 (210). Zuleeg has disowned the reference to him: "Erklärung. Zum Urteil des BVerfG vom 12.10.1993 (2 BvR 2134/92 u. 2 BvR 2159/92) stelle ich fest: Die Aussagen, für die ich auf Seite 80 der vervielfältigten Fassung zitiert werde, stammen nicht von mir. Ich weise an der angegebenen Stelle auch nicht auf andere Autoren hin, die sich in diesem Sinne geäußert haben. Ich bin der Auffassung, daß die Kompetenzgrenzen der Gemeinschaft ernst zu nehmen sind. Ich kann in der Rechtsprechung des EuGH keine Anzeichen entdecken, daß er nicht auf die Einhaltung der Kompetenzvorschriften achtet. Professor Dr. Manfred Zuleeg, Richter am EuGH" (JZ 1993, 1112).

¹² Sad but not altogether surprising: cf. decisions of the Bundesverfassungsgericht in *Re Right to Vote on the Communal Level for Foreign Citizens*, BVerfGE 83, 37 and 83, 60.

Treaty poses to the democratic character of the polity. As such the Court must address the potential for democratization of the European Union at the European level. The Court's position is skeptical.¹³ It is not the per-se skepticism which is either interesting or troubling. One can and should be troubled about democracy in the European Union, and since no easy solution seems at hand¹⁴ a skepticism about the present and caution about the future are to be lauded. What is interesting and, in my view, rather troubling is the basis on which the German Court's skepticism is founded. It is informed by what we may dub as the No Demos thesis. This seemingly elegant thesis rests on a powerful strand, how dominant strand it is difficult to tell, in German constitutional thinking represented, inter alia, in the writings of Paul Kirchhof widely reputed to be the principal architect of the Maastricht decision¹⁵, but shared by several others¹⁶. In fairness to the other judges of the Court it is true that the language of the decision does not in all

¹³ BVerfGE 89, 155 (182 et seq.).

¹⁴ On the complexities and inner contradictions of the search for democracy and legitimacy in for and in Europe. See Weiler, J.H.H., *Parlement Européen, Intégration Européenne, Démocratie et Légitimité*, in: Lóuis/Waelbroeck (eds.), *Le Parlement Européen*, Brussels 1988; Weiler, J.H.H., *The Transformation of Europe*, 100 Yale L.J. 2403 (1991), at 2466.

¹⁵ Kirchhof, Paul, *Der deutsche Staat im Prozeß der europäischen Integration*, in: Isensee, Josef / Kirchhof, Paul (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VII: Normativität und Schutz der Verfassung - Internationale Beziehungen, Heidelberg 1992, p. 855; Kirchhof, Paul, *Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland*, in: Isensee, Josef (ed.), *Europa als politische Idee und als rechtliche Form*, Berlin 1993, p. 63; Kirchhof, Paul, *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, in: Kirchhof, Paul / Ehlermann, Claus-Dieter, *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, *Europarecht Beiheft 1/1991*, Baden-Baden 1991, p. 11. It is remarkable how easy even semantic parallels can be detected between Paul Kirchhof's legal writings - Kirchhof was the juge-rapporteur in this case - and the decision of the Bundesverfassungsgericht: cf. e.g. Tomuschat, *supra* note 3, at 493. Additional critique was put forward concerning the fact that Kirchhof had published his opinion on the case at all: cf. Schwarze, *supra* note 3, at 2.

¹⁶ E.g. Isensee, Josef, *Nachwort. Europa - die politische Erfindung eines Erdteils*, in: J. Isensee (ed.), *Europa als politische Idee und als rechtliche Form*, *supra* note 15, p. 103; Ossenbühl, Fritz, *Maastricht und das Grundgesetz - eine verfassungsrechtliche Wende?*, DVBl. 1993, 629, at 634; Di Fabio, Udo, *Der neue Artikel 23 des Grundgesetzes*, *Der Staat* 1993, 191, at 202 et seq.

respect replicate the hard-core version of Kirchhof. Comparing the writings of Kirchhof and the ultimate decision of the Court one gets the impression of a Court which was not altogether happy with the full-blooded views of its Rapporteur, but which did not have an alternative construct either. The compromise seems a watered down version of Kirchhof. The most generous interpretation which can be given is that there are two possible readings of the Decision. If so, (I am doubtful) let this essay be a normative incentive to reject the Kirchhofian version of the Judgment.

The intellectual roots of the No Demos thesis go, naturally, far further than Kirchhof. The No Demos thesis finds expression in German positive law too, notably the law relating to citizenship -- articulating the conditions of membership in the German polity. In fact, the decision constitutes a transference to the European level of the Court's understanding of the German polity.

The following is a composite version of the No Demos thesis culled from the decision of the Court itself and some of the principal exponents of this thesis. I have also spelled out in this version what I consider are some of the implications which logically follow from, or are implicit in, the thesis even if the authors themselves shy away from stating them.

The people of a polity, the Volk, its demos, is a concept which has a subjective -- socio-psychological -- component which is rooted in objective, organic conditions. Both the subjective and objective can be observed empirically in a way which would enable us, on the basis of observation and analysis, to determine that, for example, there is no European Volk.

The subjective manifestations of peoplehood, of the demos, are to be found in a sense of social cohesion, shared destiny and collective self-identity which, in turn, result in (and deserve) loyalty.¹⁷ These subjective manifestations have thus both a descriptive and also a normative element.

¹⁷ Kirchhof, HdbStR VII, supra note 15, para. 18, expressly mentions 'critical loyalty' and at the same time criticises tendencies to the contrary in Germany: "In der deutschen Entwicklung - vielleicht insbesondere seiner Religionsgeschichte - scheint es geradezu eine bewußt gepflegte Geste demonstrativen Zweifels und grüblerischen Protestes zu geben, die sich eher zum Widerstand gegen die Staatsgewalt als zu kritischer Loyalität in Mitverantwortung innerhalb des Staates berufen fühlt."

The subjective manifestations are a result of, but are also conditioned on, some, though not necessarily all, of the following objective elements: Common language¹⁸, common history, common cultural habits and sensibilities¹⁹ and -- this is dealt with more discretely since the twelve years of National-Socialism -- common ethnic origin, common religion. All these factors do not alone capture the essence of Volk -- one will always find allusions to some spiritual, even mystic, element as well.²⁰ Whereas different writers may throw a different mix of

¹⁸ Cf. Kirchhof, Paul, Deutsche Sprache, in: Isensee, Josef / Kirchhof, Paul (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland. Vol. I: Grundlagen von Staat und Verfassung, Heidelberg 1987, p. 745, para. 33: "Die sprachliche Homogenität konstituiert das deutsche Staatsvolk." Critically Schwarze, supra note 3, at 4: "provinzieller Zuschnitt".

¹⁹ Kirchhof asserts these features by alluding to the foundation of the United States of America (1787), Switzerland (1848), and the Norddeutscher Bund (1866). HdbStR VII, supra note 15, para. 38: "Dort allerdings waren die Grundlagen der Staatenbildung - ein zusammengehöriges, vom Willen zu einem gemeinsamen Staat bestimmtes Staatsvolk, eine wirtschaftliche und kulturelle Homogenität und eine - mit Ausnahme der Schweiz - prägende Gemeinsamkeit der Sprache vorhanden." Ibid., at para. 41: "[...] [die] in gemeinsamer Geschichte, Sprache und Kultur gewachsenen, in gemeinsamem Schicksal zusammengehörigen Staatsvölker und ihrer Staaten [...]". I shall offer different readings of these histories, infra.

²⁰ Kirchhof, HdbStR VII, supra note 15, para. 25: "Die europäischen Staaten der Gegenwart schirmen sich somit nicht gegenüber anderen oder Bürgern anderer Staaten ab, bewahren aber ihre Eigenständigkeit in einem durch Geburt und Herkunft verwandten Staatsvolk, einem ihm zugehörigen Raum und der kulturellen Gemeinsamkeit von Sprache, Religion, Kunst und geschichtlicher Erfahrung." Isensee, Josef, Abschied der Demokratie vom Demos, Ausländerwahlrecht als Identitätsfrage für Volk, Demokratie und Verfassung, in: Schwab, Dieter / Giesen, Dieter / Listl, Joseph / Strätz, Hans-Wolfgang (eds.), Staat, Kirche, Wissenschaft in einer pluralistischen Gesellschaft - Festschrift zum 65. Geburtstag von Paul Mikat, Berlin 1989, p. 705, at 708: "Die rechtliche Einheit des Volkes ist auf Dauer nur lebensfähig, wenn sie sich auf eine reale Grundlage stützen kann: auf ein Mindestmaß effektiver Homogenität als Grundbestand an Gemeinsamkeiten, wie sie Abstammung, Geschichte, Sprache, Kultur und Interessen hervorbringen können [...]". Cf. also Isensee, Nachwort, supra note 16, at 122: "Ohne ein gewisses Maß an Homogenität kann kein Staat bestehen. Der Wille zur politischen Einheit, der eine Menschengruppe zum Volk als Nation und damit zum möglichen Subjekt demokratischer Selbstbestimmung werden läßt, knüpft an objektive Vorgegebenheiten an, etwa geopolitische Lage, wirtschaftliche Interessen, Geschichte, Sprache, zivilisatorische Standards, Ethos, Kultur, Religion." Similarly, relating to any "Bund" and extensively quoting Carl Schmitt, Faßbender, Bardo, Zur staatlichen Ordnung Europas nach der deutschen Einigung, EA 1991, 395, at 401. Cf. the mystic connotations

elements into the pot. an insistence on a relatively high degree of homogeneity, measured by these ethno-cultural criteria, is typically an important, indeed critical element of the discourse. Here rests, of course, the most delicate aspect of the theory since the insistence on homogeneity is what conditions in its statal operationalization the rules for inclusion and exclusion. When, say, Jews were excluded from full membership in many European nation-states as equal citizens it was often on the theory that being a Christian was essential to the homogeneity of the people.²¹

The "organic" nature of the Volk is a delicate matter. I call "organic" those parts of the discourse which make, to a greater or lesser degree, one or more of the following claims: The Volk pre-dates historically, and precedes politically the modern State.²² Germany could emerge as a modern Nation-State because there was already a German Volk. The "nation" is simply a modern appellation, in the context of modernist political theory and international law, of the pre-existing Volk and the state is its political expression.²³ It is on this view that the compelling case for German (re)unification rested. One could split the German State but not the German nation. Hence, maybe unification of the State but certainly only

thrown into the debate by Isensee, *Abschied der Demokratie vom Demos*, supra, at pp. 709/710: "Das Bild des Staatsvolkes [...] ist die politische

Schicksalsgemeinschaft, in welche die einzelnen Bürger eingebunden sind." - "So liegt in der grundsätzlich dauerhaften und grundsätzlich ausschließlichen personalen Zugehörigkeit zur staatlichen *Schicksalsgemeinschaft* eine Gewähr für demokratisches Bürgerethos." (emphasis added). I am, of course, not the first to observe or critique this "iconography" of peoplehood, cf. Habermas, Jürgen, *Staatsbürgerschaft und nationale Identität* (1990), in: Habermas, Jürgen, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt/Main 1992, p. 632, at 633. Very critical is also Rittstieg, Helmut, *Staatsangehörigkeit und Minderheiten in der transnationalen Industriegesellschaft*, NJW 1991, 1383, at 1386, explicitly referring to Isensee. What is striking is the way this terminology was accepted by the Bundesverfassungsgericht, cf. BVerfGE 83, 37, and 83, 60.

²¹ It is in this delicate context that the BVerfG cites as its authority Hermann Heller. See note 11 *supra*.

²² Cf. e.g. Kirchhof, HdbStR VII, supra note 15, paras. 38 and 41.

²³ Grawert, Rolf, *Staatsvolk und Staatsangehörigkeit*, in: Isensee, Josef / Kirchhof, Paul (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. I (supra note 18), p. 663, at para. 10.

reunification of the people. Anthropologically, this understanding of, say, being German, which means being part of the German Volk, is "organic" in the following sense: It has, first, an almost natural connotation. You are born German the way you are born male or female -- though you can, with only somewhat greater ease, change your national identity (even then you will remain an "ex-German") and to the extent that ethnicity continues to play a role -- muted to be sure -- in this discourse of the Volk, ethnicity is even more immutable than gender -- there is no operation which can change one's ethnicity. The implication of this is that one's nationality as a form of identity is almost primordial according to this view, taking precedence over other forms of consciousness and membership. I may have solidarity with fellow Christians elsewhere, fellow workers elsewhere, fellow women elsewhere. This would make me a Christian German, a Socialist German, a feminist German or, at most, a German Christian, a German Socialist, a German feminist. I cannot escape my Volkish, national identity.

No one today argues that the "organic" is absolute. One can, after all, "naturalize", acquire membership in a new nation -- but even here, doesn't the word "naturalization" speak volumes? And one can, more as an hypothesis than a reality, imagine that should the objective conditions sufficiently change, and a measure of homogeneity in language, culture, shared historical experience develop, a subjective consciousness could follow and a new Volk/nation emerge. But, realistically, these mutations are possible in a "geological" time frame -- epochal, not generational.

Volk fits into modern political theory easily enough. The German Constitution may have constituted the post-War German state, but it did not constitute the German people except, perhaps, in some narrow legal sense. The Volk, the Nation, understood in this national, ethno-cultural sense are the basis for the modern State.²⁴ They are the basis in an older, self-determination sense of political

²⁴ Kirchhof, HdbStR VII, supra note 15, para. 27: "Der Gedanke der Nation [erklärt] [...] den Staat aus der Mitte der kulturellen, religiösen, ökonomischen und politischen Vorbefindlichkeiten [...]." Rogers Brubaker claims that the principally ethno-cultural conception of the nation can even be perceived in the German Constitution: Brubaker, Rogers, *Einwanderung und Nationalstaat in Frankreich und in Deutschland*, Der Staat 1989, 1, at 15 ("man [kann] eine grundsätzliche ethnokulturelle Konzeption der Nation sogar im Grundgesetz der Bundesrepublik erkennen").

independence in statehood. Only nations "may have" states.²⁵ The State belongs to the nation -- its Volk, and the Nation (the Volk) "belong" to the State.²⁶

Critically, Volk/nation are also the basis for the modern democratic State: The nation and its members, the Volk, constitute the polity for the purposes of accepting the discipline of democratic, majoritarian governance. Both descriptively and prescriptively (how it is and how it ought to be) a minority will/should accept the legitimacy of a majority decision because both majority and minority are part of the same Volk, belong to the nation. That is an integral part of what rule-by-the-people, democracy, means on this reading. Thus, nationality constitutes the state (hence nation-state) which in turn constitutes its political boundary, an idea which runs from Schmitt to Kirchhof.²⁷ The significance of the political boundary is not only to the older notion of political independence and territorial integrity, but also to the very democratic nature of the polity. A parliament is, on this view, an institution of democracy not only because it provides a mechanism for representation and majority voting, but because it represents the Volk, the nation.

²⁵ This idea is not really new, cf. Schmitt, *Verfassungslehre*, supra note 11, p. 251 ("Volk = Nation = Staat"). Ibid., p. 231: "Ein demokratischer Staat, der in der nationalen Gleichartigkeit seiner Bürger die Voraussetzungen seiner Demokratie findet, entspricht dem sog. Nationalitätsprinzip, nach welchem eine Nation einen Staat bildet, ein Staat eine Nation umfaßt. Ein national homogener Staat erscheint dann als etwas Normales; ein Staat, dem diese Homogenität fehlt, hat etwas Abnormes, den Frieden Gefährdendes." Only slightly weaker Isensee, *Abschied der Demokratie vom Demos*, supra note 20, at 709, who perceives the nation as the optimal precondition for the state: "Der rechtliche Staatsverband muß nicht auf nationaler Einheit gründen. Auch die Demokratie setzt sie nicht notwendig voraus. Gleichwohl bildet sie ihre optimale Voraussetzung. Eine Nation besteht ihrer Idee und ihrem Selbstbewußtsein nach vor Staat und Verfassung. Sie begreift sich als politische Einheit und strebt danach, diese in staatlicher Form zu organisieren."

²⁶ See e.g. Verdross, *Alfred, Völkerrecht*, Berlin 1937, at pp. 39-41.

²⁷ Kirchhof describes the State as "Herrschaftsorganisation", cf. *HdbStR VII*, supra note 15, at para. 31: "Der Inhaber der Staatsgewalt sichert den Zusammenhalt des Staates durch Entscheidung und Zwang, der Staat hebt seine Staatsangehörigen von Fremden rechtlich und tatsächlich ab, beansprucht Führung, indem er Eigenes vom Allgemeinen, Zugehöriges vom Fernstehenden unterscheidet. Die Staatstheorie betont den Gegensatz von Freund und Feind, um dem Denken und Handeln eine verlässliche Ausrichtung zu geben." Kirchhof's only footnote in this context refers to Carl Schmitt, *Der Begriff des Politischen*, 1932, pp. 13 et seq., esp. p. 17.

the demos from which derive the authority and legitimacy of its decisions.²⁸ To drive this point home, imagine an *anschluss* between Germany and Denmark. Try and tell the Danes that they should not worry since they will have full representation in the Bundestag. Their screams of grief will be shrill not simply because they will be condemned, as Danes, to permanent minorityship (that may be true for the German Greens too)²⁹, but because the way nationality, in this way of thinking, enmeshes with democracy is that even majority rule is only legitimate within a demos, when Danes rule Danes.³⁰ Demos, thus, is a condition of democracy. By contrast, when democrats like Alfred Verdross argued for a Greater Germany³¹ this was clearly not motivated by some proto-fascist design but by a belief that the German speaking "peoples" were in fact one people in terms of this very understanding of peoplehood.

Turning to Europe, it is argued as a matter of empirical observation, based on these organic cultural-national criteria, that there is no European demos³² -- not a

²⁸ The nexus in the mind of the Court between demos -- understood in this ethno-cultural terms -- and democracy is also very clear in the decisions of the Bundesverfassungsgericht in *Re Right to Vote on the Communal Level for Foreign Citizens* (BVerfGE 83, 37; 83, 60) The best theoretical work to my knowledge of political boundaries and their relation to democracy is Dahl, Robert A., *Democracy and its Critics*, New Haven/London 1989, pp. 19 et seq. Cf. for the link between democracy and the people BVerfGE 89, 155 (182); Böckenförde, Ernst-Wolfgang, *Demokratie als Verfassungsprinzip*, in: Isensee, Josef / Kirchhof, Paul (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. I (supra note 18), p. 887, paras. 10 et seq.

²⁹ This issue is addressed by Dahl, supra note 28, pp.146-148.

³⁰ Of course, as shall be argued below, there can be less Volkish/nationalist ways of conceiving the polity which would allow transnational forms of democracy. Cf. Dahl, supra note 28, at pp. 317 et seq., who, after giving a brief account of the transformation of democracy with a limited demos as in the city-states of ancient Greece or Rome to the enlarged scale of the political order in the nation-state, envisions another expansion of limits of democracy through the proliferation of transnational activities and decisions.

³¹ See Carty, Anthony, *Alfred Verdross and Othmar Spann, German Romantic Nationalism, National Socialism and International Law* (Forthcoming 1995 EJIL).

³² Kirchhof, HdbStR VII, supra note 15, para. 12: "Die Entwicklung einer kulturellen Einheit in Europa ist ausgeschlossen, weil in der Gemeinschaft neun verschiedene nationale Sprachen gesprochen werden [...]" Ibid., para. 37: "Das Sprachbild einer "verfassunggebenden Gewalt" des zustimmenden Staatsvolkes kann auch das Entstehen eines europäischen Staates

people not a nation.³³ Neither the subjective element (the sense of shared collective identity and loyalty) nor the objective conditions which could produce these (the kind of homogeneity of the organic national-cultural conditions on which

nicht ausreichend rechtlich fassen. Es erklärt nicht, warum die Bildung eines neuen Staates in seiner anderen Verfaßtheit die gegenwärtig nicht mit abstimmenden, nachfolgend aber stimmberechtigten Staatsbürger binden sollte. Es rechtfertigt nicht, warum der entstehende Staat - etwa die Gemeinschaft der Zwölf - andere Staaten und Staatsbürger ausgrenzt und damit ihre europäische Ausgangslage tiefgreifend verändern darf. Es vermag aber vor allem seine eigenen Prämissen nicht zu begründen, nämlich die Gemeinsamkeit eines zusammengehörigen europäischen Staatsvolkes: eine Mindesthomogenität in den staatsrechtlichen Grundauffassungen, eine für jedermann zugängliche Rechtssprache, wirtschaftliche und kulturelle Ähnlichkeiten oder zumindest Annäherungskräfte, die Fähigkeit zum politischen Austausch durch gesamteuropäisch wirkende Medien, ein in Europa bekanntes Führungspersonal und europaweit tätige Parteien." Ibid., at para. 52: "Eine Europäisierung ohne ein sich vorausentwickelndes europäisches Bewußtsein und damit ohne ein europäisches Volk mit konkreter Fähigkeit und Bereitschaft zur gemeinsamen Staatlichkeit wäre ideengeschichtlich uneuropäisch." Cf. as well Kirchhof's statements concerning the economic community as a basis of statehood, para. 10: "Eine im Handlungsziel und Rechtsmaßstab derart begrenzte Wirtschaftsgemeinschaft mag zwar anfangs als Vorstufe eines staatsähnlichen Verbundes gedacht gewesen sein, ist aber in ihren Kompetenzen und Befugnissen nicht darauf angelegt, sich zu einer umfassenden Staatlichkeit fortzubilden. [...] Insofern ist eine Wirtschaftsgemeinschaft keine Demokratie, die sich veranlaßt sähe, ihr Entstehen und ihre Entwicklung kontinuierlich auf den Willen der Marktbürger abzustimmen. Auch das Anliegen einer gemeinsamen Sprache, eines politischen Zusammenhalts und einer rechtlich geprägten Einheit treten in einer Wirtschaftsgemeinschaft zurück [...]." Cf. also Kirchhof, in: *Europarecht Beiheft* 1/1991, supra note 15, at 12: "Die Europäische Gemeinschaft (EWG) hingegen ist eine internationale Organisation, die nicht die Marktbürger zu einem Staatsvolk der 'EWG-Bürger' zusammenfaßt, insbesondere kein umfassendes Schutz- und Gehorsamsverhältnis begründet." Cf. also explicitly Isensee, *Nachwort*, supra note 16, at 133-134: "[E]s gibt kein europäisches Volk, sondern nur die Völker der europäischen Staaten. [...] Auch die Einführung einer rechtlich formalisierten Unionsbürgerschaft, die durch die Staatsangehörigkeit eines Mitgliedsstaates vermittelt wird, vermag kein Unionsvolk als politische Einheit zu schaffen; keine Europanation. Eben damit fehlt auch das Subjekt für eine mögliche europäische Demokratie: das europäische Volk. Es gibt keine Demokratie ohne Demos. [...] Da [der Europäischen Gemeinschaft] das Volk fehlt, ermangelt ihr ein Staatselement, mithin die verfassungspolitische Fähigkeit, aus sich heraus Demokratie zu bilden."

³³ And hence not a state: cf. BVerfGE 89, 155 (188): "Der Unions-Vertrag begründet - wie ausgeführt - einen Staatenverbund zur Verwirklichung einer immer engeren Union der - staatlich organisierten - Völker Europas (Art. A EUV), *keinen sich auf ein europäisches Staatsvolk stützenden Staat.*" (emphasis added).

peoplehood depend) exist. Long term peaceful relations with thickening economic and social intercourse should not be confused with the bonds of peoplehood and nationality forged by language, history, ethnicity and all the rest. At this point we detect two versions to the No Demos thesis. The "soft" version of the Court itself³⁴ is the Not Yet³⁵ version: Although there is no demos now the possibility for the future is not precluded a-priori. If and when a European demos emerges, then, and only then, will the basic political premises of the decision have to be reviewed. This is unlikely in the foreseeable future.³⁶ The "hard" version does not only dismiss that possibility as objectively unrealistic but also as undesirable: It is argued (correctly in my view) that integration is not about creating a European nation or people, but about the ever closer Union among the peoples of Europe.³⁷

³⁴ And some others: cf. e.g. Grimm, Dieter, *Mit einer Aufwertung des Europa-Parlaments ist es nicht getan. - Das Demokratiedefizit der EG hat strukturelle Ursachen -*, in: *Jahrbuch zur Staats- und Verwaltungswissenschaft*, Bd. 6 (1992/93), p. 13.

³⁵ BVerfGE 89, 155 (185): "Demokratie, soll sie nicht lediglich formales Zurechnungsprinzip bleiben, ist vom Vorhandensein bestimmter vorrechtlicher Voraussetzungen abhängig, wie einer ständigen freien Auseinandersetzung zwischen sich begegnenden sozialen Kräften, Interessen und Ideen, in der sich auch politische Ziele klären und wandeln [...] und aus der heraus eine öffentliche Meinung den politischen Willen vorformt. Dazu gehört auch, daß die Entscheidungsverfahren der Hoheitsgewalt ausübenden Organe und die jeweils verfolgten politischen Zielvorstellungen allgemein sichtbar und verstehbar sind, und ebenso, daß der wahlberechtigte Bürger mit der Hoheitsgewalt, der er unterworfen ist, in seiner Sprache kommunizieren kann. *Derartige tatsächliche Bedingungen können sich, soweit sie noch nicht bestehen, im Verlauf der Zeit im institutionellen Rahmen der Europäischen Union entwickeln.* Eine solche Entwicklung hängt nicht zuletzt davon ab, daß die Ziele der Gemeinschaftsorgane und die Abläufe ihrer Entscheidungen in die Nationen vermittelt werden. Parteien, Presse und Rundfunk sind sowohl Medium als auch Faktor dieses Vermittlungsprozesses, aus dem heraus sich eine öffentliche Meinung in Europa zu bilden vermag (vgl. Art. 138a EGV)." (emphasis added).

³⁶ E.g. Grimm, supra note 34, at 16: "Eine europäische Öffentlichkeit und einen breiten öffentlichen Diskurs auf europäischer Ebene wird es deswegen noch auf längere Zeit nicht geben. Ein europäisches Staatsvolk, dem die europäische Hoheitsgewalt zugerechnet werden könnte, ist nicht einmal in Sicht."

³⁷ See Isensee, Nachwort, supra note 16, p. 137: he is clearly negative about this idea ("Schon die Sprachenvielfalt bildet hier ein Hindernis für den allgemeinen, direkten Diskurs der Demokratie. Alles spricht gegen die staatliche Einheit: Reichtum an kollektiver Individualität, Verdichtung des Lebens in gedrängten Räumen, historische Tiefe und kulturelle Gegensätze, die Runzeln und Falten, die Abgründe eines alten Erdteils. Vielleicht werden alle

However, what the "soft" and "hard" version share is the same understanding of peoplehood, its characteristics and manifestations.

Soft version or hard, the consequences of the No Demos thesis for the European construct are interesting. The rigorous implication of this view would be that absent a demos, there cannot, by definition, be a democracy or democratization at the European level.³⁸ This is not a semantic proposition. On this reading, European democracy (meaning a minimum binding majoritarian decision-making at the European level) without a demos is no different from the previously mentioned German-Danish *anschluss* except on a larger scale. Giving the Danes a vote in the Bundestag is, as argued, ice cold comfort. Giving them a vote in the European Parliament or Council is, conceptually, no different. This would be true for each and every nation-state. European integration, on this view, may have involved a certain transfer of state functions to the Union but this has not been accompanied by a redrawing of political boundaries which can occur only if, and can be ascertained only when, a European Volk can be said to exist. Since this, it is claimed, has not occurred, the Union and its institutions can have neither the authority nor the legitimacy of a Demos-cratic State.³⁹ Empowering the European

diese Besonderheiten Europas einmal aufhören zu existieren, nivelliert von einer kosmopolitischen Zivilisation oder überlagert durch Einwanderer aus anderen Weltgegenden. Am Ende mag es sein, daß Deutschland und Italien sich zueinander verhalten werden wie Kansas und Texas, daß auch hier der amerikanische Traum aufgeht: von der einen, neuen Gesellschaft, multikulturell und uninational. Doch wenn der amerikanische Traum sich auf dem alten Kontinent verwirklichen sollte, wäre der europäische Traum zu Ende. Mit ihm die Realität des politischen Europa."). Similarly Judge at the Bundesverfassungsgericht Klein, Hans Hugo, Europa - Verschiedenes gemeinsam erlebt. Es gibt kein europäisches Volk, sondern die Völker Europas, Frankfurter Allgemeine Zeitung, October 17, 1994, p. 12.

³⁸ Cf. Kirchhof's claim in HdbStR VII, supra note 15, at para. 33: "Demokratie setzt eine Vergemeinschaftung im Staatsvolk voraus." Explicitly referring to the European Community, *ibid.*, at para. 53: The European Community cannot rest upon democratic legitimation since "die Repräsentation durch das Europäische Parlament [stützt] sich [...] nicht auf ein europäisches Staatsvolk". Isensee, Nachwort, supra note 16, at p. 133: "Es gibt keine Demokratie ohne Demos." Less rigorous BVerfGE 89, 155 (186): "Vermitteln die Staatsvölker - wie gegenwärtig - über die nationalen Parlamente demokratische Legitimation, sind mithin der Ausdehnung der Aufgaben und Befugnisse der Europäischen Gemeinschaften vom demokratischen Prinzip her Grenzen gesetzt."

³⁹ Isensee, Abschied der Demokratie vom Demos, supra note 20, at p. 727: "Demokratie entwickelt sich legitim nur innerhalb des Demos, aus dem und für den sie besteht."

Parliament is no solution and could -- to the extent that it weakens the Council (the ~~voice of the Member States~~) -- actually exacerbate the legitimacy problem of the Community.⁴⁰ On this view, a parliament without a demos is conceptually impossible, practically despotic. If the European Parliament is not the representative of a people, if the territorial boundaries of the EU do not correspond to its political boundaries, than the writ of such a parliament has only slightly more legitimacy than the writ of an emperor.

What, however, if the interests of the nation-state would be served by functional cooperation with other nation-states? The No Demos thesis has an implicit and traditional solution: Cooperation through international treaties, freely entered into by High Contracting Parties, preferably of a contractual nature (meaning no-open ended commitments) capable of denunciation, covering well-circumscribed subjects. Historically, such treaties were concluded by heads of state embodying the sovereignty of the nation-state. Under the more modern version, such treaties are concluded by a government answerable to a national parliament often requiring parliamentary approval and subject to the material conditions of the national democratic constitution. Democracy is safeguarded in that way.

There are some passages in the decision of the Court -- especially in its soft version -- which seem to belie this conclusion. After all the Court suggests that as the functions and powers of the Union are extended the representation of the peoples of the individual States by a European Parliament will add to the democratic legitimacy of the Union. ("Indessen wächst mit dem Ausbau der Aufgaben und Befugnisse der Gemeinschaft die Notwendigkeit, zu der über die nationalen Parlamente vermittelten demokratischen Legitimation und Einflussnahme eine Repräsentation der Staatsvölker durch ein europäisches Parlament hinzutreten zu lassen, von der ergänzend eine demokratische Abstützung der Politik der Europäischen Union ausgeht" BVerfGE 89, 155, 184). But this only demonstrates the Court's inconsistency. With this attempt to position itself along the more traditional line of democratization through the European Parliament the Court is pressed into a rather sharp contradiction with its own explicitly stated understanding of democracy and its nexus to demos. Given the Court's negation of a European demos, its notion of "representation of the peoples of the individual States" by a European Parliament is, at worst, nothing but a hollow rhetoric inconsistent with its convictions, at best the inconsistent exception of a rationale

⁴⁰ Cf. Weiler, *Parlement Européen*, supra note 14.

the most part of which runs in the opposite direction.

III. European Democracy Deficit and the No Demos Thesis

That, then, constitutes the No Demos thesis, driven it seems by a strong concern for democratic structure and process which must, however rest on the existence of a demos. Whether or not there is a European Demos, it is hard to see how in the already existing stage of European integration both pre- and post-Maastricht, statal structures, processes and institutions alone, including the German Federal Constitutional Court itself, can possibly provide adequate democratic guarantees for the European construct. To put this crudely and brutally: If the concern of the German Court was to safeguard the democratic character of the European construct in its future developments, and if its explicit and implicit thesis that absence a European demos, democracy can be guaranteed only through Member State mechanisms, it is hard to see how, employing the same sensibilities it could have given a democratic seal of approval to the already existing European Community and Union.

Whatever the original intentions of the High Contracting parties, the Treaties establishing the European Community and Union have become like no other international parallel, and national procedures to ensure democratic control over international treaties of the State are clearly ill suited and woefully inadequate to address the problems posited by the European Union.

The problematic of democracy in the European Union is well explored. It is frequently labelled as the "Democratic Deficit" of the Community but whatever nomenclature is employed, the principal features are notorious. Here is a capsule version.

European Integration has seen many, and increasingly important, government functions transferred to "Brussels", brought within the exclusive or concurrent responsibility of the Community and Union. This is problematic in a variety of ways.

Though the formal political boundaries of the State have remained intact, in the areas of transfer of responsibility to the Union the functional political boundaries of the polity have been effectively re-drawn. If critical public policy choices about, say, international trade, or environmental protection, or consumer protection, or

immigration come exclusively or predominantly within Community responsibility, for those matters the locus of decision-making is no longer the State but the Union. Even if the Union were to replicate in its system of governance the very same institutional set-up found in its constituent states, there would be a diminution in the specific gravity, in the political weight, in the level of control of each individual within the redrawn political boundaries. That is, *arguendo*, an inevitable result from enlarging the membership of the functional polity (when a company issues new voting shares, the value of each share is reduced) and from adding a tier of government thereby distancing it further from its ultimate subjects in whose name and for whom democratic government is supposed to operate. If you want a label, call this Inverted Regionalism. All the real and supposed virtues of regionalism are here inverted.

Inverted Regionalism does not simply diminish democracy in the sense of individual disempowerment, it also fuels the separate and distinct phenomenon of de-legitimation. Democracy and legitimacy are not co-terminus. One knows from the past of polities with arguably democratic structure and process which enjoyed shaky political legitimacy and were replaced, democratically, with dictatorships. One knows from the past and present of polities with egregiously undemocratic governmental structure and process which, nonetheless, enjoyed or enjoy high levels of legitimacy.⁴¹ Inverted Regionalism, to the extent, that it diminishes democracy in the sense outlined above or to the extent that it is thought to have that effect, will, to a greater or lesser extent, undermine the legitimacy of the Union.

The perceived perniciousness of Inverted Regionalism and its delegitimation effect will be/are enhanced by three factors:

The reach of the Community or Union into areas which are, or are thought to be, classical symbolic "State" functions in relation to which "Foreigners" should not be telling "Us" (French, or Danes, or Irish etc.) how to run our lives. These areas, socially constructed and culturally bound, are not fixed. They range from the ridiculous (the British Pint) to the sublime (the right-to-life of the Irish abortion saga).

⁴¹ For the need to separate analytically legitimacy and democracy, see Weiler, *Parlement Européen*, supra note 14.

The reach of the Community or Union into areas which are, or are thought to be, matters left to individuals or local communities and in relation to which "Government" should not be telling "Us" (the people) how to run their lives.

The perception, whether or not rooted in reality, that there is no effective limit and/or check on the ability of the Community or Union to reach into areas previously thought to be the preserve of the state or of the individual.

Inverted Regionalism is only one feature of the alleged democratic malaise of European Integration. I wrote above: "Even if the Union were to replicate in its system of governance the very same institutional set-up found in its constituent states, there would be a diminution in the specific gravity, in the political weight, in the level of control of each individual within the redrawn political boundaries." But, of course, the Union does not replicate domestic democratic arrangements.

A feature of the democratic process within the Member States, with many variations of course, is that government, the executive branch, is, at least formally, subject to parliamentary accountability. In particular, when policy requires legislation, parliamentary approval is needed. National parliaments, apart from exercising these "power functions," also fulfil a "public forum" function described variously as information, communication, legitimation etc. The argument is that Community and Union governance and Community institutions have a perverse effect on these principal democratic processes within the Member States and within the Union itself.

Community and Union governance pervert the balance between executive and legislative organs of government of the State. The Member State executive branch, Government Ministers, are reconstituted in the Community as the principal legislative organ with, as noted above, an ever widening jurisdiction over increasing areas of public policy. The volume, complexity and timing of the Community decisional process makes national parliamentary control, especially in large Member States, more an illusion than a reality. In a majority decision environment, the power of national parliaments to affect outcomes in the Council of Ministers is further reduced. The European Parliament does not offer an effective substitution. Even after Maastricht the powers of the European Parliament in the legislative process leave formal and formidable gaps in parliamentary control. On this reading, Union governance results in a net empowerment of the executive branch of the States.

The European Parliament is debilitated not only by its formal absence of certain powers but also by its structural remoteness. The technical ability of MEPs to link and represent actual constituents to the Community process is seriously compromised in the larger Member States by simple reasons of size. Its abstract representation function of "the people" -- its public forum function -- is also compromised, by a combination of its ineffective powers (the real decisions do not happen there), by its mode of operation (time and place), by its language "problem", by the difficulty (and disinterest) of media coverage. It is evocative that over the years one has seen a gradual increase in the formal powers of the European Parliament and a decrease in the turn-out to European elections. And when they turn out, these elections are dominated by a national political agenda, a mid-term signal to the national party in power. This is, an evocative fact too, the opposite of American politics where State elections are frequently a mid-term signal to the central federal government. The non-emergence of true trans-European political parties is another expression of the phenomenon. Critically, there is no real sense in which the European political process allows the electorate "to throw the scoundrals out", to take what is often the only ultimate power left to the people which is to replace one set of "governors" by another. In its present state, no one who votes in the European elections has a strong sense at all of affecting critical policy choices at the European level and certainly not of confirming or rejecting European governance.

Community governance might have a distorting effect also if one takes a neo-corporatist view of the European polity. Under this view, government -- both executive and legislative branches -- do not monopolize policy-making and are but actors, important actors, in a broader arena involving public and private parties. The importance of parliament under this model is to give voice and power to diffuse and fragmented interests whose principal political clout derives from a combination of their electoral power and the re-election drive of politicians. Other actors, such as, say, big industry or organized labour, whose "membership" is far less diffuse and fragmented, exercise influence through different channels and by different means such as political contributions, control of party organization, and direct lobbying of the administration. When policy areas are transferred to Europe there will be a per-se weakening effect on diffuse and fragmented national interests deriving from the greater difficulty they will experience in organizing themselves at the transnational level compared to, say, a more compact body of large manufacturers (e.g. the tobacco industry). In addition, the structural weakness of the European Parliament has a corresponding effect on these interests even if

organized. Electoral power simply carries less weight in Euro-politics.

Since the outcome of the Community legislative process becomes the supreme law of the land, national judicial control of primary legislation -- in those systems which have such control (e.g. Italy, Germany, Ireland) -- is compromised, too. The European Court of Justice, like the European Parliament, does not, *arguendo*, offer an effective substitution since, inevitably it is informed by different judicial sensibilities in particular in relation to interpreting the limits of Community competences. Since the governments of the Member States are not only the most decisive legislative organ of the Community, but also fulfil the most important executive function (they, much more than the Commission, are responsible for the implementation and execution of Community law and policy) they escape, too, national parliamentary (typically weak) and national judicial (typically stronger) control of large chunks of their administrative functions.

Domestic preferences are, arguably, perverted in a substantive sense, too. A Member State may elect a center right government and yet might be subject to center left policies if a majority of, say, center left governments dominate the Council. Conversely, there might even be a majority of, say, center right governments in the Council, but they might find themselves thwarted by a minority of center right governments or even by a single such government where Community decisional rules provide for unanimity. Both in Council and in the European Parliament the principle of proportional representation is compromised whereby enhanced voice is accorded citizens of small states, notably Luxembourg, and, arguably, inadequate voice accorded citizens of the larger states, notably Germany.

Lastly a feature which is said to pervade all Community governance, and negatively affect the democratic process, is its overall lack of transparency. This is not just a result of the added layer of governance and its increased remoteness. The process itself is notoriously prolix, extremely divergent when one moves from one policy area to another and in part kept secret. "Comitology" is an apt neologism -- a phenomenon which requires its very own science which no single person has mastered.

Even if one does not accept all the details of this capsule version of the Democracy Deficit, can it seriously be argued that all of it is wrong? That there is no serious democratic problem in the Community of today? Ironically, the No Demos thesis

accentuates and aggravates the problem since it means that even the modest gains in the power of the European Parliament over the decisional process cannot contribute to resolving the democratic dilemma since, as explained above, absent a European Demos the European Parliament cannot enjoy independent authority or legitimacy as a rule making body in the polity.

This is not the place to put forward any detailed remedies to the democratic ills of the European Union. But I would submit that a realistic assessment of the problem suggests that unless one would undo much of the existing structure and wrest back much of the existing competences of Europe, the only way to achieve a modicum of democratization would be by a combined revision of powers and processes at both the European and the Member State levels. I would, for example, argue forcefully that there has to be greater involvement of national parliaments in critical areas of Union decision-making and/or effective, not merely symbolic, control over the legislative activities of national ministers at the European level. But that alone will not "close the deficit" for example in those areas where the Union enjoys exclusive competences, where Member States have simply lost their power to regulate or where Community governance, managerial and administrative, simply escapes control. It is clear that the powers of the European Parliament have to be strengthened in certain areas. But that either will not "close the deficit" for the reasons sketched in the capsule. It is only a combination of the national and transnational which could make a real impact on the problem of democracy. This should not surprise us since the Union is clearly less than a State but also clearly more than a classical international organization.

If this is true, it leaves the subscribers to the No Demos thesis in a somewhat complicated position. Consider the position of the Bundesverfassungsgericht. By endorsing the No Demos thesis it accentuates the gravity of the Democratic Deficit by negating any democratization power which the European Parliament with its present, expanded powers, may yield. And yet, having done so, by approving the Treaty of Maastricht, it willy-nilly gave it a passing bill of democratic health. How can this be? By, it seems to me one of the following:

-- One could engage in a fiction, stick one's head in the sand and pretend that the current problem does not exist. After all, to highlight the democratic deficiencies of the Community which existed long before Maastricht and which Maastricht did not cure would simply draw attention to the failure of the Bundesverfassungsgericht on the prior occasions to identify and insist on

a cure to the Democracy Deficit. But when the ostrich sticks its head in the sand it alone is blind to reality. What would that do to the Court's credibility as the future guarantor of democracy? If you do not see the problem now, why should you spot it tomorrow? There was, I am afraid, a little bit of this ostrich syndrome in the German Court decision.

-- One could suggest, explicitly or implicitly,⁴² that the current situation of the Union has been democratically legitimated by national processes -- for example the successive approvals of the Community by the houses of the German parliament. But this is problematic and somewhat embarrassing, too. First, even if, as I have conceded elsewhere,⁴³ the current Union has been democratically approved by successive approvals of Treaty amendments (such as the Single European Act and the various acts of accession of new Member States) this takes a very formal view of democratic legitimation. Is it not just a little bit like the Weimar elections which democratically approved a non-democratic regime? Is it not the task of a constitutional court to be a counter-balance to such self-defeating democratization? Member State mediation does have a powerful impact on the social and formal legitimacy of the European construct but it has done only little to address the problems of deficient democratic structures and processes. If the current democratic malaise of the Union can be said to have been cured by the simple fact that national parliaments have endorsed the package deal in one way or another, the Court would have engaged at worst in another form of fiction about the reality of the Union and the democratizing power of national structures and institutions, at best in adopting a formal and impoverished sense of what it takes to ensure democracy in the polity. One or the other, this bodes ill for the confidence we may have in the German Court's ability to act as an effective vigilante over precious democratic structures and processes.

-- As regards democratization at the European level, the German Court would seem to be in a No-Win situation. If you allow further empowerment of the European Parliament (especially at the expense of national institutions) you are undermining the No Demos thesis. If you do not allow such further empowerment, you are, in my view, precluding ever resolving the democratic

⁴² BVerfGE 89, 155 (183-184).

⁴³ Weiler, *Parlement Européenn*, *supra* note 14.

malaise of the Community since it is submitted that whilst democratization at the European level is not sufficient it is at least a necessary condition to redress the democratic malaise.

I can only speculate as to how the Bundesverfassungsgericht manouvred itself into this series of untenable options. European integration was always perceived as a positive element in German policy, desirable on its own terms but also as a major platform for German relegitimation after 1945. It was not, however, a principal political and/or intellectual concern of the Court and its judges until quite recently. This, I suspect, was true for a great many of German Public Law professors. European Community law was for many years the preserve of a relatively small group of scholars and practitioners.⁴⁴ And thus, while attention in Karlsruhe was focussed elsewhere, the Community underwent powerful constitutional mutations, different in content but as radical as, say, those effected by the American Philadelphia Constitutional Convention, and certainly as profound as any mutations explicitly agreed in the Treaty itself. In my own study, *The Transformation of Europe*⁴⁵, I attempted not only to explain the nature of the mutations but also to explain how radical movements such as the disintegration of constitutional guarantees to limited Community competences which took place in the 70s (!) could occur without much political or legal fanfare.⁴⁶ In another study, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*⁴⁷ I speculated on the reasons why the field of European integration was so late in developing an internal critical perspective. Be that as it may, it was only the advent of the Single European Act in 1986 (which "restored" Community majority decision-making thus accentuating problems of legitimacy and, arguably, democracy⁴⁸) and the Maastricht Treaty in

⁴⁴ Cf. in this context Fritz Ossenbühl describing the German constitutional scholars as sleeping the sleep of the Sleeping Beauty with regard to the impact of the European integration on municipal constitutional law (Ossenbühl, supra note 16, at 637: "die deutsche Staatsrechtslehre [hat] lange Zeit im Hinblick auf die verfassungsrechtlichen Fragen der europäischen Integration in einem Dornröschenschlaf gelegen.")

⁴⁵ Weiler, *The Transformation of Europe*, supra note 14.

⁴⁶ *Transformation of Europe*, supra note 14, Part II.

⁴⁷ 31 *Journal of Common Market Studies* 418 (1993)

⁴⁸ Weiler, *Parlement Européen*, supra note 14.

the early 90s which spread serious Community interest to a broader circle of constitutionalists. The fierce debate and widespread popular opposition to Maastricht galvanized a new critical perspective. But, by that time, the doors of the stable of democracy were already wide open and the horse had long bolted. When the Sleeping Beauty of Karlsruhe awoke there was little one could do about the *status quo*: Declare, in the name of democracy, that the problem was not Maastricht but much that happened before? (It should be made absolutely clear: From a democratic perspective Maastricht, inadequate as it may have been, ameliorated the prior condition of democratic deficiencies!) Shut down the EC? Insist on a German pullout? All politically fanciful and legally impossible. And then the question would be asked as to the strange absence of these democratic sensibilities when the Court gave its much touted *Solange I*⁴⁹ and *Solange II*⁵⁰ decisions. And so, it seems, that the only way out was to legitimate the past by those weak notions of Member State democratic mediation, and put the polity on notice that German constitutionalism will not be caught napping again.

IV. The No Demos Thesis: What Polity? Which Membership?

The Court could have adopted an alternative construct: Highlight, embarrassing as this may have been, the democratic failings of the Community, uncured by Maastricht and in which all European and Member State institutions (including courts) connived. Since, despite these failings, the Union was formally legitimated⁵¹ the Court could have, for example, approved the Treaty but insisted that the existing gap between formal legitimation and material democratic deficiency must be regarded as temporary and could not be accepted in the medium and long term. In this way the Bundesverfassungsgericht would have thrown its formidable power behind the pressure for democratization.

But this option would inevitably have to involve some acknowledgement of the need to strengthen, among other measures, the powers of, say, the European Parliament. You simply cannot be serious about democracy in Europe and believe

⁴⁹ BVerfGE 37, 271.

⁵⁰ BVerfGE 7, 339.

⁵¹ See Weiler, *Parlement Européen*, supra note 14, for the possibility of formal and even social legitimacy to co-exist with deficient material democratic processes.

that given the present array of powers and competences already transferred to the Union, democratization can take place exclusively on the national level. But this construct, I suspect, seemed even more threatening to the German Constitutional Court. Why so? This is one of the riddles of its decision. As I shall try and show, for all its talk about democracy, the Court, by adopting the view it has on Volk, Staat and Staatsangehörigkeit has boxed itself into a further untenable situation.

Stated briefly: If the judges who subscribed to the decision truly believe that a polity enjoying democratic authority and legitimate rule-making power must be based on the conflation of Volk, Staat and Staatsangehörigkeit, that the only way to conceive of the demos of such a polity is in thickly homogeneous organic-cultural terms, then, whether one admits it or not, the future of European integration poses a huge threat. The problem is not that there is not now a European demos; the problem is that there might one day be one. And why is that a problem? Because the emergence of a European demos in a European polity enjoying legitimate democratic authority would signify -- on this understanding of polity and demos -- the replacement of the various Member State demi, including the German Volk. This, I myself would agree, would be a price too high to pay for European integration. But since on their reading there is only a binary option -- either a European State (one European Volk) or a Union of States (with the preservation of all European Völker -- including Germans) their fear is inevitable.

I shall try and show how this view is based on one and perhaps two profound misconceptions with unfortunate consequences both for Germany itself (I think) and for Europe (I am sure). My challenge, note, is not to the ethno-cultural, homogeneous concept of Volk as such. It is, instead, to the view which insists that the only way to think of a demos, bestowing legitimate rule-making and democratic authority on a polity, is in these Volkish terms. I also challenge the concomitant notion that the only way to think of a polity, enjoying legitimate rule-making and democratic authority, is in statal terms. Finally, I challenge the implicit view in the decision that the only way to imagine the Union is in some statal form: Staat, Staatenbund, Bundesstaat, Staatenverbund. Noteworthy is not only the "enslavement" to the notion of State, but also, as we shall see, the inability to contemplate an entity with a simultaneous multiple identity. Polycentric thinking is, apparently, unacceptable.

I will construct the critique step-by-step beginning with Demos-as-Volk first. I want to raise three possible objections to the Court's version of the No Demos thesis and

its implications.

The first objection has two strands. One, less compelling, would argue that the No Demos thesis simply misreads the European anthropological map. That, in fact, there is a European sense of social cohesion, shared identity and collective self which, in turn, results in (and deserves) loyalty and which bestows thus potential authority and democratic legitimacy on European institutions. In short that there is, want it or not, a European people on the terms stipulated by the No Demos thesis and that the only problem of democracy in the Community relates to the deficient processes, such as the weakness of the European Parliament, but not the deep structural absence of a demos. Though there is no common European language, that cannot in itself be a *conditio sine qua non* as the case of, say, Switzerland would illustrate. And there is a sufficient measures of shared history and cultural habits to sustain this construct. The problem is that this construct simply does not ring true.⁵² For most Europeans any sense of European identity defined in organic-cultural or national terms would be extremely weak. I do not wish to pursue this critique as such.

But there is one strand worth picking up from this first objection. One can argue that peoplehood and national identity have, at certain critical moments of transition, a far larger degree of artificiality, of social constructionism and even social engineering than the organic, Volkish view would concede. As such they are far more fluid, potentially unstable and capable of change. They decidedly can be

⁵² Cf. e.g. Dellavalle, Sergio. Für einen normativen Begriff von Europa: Nationalstaat und europäische Einigung im Lichte der politischen Theorie. in: v. Bogdandy, Armin, Die Europäische Option, Baden-Baden 1993, p. 237, at 253: "[Es fehlen] sowohl die sprachliche als auch die kulturelle und religiöse Einheit, die rassische Homogenität sowie die Möglichkeit eines Rückgriffs auf eine gemeinsame historische Vergangenheit." This seems to be so obvious for most writers that they do not even dwell upon the possibility of an organic-cultural or national European identity. Instead, what is at least debated is whether or not there is a European "political public" (see Habermas, supra note 20, at 645 and 650, and Lepsius, M. Rainer, Der europäische Nationalstaat: Erbe und Zukunft, in: Lepsius, M. Rainer, Interessen, Ideen und Institutionen, Opladen 1990, p. 256, at 266) or a European "public opinion" (see, e.g., Lepsius, M. Rainer, Die Europäische Gemeinschaft, Beitrag zum 20. Deutschen Soziologentag, Frankfurt/Main 1990, quoted in Habermas, supra note 20, at 646). It has even been suggested that the extraordinary diversity of cultural, political and religious traditions - having conflicted which each other and having created tolerance and mutual enrichment - constitutes the characteristic feature and perhaps even unifying element of Europe: cf. Dellavalle, in this note, at 253 with further reference.

constructed as a conscious decision and not only be a reflection of an already pre-existing consciousness. Indeed, how could one ever imagine political unification taking place if it has strictly to follow the sense of peoplehood? In the creation of European states involving political unification such as, yes, Germany and Italy, the act of formal unification preceded full and universal shift of consciousness. Although conceptually the nation is the condition for the state, historically, it has often been the state which constituted the nation by imposing a language and/or prioritizing a dialect and/or privileging a certain historical narrative and/or creating symbols and myths.⁵³ This would, often, have to be the order in the process of unification. Think, say, of Prussia and Austria. Is it so fanciful to imagine a different historical path in which Prussia went its own way, privileging a particularist read of its history, symbols, cultural habits and myths and developing a sense of Volk and nation which would emphasise that which separates it from other German-speaking nations and that Austria, in this would-be history, could have just become another part of a unified Germany?

I am, of course, taking no position here on the desirability or otherwise of European unification driven by the notion of nation and peoplehood. (As will transpire, I oppose it). But I am arguing that to insist on the emergence of a pre-existing European Demos defined in organic national-cultural terms as a

⁵³ This observation was also made by the same Heller which the Court cites for its homogeneity thesis. See Heller, Hermann, *Staatslehre*, Leiden 1934, p. 164: "Weder das Volk noch die Nation dürfen als die gleichsam natürliche Einheit angesehen werden, die der staatlichen Einheit vorgegeben wäre und sie selbsttätig konstituierte. Oft genug war es [...] umgekehrt die staatliche Einheit, welche die "natürliche" Einheit des Volkes und der Nation erst gezüchtet hat." Obviously I take issue here with Kirchhof who claims that Germany in the 19th century (1866) as well as the United States in 1787 constitute an example of economic and cultural homogeneity, common language and a people preceding the state: Kirchhof, *HdbStR VII*, supra note 15, at para. 38. Maybe the difference in perspective is simply a reflection of the half-full, half-empty glass. Alexis de Tocqueville apparently took a view somewhat different to Paul Kirchhof as regards the USA. In a letter to Ernest de Chabrol of June 9, 1831 he writes how American society "[...] formed of all the nations of the world [...] people having different languages, beliefs, opinions: in a word, a society without roots, without memories" could turn into one people. His answer, it seems, was that nations could be based on adherence to values, those, like democracy, self-government, equality etc. found in the American constitution. Boesche, Roger (ed.), *Alexis de Tocqueville, Selected Letters on Politics and Society*, Berkeley 1985, at 38. I have relied on the illuminating lecture of Arthur Schlesinger jr., *Multiculturalism and the Bill of Rights*, 46 *MELR* 191 (1994), in which the de Tocqueville position is cited and elaborated.

precondition for constitutional unification or, more minimally, a re-drawing of political boundaries, is to ensure that this will never happen. The No Demos thesis which is presented by its advocates as rooted in empirical and objective observation barely conceals a pre-determined outcome.

The second objection is more central and is concerned with the notion of membership implicit in the No Demos thesis. Who, we may ask, are the members of, say, the German polity? The answer would seem obvious: The German Volk, those who have German nationality. They are Germany's demos. Germany is the state of the Germans defined in the familiar organic-national terms. By contrast, to say that there is no European demos is equivalent to saying that there is no European nation. I should immediately add that I agree: There is no European nation or Volk in the sense that these words are understood by the German Court and the constitutionalists on which it relies.

But that is not the point. The real point is the following: Is it mandated that demos in general and the European demos in particular be understood exclusively in the organic cultural homogeneous terms which the German Federal Constitutional Court has adopted in its own self-understanding? Can there not be other understandings of demos which might lead to different conceptualizations and potentialities for Europe? Has not German sociology and political theory itself come up with one of the most challenging concepts in this regard, Constitutional Patriotism?

I have, so far, in this English language narrative studiously avoided using the concept of citizen and citizenship. Can we not define membership of a polity in civic, non-organic-cultural terms? Can we not separate ethnos from demos? And can we not imagine a polity whose demos is defined, understood and accepted in civic, non-organic-cultural terms, and would have legitimate rule-making democratic authority on that basis? To be sure, there is a German constitutional tradition from which the No Demos thesis arises which masks these possibilities since historically, at least from the time of the Kaiserreich or so there has been such a strong current which insists on the unity of Volk-Nation-State-Citizenship. A German citizen is, save for some exceptions, a German national,⁵⁴ primarily one

⁵⁴ German citizenship law is governed primarily and historically by the basic principle of *ius sanguinis* saying that only descendants of German citizens obtain German citizenship, § 4 Reichs- und Staatsangehörigkeitsgesetz (Citizenship Act from 1913). The *ius sanguinis*

who belongs to the Volk. Belonging to the Volk is normally the condition for citizenship.⁵⁵ And, in turn, citizenship in this tradition can only be understood in statal terms. Here the very language reflects the conflation: The concept of State is built into the very term of Staatsangehöriger. If there is citizenship, Statehood is premised. If there is Statehood, citizenship is premised. This is not simply a matter of constitutional and political theory. It finds its reflection in positive law. That is why naturalization in Germany -- other than through marriage, adoption and some other exceptions -- is an act which implies not simply accepting civic obligations of citizenship and loyalty to the State but of embracing German national identity understood in this thick cultural sense, a true cultural assimilation and a demand for an obliteration of other Volkish loyalties and identification⁵⁶. Thus, for example, emancipation of the Jews in Germany was premised on a consignment of Jewishness and Judaism to the realm of religion and a refusal to accept Jewish

concept, as opposed to the concept of *ius soli*, reflects a negative attitude towards immigration and an underlying concept of citizenship. It was carefully chosen in 1913 to promote and maintain the ethnic tradition of the German nation-state (Rittstieg, supra note 20, at 1387: "Die Reichstagsmehrheit des Jahres 1913 wählte ganz bewußt das Abstammungsprinzip zur nahezu ausschließlichen Anknüpfung der Staatsangehörigkeit, um die ethnische Tradition des deutschen Nationalstaatsgedankens zu fördern.").

⁵⁵ Cf. Isensee, *Abschied der Demokratie vom Demos*, supra note 20, at p. 735, describing the function of citizenship as "die nationale Einheit und die deutsche Identität zu gewährleisten"; see also Bleckmann, Albert, *Anwartschaft auf die deutsche Staatsangehörigkeit?*, NJW 1990, 1397, who makes a distinction between a formal citizenship (the 'normal' citizenship) and a material citizenship (the belongingness to the nation) (cf. *ibid.*, at 1399: "[D]as Staatsangehörigkeitsrecht [darf] nur solchen Personen die deutsche Staatsangehörigkeit verleihen, welche der deutschen Nation angehören, also in hinreichendem Maße in die deutsche Kulturintegration integriert sind.").

⁵⁶ The rules governing naturalization as the other possibility to attain German citizenship besides birth reveal the underlying concepts of German citizenship law (cf. Rittstieg, supra note 20, at 1387: "Die Einbürgerungsrichtlinien aus dem Jahre 1977 und ihre praktische Handhabung entsprechen ohne Einschränkung der völkischen Tradition des Reichs- und Staatsangehörigkeitsgesetzes"); Naturalization in Germany requires *inter alia* a voluntary and permanent dedication to Germany ("freiwillige und dauernde Hinwendung zu Deutschland"; *Einbürgerungsrichtlinien von Bund und Ländern vom 15.12.1977*, 3.1 and 3.1.1 [GMBl. 1978, 16, last changed through Circular Note BMI March 7, 1989, GMBl. 1989, 195]; it is not surprising, by the way, that this disposition is "hidden" in the guidelines for the naturalization-administration).

peoplehood.⁵⁷ To be a German citizen, under this conception, you have to be part of the Volk. And Germany as a State, is the State of the Germans understood in these terms.

Likewise, until very recently, you may have been a third generation resident of Germany and be denied citizenship because you are unable or unwilling to become "German" in a cultural and identification sense.⁵⁸ With few exceptions, the law specifically denies naturalization to resident who would wish to embrace the duties of citizenship but retain an alternative national identity. Multiple citizenship is permitted in peculiar circumstances but is frowned upon.⁵⁹ By contrast, if you are an ethnically defined German national even if a third generation citizen and resident of some far flung country you would still be a member of the Volk⁶⁰ and

⁵⁷ Cf. the following essays by Scholem, Gershom Gerhard, *Against the Myth of the German-Jewish Dialogue: Once More: The German-Jewish Dialogue: Jews and Germans*, in Scholem, Gershom Gerhard, *On Jews and Judaism in Crisis: Selected Essays*, New York, 1976.

⁵⁸ The 'request for ethnic assimilation' (Rittstieg, supra note 20, at 1385) has been weakened in the following way: since January 1, 1991, for foreigners aged 16-23 who have lived continuously in Germany for eight years citizenship is easier to attain (no more administrative discretion), apart from this, naturalization can no longer be arbitrarily refused to foreigners raised and educated in Germany or maintaining permanent residence for at least 15 years (§§ 85 and 86 *Ausländergesetz* [Foreigners Act]). Even in these cases one's former citizenship must be abandoned.

⁵⁹ Though multiple citizenship is possible the *Bundesverfassungsgericht* and other German courts as well as German constitutional scholars and the German government consider multiple citizenship as an 'evil' ("Übel", *BVerfGE* 37, 217 (254); *BVerwGE* 64, 7 (10); v. Mangoldt, *Probleme mehrfacher Staatsangehörigkeit*, *JZ* 1993, 965, at 969; Administrative guidelines for naturalization ("Einbürgerungsrichtlinien", supra note 56) 5.3; Statement of the Federal government in the Federal Parliament, *Bundestags-Drucksache* 12/2035, referring to question No. 4). They claim that this is a principle of public international law, which is doubtful (cf. Rittstieg, Helmut, *Doppelte Staatsangehörigkeit im Völkerrecht*, *NJW* 1990, 1401, at 1403).

⁶⁰ Volk in ethno-cultural sense, see Isensee, *Abschied der Demokratie vom Demos*, supra note 20, at p. 724: they belong to the "Volk als vor-rechtlicher, ethnisch-kultureller Einheit").

hence have a privileged position in applying for citizenship.⁶¹ On this view, the legal "passport" of membership in the polity is citizenship⁶²: Citizenship is what

⁶¹ I certainly do not wish to enter into the miasma of the German law on citizenship. Still, it may seem typical of the German conception of citizenship that a notion like 'member of the German Volk' ("deutscher Volkszugehöriger") is still relevant in German citizenship law, as well in the context of naturalization as for the question of who has to be considered as a German ("Deutscher") in the sense of the constitution: "Volkszugehöriger" is a notion that has been introduced by the legislator in 1938. In a circular note from 1939, the Minister of the Interior (Runderlaß des RMI vom 29.3.1939 [RMBliV 783]) defined Volkszugehörige in cultural and in racial terms ("Deutscher Volkszugehöriger ist, wer sich selbst als Angehöriger des deutschen Volkes bekennt, sofern dieses Bekenntnis durch bestimmte Tatsachen, wie Sprache, Erziehung, Kultur usw., bestätigt wird. Personen artfremden Blutes, insbesondere Juden, sind niemals solche Volkszugehörige, auch wenn sie sich bisher als solche bezeichnet haben."). After the war, the notion of Volkszugehöriger was re-defined in a statute of the Federal Republic of Germany (§ 6 BVFG: "Deutscher Volkszugehöriger im Sinne dieses Gesetztes ist, wer sich in seiner Heimat zum deutschen Volkstum bekannt hat, sofern dieses Bekenntnis durch bestimmte Merkmale wie Abstammung, Sprache, Erziehung, Kultur bestätigt wird."), the close relation to the definition of 1939 is obvious (Makarov, Alexander / von Mangoldt, Hans, *Deutsches Staatsangehörigkeitsrecht. Kommentar*, 10. Lieferung August 1993, Neuwied, Section 11, para. 5). In administrative guidelines, the notion of "Volkszugehöriger" is related to the idea of nation, see e.g. for the state of Bavaria the guidelines quoted in Makarov / von Mangoldt, *ibid.*, Section 2, at para 26: "Das Bekenntnis zum deutschen Volkstum setzt das Bewußtsein und den Willen voraus, ausschließlich als Angehöriger des deutschen Volkes als einer national geprägten Kulturgemeinschaft angesehen zu werden und sich dieser Gemeinschaft verbunden zu fühlen [...]. Eine deutschfreundliche Einstellung und Betätigung reicht für dieses Bekenntnis nicht aus [...]." Although it is claimed that "deutscher Volkszugehöriger" is not an ethnological but only a legal term (Makarov / von Mangoldt, *ibid.*, Section 2, at para. 34; see also Administrative Guidelines on § 6 BVFG [Richtlinien zur Anwendung des § 6 BVFG, Musterlaß des Landes Nordrhein-Westfalen vom 20.2.1980, MBl. NRW 1980, 1782]), and that the rather technical notion of citizenship on the one hand and belonging to a people or a nation on the other hand are independant from each other (von Mangoldt, *supra* note 58, at 971), the idea of a multinational or even multicultural polity is clearly not entertained by German citizenship law. For recent implications with regard to the notion of "Volkszugehöriger" (esp. the dramatic influx of ethnic Germans from Eastern Europe and the Soviet Union, over 1 million between 1988 and 1991) see Brubaker, Rogers, *Citizenship and Nationhood in France and Germany*, Cambridge, Mass./London 1992, pp. 168 et seq.

⁶² Cf. Isensee, *Abschied der Demokratie vom Demos*, *supra* note 20, at p. 706: "Das Volk, auf dem die Demokratie als Staats- und Regierungsform aufbaut, wird gefaßt durch das Staatsangehörigkeitsrecht. Volk in diesem rechtlichen Sinn ist die Gesamtheit der Staatsangehörigen.": at p. 707: "Die rechtliche Verfaßtheit des Volkes liegt im

defines you as a member of the polity with full political and civil rights and duties. But that, in turn, is conflated with nationality, with being a member of the Volk in the organic-cultural sense.⁶³ And, since Demos is defined in national terms, the only Demos conceivable is one the members of which are citizen-nationals -- hence the state.

I should point out that Germany is not the only state in Europe or elsewhere whose membership philosophy is so conceived. In some measure that is the philosophy of the nation-state. But it does offer a rather extreme example of the conflation of State, Volk/Nation and Citizenship.

Be that as it may, this conflation is neither necessary conceptually, nor practiced universally, nor, perhaps, even desirable. There are quite a few states where, for example, mere birth in the state creates actual citizenship or an entitlement to citizenship without any pretence that you thus become a national in an ethno-cultural sense. There are states where citizenship, as a commitment to the constitutional values and the civic duties of the polity are the condition of naturalization whereas nationality, in an ethno-cultural sense is regarded, like religion, a matter of individual preference.⁶⁴ There are states, like Germany, with a strong ethno-cultural identity, which, nonetheless, allow citizenship not only to individuals with other nationalities, who do not belong to the majority Volk, but to minorities with strong, even competing, ethno-cultural identities.⁶⁵ It is, I

Staatsangehörigkeitsrecht."

⁶³ In that sense Isensee, *Abschied der Demokratie vom Demos*, supra note 20, at p. 706: "Die Staatsangehörigkeit muß an Vorgaben realer Homogenität und politischen Einheitswillens anknüpfen, die das Recht als solches nicht schaffen und nicht herbeizwingen [...] kann."

⁶⁴ This, in theory, is the American constitutional design. Naturalization is understood primarily in civic terms and many proud American citizens are equally proud about their diverse ethno-national identity -- African Americans, Italo-Americans, Jewish Americans etc. Of course, in the actuation of this design there have been no shortages of pathologies such as the shameful internment of Japanese Americans during World War II, not to mention that ever present burden of racism in American society.

⁶⁵ Israel is interesting in this respect. It is conceived as the State of the Jews understood in a Volk sense. But its citizenship is not exclusively Volk based. Being a Jew is certainly not a condition for citizenship -- there is a sizable Arab minority with full membership and

suppose, a matter for the Germans to decide whether the unity of Volk, Staat, and Staatsangehörigkeit continues to be the best way in which to conceive of their state, nation and citizenry. I shall return to this theme below.

Embedded, however, in the decision of the Bundesverfassungsgericht is an understanding not only of German polity and demos but of Europe too, notably in its "Not Yet" formulation. When the German Court tells us that there is not yet a European demos, it implicitly invites us to think of Europe, its future and its very telos in organic-national terms. It implicitly construes Europe in some sort of "pre-state" stage, as yet underdeveloped and hence lacking in its own legitimate rule-making and democratic authority. It is this (mis)understanding which produces the either-or zero sum relationship between Europe and Member State. If demos is Volk and citizenship can only be conceived as *Staatsangehörigkeit*, then European demos and citizenship can only come at the expense of the parallel German terms.

What is inconceivable in this view is a decoupling of nationality (understood its Volkish organic national-cultural sense) and citizenship. Also inconceivable is a demos understood in non-organic civic terms, a coming together on the basis not of shared ethnos and/or organic culture, but a coming together on the basis of shared values, a shared understanding of rights and societal duties and shared rational, intellectual culture which transcend organic-national differences.⁶⁶

citizenship. Here too there is no dearth of pathologies in the actuation of what is essentially a State with at least two national groups but one citizenship.

⁶⁶ I claim no originality for the idea of decoupling of nationality and citizenship, a concept which has already been suggested, especially in non-legal writings, including quite prominently in Germany itself: see generally, Kristeva, Julia, *Nations without Nationalism*, New York 1993, and a recent brilliant construct: Von Bogdandy, Armin, *L'Unione Sovranazionale Come Forma di Potere Politico. X Teoria Politica* 133 (1994). In Germany see above all Habermas, supra note 20, at 633, 634, 637, 638, 643, and M. Rainer Lepsius, "Ethnos" oder "Demos" - Zur Anwendung zweier Kategorien von Emerich Francis auf das nationale Selbstverständnis der Bundesrepublik und auf die europäische Einigung, in: Lepsius, *Interessen, Ideen und Institutionen*, supra note 52, p. 247, at 249 et seq., both with further references. Lepsius clearly shows the dangers of the concept of conflating nationality and citizenship and hints at the Third Reich: "Jede Gleichsetzung des 'Demos' als des Trägers der politischen Souveränität mit einem spezifischen 'Ethnos' führt im Ergebnis zu einer Unterdrückung oder Zwangsassimilation von anderen ethnischen, kulturellen, religiösen oder sozio-ökonomischen Bevölkerungsteilen innerhalb eines politischen Verbandes. [...] [D]as Gleichheitsgebot zwischen den Staatsbürgern erfährt eine Brechung über zusätzliche

Equally inconceivable in this view is the notion of a polity enjoying rule making and democratic authority whose demos, and hence the polity itself, is not statal in character and is understood differently from the German self-understanding. Finally, and critically, what is also inconceivable on this view is that a Member State like Germany may have its own understanding of demos for itself (for example its relatively extreme form of State=People=Citizens) but be part of a broader polity with a different understanding of demos.

At the root of the No Demos thesis is ultimately a world view which is enslaved to the concepts of Volk, Staat and Staatsangehöriger and cannot perceive the Community or Union in anything other than those terms. This is another reason why the Union may appear so threatening since the statal vision can only construe it in oppositional terms to the Member State. But that is to impose on the Community or Union an external vision and not an attempt to understand (or define it) in its own unique terms. It is a failure to grasp the meaning and potentialities of supranationalism.

Before returning, then, to the potentialities of decoupling Nationality and Citizenship, it will be worth to discuss the broader relationship between Union, Nation and State within the European construct encapsulated in the term supranationalism. It will appear that supranationalism and nationalism are not truly oppositional.

V. Supranationalism: Community, Nation and State

How, then, should we understand -- or construe -- the notion of supranationalism in this context? A word of caution would be necessary here. There is no fixed meaning to the term supranationalism. Indeed, from its inception there seems to have been two competing visions of its realization through the Community: a Unity or statal vision -- encapsulated in those who favoured a United States of

Eigenschaften: die ethnische Gleichheit, die religiöse Gleichheit, die kulturelle Gleichheit oder die rassische Gleichheit. Das extremste Beispiel für die Brechung der staatsbürgerlichen Gleichheitsnorm durch die Einführung eines weiteren Kriteriums zur Gewährung der politischen Gleichheit stellt die nationalsozialistische Judengesetzgebung dar, durch die deutsche Staatsbürger jüdischer Herkunft ihrer Gleichheitsrechte beraubt wurden." (pp. 249-250). Evidently the thinking was there if the Court and judges were interested in it. Why this thinking has been eschewed in the context of the German Europe legal debate is, I believe, because of misunderstanding the nature of Community.

Europe -- and a more attenuated Community vision. The two strands (which, of course, overlap) have continued to co-exist. But it is my reading of the historical map -- the rejection of the European Defense Community and the European Political Community in the 50s and the articulation of supranationalism in, especially, the Treaty of Rome and its practices -- that the Community vision prevailed in the formative years of the EC.

In trying to explain the ways in which the Community is, or has become, supranational, most discussion over the years has tended, interestingly, to focus on its relation to the "state" rather than the "nation." This conflation of nation/state is not always helpful. Supranationalism relates in specific and discreet ways to nationhood and to statehood. Indeed, in my understanding and construction of supranationalism its value system is, surprisingly actually wrapped up with the value system of European ethno-national liberalism of the 19th century and, as such, can offer great comfort to those concerned to preserve the values and virtues of the nation-state.

To see the relationship between supranationalism, nationhood and statehood, I propose to focus in turn on nationhood and statehood and try and explore their promise and their dangers. This will be then related to the ends of supranationalism. Naturally, in discussing nation and state, I shall only give a few pointers and headlines of what would otherwise have to be an extremely elaborate analysis.

With all the talk about Volk and Nation and with all our obsessions about the dangers of nationalism and chauvinism and even racism which are often said to derive from these concepts, what can be said about them in normative terms? What values can they be said to uphold and vindicate? I will talk about nationhood but this could, in most respects, capture Volk and peoplehood, too.

It seems to me that, at least in its 19th century liberal conception, two deep human values are said to find expression in nationhood: Belongingness and Originality. (It should immediately be stated that nationhood is not the only social form in which these values may find expression).

Belongingness is inherent in nationhood, nationhood is a form of belonging. Nationhood is not an instrument to obtain belongingness, it is it. Form and substance here conflate, the way they do, say, in a love sonnet by Shakespeare: The value of the sonnet does not lie in, say, its message of love; we do not think of the

sonnet as an instrument for the conveyance of the idea. Take away the form and the message is banal. What gives the sonnet its timeless value is the inextricable way in which the substance and the form were woven together by Shakespeare.

What are the values embedded in belonging, in national belonging, beyond the widely shared view that belonging is pleasant, is good? We can readily understand a certain basic appeal to our human species which is, arguably, inherently social: the appeal that family and tribe have, too. Part of the appeal is, simply, the provision of a framework for social interaction. But surely one has to go beyond that: after all, much looser social constructs than nationhood, let alone tribe and family, could provide that framework. Belonging means, of course, more than that. It means a place, a social home.

The belonging of nationhood is both like and unlike the bonds of blood in family and tribe and in both this likeness and unlikeness we may find a clue to some of its underlying values.

It is like the "bonds of blood" in family and tribe in that those who are of the nation have their place, are accepted, belong, independently of their achievements - by just being -- and herein lies the powerful appeal (and terrible danger) of belonging of this type -- it is a shield against existential aloneness. In, for example, the tradition of the Jewish nation, a tradition worthy of some consideration given the continuity of Jewish national survival for over three millennia, we find a normative expression to this form of belonging: "Even though he has sinned, he remains Israel."⁶⁷ The power of this belongingness may be understood by the drama and awesomeness of its opposites: isolation, seclusion, excommunication.

But nationhood transcends the family and tribe, and maybe here lurks an even more tantalizing value: Nationhood not only offers a place to the familyless, to the tribeless, but in transcending family and tribe it calls for loyalty -- the largest coin in the realm of national feeling -- towards others which go beyond the immediate "natural" (blood) or self-interested social unit.

And, indeed, belongingness of this type is a two way street. It is not only a passive value: to be accepted. It is also active: to accept. Loyalty is one of those virtues which, if not abused, benefits both those on the giving and receiving ends.

⁶⁷ Talmud Sanhedrin, p. 44:2.

The other core value of nationhood, in some ways also an instrument for national demarcation, is the claim about originality. On this reading, the Tower of Babel was not a sin against God but a sin against human potentiality; and the dispersal that came in its aftermath, not punishment, but divine blessing. The nation, with its endlessly rich specificities, coexisting alongside other nations, is, in this view, the vehicle for realizing human potentialities in original ways, ways which humanity as a whole would be the poorer for not cultivating.⁶⁸ (How one decides the self which qualifies as a nation is a tantalizing issue which is not necessary to explore here).

It is here that one may turn from the nation to the modern state. It is worth remembering at the outset that national existence and even national vibrancy do not in and of themselves require statehood, though statehood can offer the nation advantages, both intrinsic as well as advantages resulting from the current organization of international life which gives such huge benefits to statehood.

I would argue that in the modern notion of the European organic-national nation-state, the state is to be seen principally as an instrument, the organizational framework within which the nation is to realize its potentialities. It is within the statal framework that governance, with its most important functions of securing welfare and security, is situated. The well-being and integrity of the state must, thus, be secured so that these functions may be attained. That is not a meager value in itself. But to the extent that the state may claim, say, a loyalty which is more than pragmatic, it is because it is at the service of the nation with its values of belongingness and originality. (This conceptualization underscores, perhaps exaggerates, the difference with the American truly radical alternative liberal project of the non-ethno-national polity, and of a state, the Republic, the organization of which, and the norms of citizenship behavior within, were central to its value system.)

It is evident, however, that in the European project, boundaries become a very central feature of the nation-state.

⁶⁸ The "Tower of Babel"-metaphor is as well employed and - in its ambiguity - explored by Gauger, Hans-Martin, *Kommunikation und Identität: Zum Problem der Sprache*, in: Bremer, Bento (ed.), *Europe By Nature. Starting-Points for Sustainable Development*, Assen/Maastricht 1992, p.133, at 138-139.

There are, obviously, boundaries in the legal-geographical sense of separating one nation-state from another. But there are also internal, cognitive boundaries by which society (the nation) and individuals come to think of themselves in the world.

At a societal level, nationhood involves the drawing of boundaries by which the nation will be defined and separated from others. The categories of boundary-drawing are myriad: linguistic, ethnic, geographic, religious etc. The *drawing* of the boundaries is exactly that: a constitutive act, which decides that certain boundaries are meaningful both for the sense of belonging and for the original contribution of the nation. This constitutive element is particularly apparent at the moment of "nation building" when histories are rewritten, languages revived etc. Of course, with time, the boundaries, especially the non-geographical ones, write themselves on collective and individual consciousness with such intensity that they appear as natural -- consider the virtual interchangeability of the word international with universal and global: It is hard not to think, in the social sphere, of the world as a whole without the category of nation (as in international).

Finally, at an individual level, belonging implies a boundary: You belong because others do not.

As evident as the notion of boundaries is to the nation-state enterprise, so is the high potential for abuse of boundaries.

The abuse may take place in relation to the three principal boundaries: The external boundary of the State, the boundary between nation and state and the internal consciousness boundary of those making up the nation.

The most egregious form of abuse of the external boundary of the State would be physical or other forms of aggression towards other states.

The abuse of the boundary between nation and state is most egregious when the state comes to be seen not as instrumental for individuals and society to realize their potentials but as an end in itself. Less egregiously, the State might induce a 'laziness' in the nation - banal statal symbols and instrumentalities becoming a substitute for truly original national expression. This may also have consequences for the sense of belongingness whereby the apparatus of the State becomes a substitute to a meaningful sense of

belonging. An allegiance to the State can replace human affinity, empathy, loyalty and sense of shared fate with the people of the State.

There can be, too, an abuse of the internal boundary which defines belongingness. The most typical abuse here is to move from a boundary which defines a sense of belonging to one which induces a sense of superiority and a concomitant sense of condescension or contempt for the other. A sense of collective national identity implies an other. It should not imply an inferior other.

The manifestations of these abuses are a living part of the history of the European nation-state which are so well known as to obviate discussion.

A central plank of the project of European integration may be seen, then, as an attempt to control the excesses of the modern nation-state in Europe, especially, but not only, its propensity to violent conflict and the inability of the international system to constrain that propensity. The European Community was to be an antidote to the negative features of the state and statal intercourse; its establishment in 1951 was seen as the beginning of a process that would bring about the elimination of these excesses.

Historically there have, as mentioned above, always been those two competing visions of European Integration. Whilst no one has seriously envisioned a Jacobin type centralized Europe, it is clear that one vision, to which I have referred as the Unity vision, the United States of Europe vision, has really posited as its ideal type, as its aspiration, a statal Europe, albeit of a federal kind. Tomorrow's Europe in this form would indeed constitute the final demise of Member State nationalism replacing or placing the hitherto warring Member States within a political union of federal governance.

It is easy to see some of the faults of this vision: It would be more than ironic if a polity set up as a means to counter the excesses of statism ended up coming round full circle and transforming itself into a (super) state. It would be equally ironic if the ethos which rejected the boundary abuse of the nation-state, gave birth to a polity with the same potential for abuse. The problem with this Unity vision is that its very realization entails its negation.

The alternative vision, the one that historically has prevailed, is the supranational

b/ vision, the community vision. At one level aspirations here are both modest compared to the Union model and reactionary: Supranationalism, the notion of community rather than unity, is about affirming the values of the liberal nation-state by policing the boundaries against abuse. Another way of saying this would be that Supranationalism aspires to keep the values of the nation-state pure and uncorrupted by the abuses I described above.

At another level the supranational community project is far more ambitious than the Unity one and far more radical. It is more ambitious since, unlike the Unity project which simply wishes to redraw the actual political boundaries of the polity within the existing nation-state conceptual framework, albeit federal, the supranational project seeks to redefine the very notion of boundaries of the State, between the Nation and State, and within the Nation itself. It is more radical since, as I shall seek to show, it involves more complex demands and greater constraints on the actors.

How, then, does supranationalism, expressed in the community project of European integration, affect the excesses of the nation-state, the abuse of boundaries discussed above?

At the pure statal level supranationalism replaces the "liberal" premise of international society with a community one. The classical model of international law is a replication at the international level of a liberal theory of the state. The state is implicitly treated as the analogue, on the international level, to the individual within a domestic situation. In this conception, international legal notions, such as self-determination, sovereignty, independence, and consent have their obvious analogy in theories of the individual within the state. In the supranational vision, the community as a transnational regime will not simply be a neutral arena in which states will seek to pursue the national interest and maximize their benefits, but will create a tension between the state and the Community of states. Crucially, the community idea is not meant to eliminate the national state but to create a regime which seeks to tame the national interest with a new discipline. The challenge is to control at societal level the uncontrolled reflexes of national interest in the international sphere.

Turning to the boundary between nation and state supranationalism is meant to prevent abuses here, too. The supranational project recognizes that at an inter-group level nationalism is an expression of cultural (political and/or other) specificity

underscoring differentiation, the uniqueness of a group as positioned vis-à-vis other groups, calling for respect and justifying the maintenance of inter-group boundaries. At an intra-group level nationalism is an expression of cultural (political and/or other) specificity underscoring commonality, the "sharedness" of the group vis-à-vis itself, calling for loyalty and justifying elimination of intra-group boundaries.

But, crucially, nationality is not the thing itself -- it is its expression, an artifact. It is a highly stylized artefact, with an entire apparatus of norms and habits; above all it is not a spontaneous expression of that which it signifies but a code of what it is meant to give expression to, frequently even translated into legal constructs. Nationality is inextricably linked to citizenship, citizenship not simply as the code for group identity, but also as a package of legal rights and duties, and of social attitudes.

Supranationalism does not seek to negate as such the interplay of differentiation and commonality, of inclusion and exclusion and their potential value. But it is a challenge to the codified expressions in nationality. Since, in the supranational construct with its free movement provisions which do not allow exclusion through statal means of other national cultural influences and with its strict prohibition on nationality/citizenship based discrimination, national differentiation can not rest so easily on the artificial boundaries provided by the State. At intergroup level then it pushes for cultural differences to express themselves in their authentic, spontaneous form, rather than the codified statal legal forms. At the intra-group level it attempts to strip the false consciousness which nationalism may create instead of belongingness derived from a non-formal sense of sharedness. This, perhaps, is the first Kantian strand in this conceptualization of supranationalism. Kantian moral philosophy grounds moral obligation on the ability of humans not simply to follow ethical norms, but, as rational creatures, to determine for themselves the laws of their own acting and to act out of internal choice according to these norms. Supranationalism on our view favours national culture when, indeed, it is authentic, internalized, a true part of identity.

There is another, Enlightenment, Kantian idea in this discourse. Supranationalism at the societal and individual, rather than the statal level, embodies an ideal which diminishes the importance of the statal aspects of nationality -- probably the most powerful contemporary expression of groupness -- as the principal referent for transnational human intercourse. That is the value side of non-discrimination on grounds of nationality, of free movement provisions and the like. Hermann Cohen,

the great neo-Kantian, in his *Religion der Vernunft aus den Quellen des Judentums*⁶⁹, tries to explain the meaning of the Mosaic law which call for non-oppression of the stranger. In his vision, the alien is to be protected, not because he was a member of one's family, clan religious community or people, but because he was a human being. In the alien, therefore, man discovered the idea of humanity.

We see through this exquisite exegesis that in the curtailment of the totalistic claim of the nation-State and the reduction of nationality as the principle referent for human intercourse, the Community ideal of supranationalism is evocative of, and resonates with, Enlightenment ideas, with the privileging of the individual, with a different aspect of liberalism which has as its progeny today in liberal notions of human rights. In this respect the Community ideal is heir to Enlightenment liberalism. Supranationalism assumes a new, additional meaning which refers not to the relations among nations but to the ability of the individual to rise above his or her national closet.

VI. Between State Citizenship and Union Membership

What, must now be asked, is the nature of membership in such a construct of Community and Member States? Does that construct have a demos? Can it have a demos?

How is it possible, it may be asked by those to whom Volk is the demos, and the demos is the basis for legitimate authority in a statal structure, other than in a formalistic and semantic sense to decouple peoplehood from citizenship? Do not Volk and nationality with their organic-cultural grounding create in the individual member a sense of closeness, in the national community a sense of social cohesion which are both necessary for the sense of duty and loyalty which are and should be conditions for citizenship?

There may be strength in this argument. The critique of it is not that it is necessarily wrong, but that it is a world view which may be seen as more or less attractive. It is certainly far from compelling. I wish to look at it first at the level of state and then at the European level.

⁶⁹ Cohen, Hermann, *Die Religion der Vernunft aus den Quellen des Judentums*, Leipzig 1919.

Here are some reasons to be suspicious of this view even at the statal level:

Note first the impoverished view of the individual and human dignity involved in the Volk-State-Citizenship equation: Is it really not possible for an individual to have very strong and deep cultural, religious and ethnic affiliations which differ from the dominant ethno-cultural group in a country, and yet in truth accept full rights and duties of citizenship and acquit oneself honorably? And to look at the other, societal, side of this coin: Is it necessary for the state to make such a deep claim on the soul of the individual, reminiscent of the days when Christianity was a condition for full membership of civic society and full citizenship rights -- including the right to have citizenship duties?

Note, too, that the view that would decouple Volk from Demos and Demos from State, in whole or in part, does not require a denigration of the virtues of nationality -- the belongingness, the social cohesion the cultural and human richness which may be found in exploring and developing the national ethos.⁷⁰ It questions whether nationality in the organic sense, as a guarantor of homogeneity of the polity, must be the exclusive condition of full political and civic membership of that polity. Let me not mince my words: To reject this construct as impossible and/or undesirable is to adopt a worldview which ultimately informs ethnic cleansing. I am not suggesting, of course, that the German Court and its Judges feel anything but abhorrence to that particular solution. But their authoritative pronouncements on the German Constitution cannot but be an important voice in defining the discourse and civic ethos of the public square.

That such an infamous worldview as ethnic cleansing has an intellectual nexus to the construct which makes citizenship depend on nationality and conflates both with the State is apparent from one prominent source of this construct, Carl Schmitt. The insistence on "homogeneity" as a prerequisite for democracy may, in the urbane discourse of the Constitutional Court, seem innocuous enough. But Schmitt himself was able, in the climate in which he wrote, to avoid euphemisms and spell out unadorned the implications of this construct. Thus, in his *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, we find: "Zur

⁷⁰ Therefore, attempts to redefine citizenship in a way which cuts all links between the demos and national belongingness - as mentioned, e.g., by Dellavalle, supra note 52, at 258 - are not strictly necessary and may go too far.

Democratie gehört also notwendig erstens Homogenität und zweitens -- nötigenfalls -- die Ausscheidung oder Vernichtung des Heterogenen." (2nd ed. Berlin 1926, p.14). No less.

The next step follows naturally. Referring, approvingly, to, *inter alia*, Turkey's expulsion of its Greek community he notes: "Die Politische Kraft einer Demokratie zeigt ich darin, dass sie das Fremde und Ungleiche, die Homogenität Bedrohende zu beseitigen oder fernzuhalten weiss." (*Id.*) The final step, in which theory and praxis combine, is no surprise either. Reichsgruppenwalters Staatsrat Schmitt convenes in 1936 a conference of leading figures in the legal world to discuss *Das Judentum in der Rechtswissenschaft*. In the concluding address to the Conference, Schmitt, at least, does not shy away from the implication of the theoretical construct. The cleansing begins with books ("Säuberung der Bibliotheken") but inevitably moves to demonization of their authors. (*Der Jude hat zu unserer geistigen Arbeit eine parasitäre, eine taktische und eine händlerische Beziehung*). As such, that particular heterogeneous element is defined as a "Todfeind." The logic of Schmitt's final statement is unassailably pure. His concluding words, unchanged, speak for themselves: "Was wir suchen und worum wir kämpfen, ist unser unverfälschte eigene Art, die unversehrte Reinheit unseres deutschen Volkes." "Indem ich mich des Juden erwehre" sagt unser Führer Adolf Hitler, "kämpfe ich für das Werk des Herrn" (Schlusswort des Reichsgruppenwalters Staatsrat Prof. Dr. Carl Schmitt, in Vol. 1. *Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist*, in *Das Judentum in der Rechtswissenschaft*, Deutscher Rechts-Verlag, Berlin 1936).

Be all this as it may, at the level of state and nation, the conflating of Volk with demos and demos with state, is clearly unnecessary and undesirable as a model for Europe. In fact such a model would deflect Europe from its supranational civilizing telos and ethos. There is no reason for the European demos to be defined in terms identical to the demos of one of its Member States or vice-versa.⁷¹

Consider the Maastricht citizenship provisions:

⁷¹ See generally in this context the illuminating Meehan, Elizabeth, *Citizenship and the European Community*, London 1993; Lippolis, V., *La Cittadinanza Europea*, Bologna 1994; cf. Koslowski, Ray, *Intra-EU Migration, Citizenship and Political Union*, 32 *Journal of Common Market Studies* 369 (1994).

Article 8

Citizenship of the Union is hereby established.

Every person holding the nationality of a Member State shall be a citizen of the Union [...]

The introduction of citizenship to the conceptual world of the Union could be seen as just another step in the drive towards a statal, unity vision of Europe, especially if citizenship is understood as being premised on statehood. I speculated on this dangers of this possibility elsewhere. (Europe After Maastricht -- Do the New Clothes have an Emperor).

But there is another more tantalizing and radical way of understanding the provision, namely as the very conceptual decoupling of nationality/Volk from citizenship and as the conception of a polity the demos of which, its membership, is understood in civic rather than organic-cultural terms. On this view, the Union belongs to, is composed of, citizens who by definition do not share the same nationality. The substance of membership (and thus of the demos) is in a commitment to the shared values of the Union as expressed in its constituent documents, a commitment to the duties and rights of a civic society covering discrete areas of public life, a commitment to membership in a polity which privileges exactly the opposites of classic organic-nationalism -- those human features which transcend the differences of organic cultural nationalism. It should be noted that I am suggesting here something that is more than simple American Republicanism transferred to Europe. First, even though the USA rejected ethno-culturalism as a basis for citizenship, America is very much about nation building: One Nation, Indivisible Under God -- the famous American Pledge of Allegiance. The idea of European Demos here is not about One Nation, not about Indivisibility and certainly not about God. What is special in this understanding of the European construct (and in this it also goes in some ways beyond Habermassian Constitutional Patriotism despite the large intellectual debt owed to that construct) is that it invites individuals to see themselves as belonging simultaneously to two demoi, *based on different subjective factors of identification*. I may be a German national in the in-reaching strong sense of organic-cultural identification and sense of belongingness. I am simultaneously a European citizen in terms of my European transnational affinities to shared values which transcend my organic-national diversity. So much so, that in the a range of areas of public life, I am willing to accept the legitimacy and authority of decisions adopted by my fellow European

citizens in the realization that in these areas I have given preference to choices made by my outreaching demos, rather than by my in-reaching demos. Indeed, this may be especially important in a value-based demos. Our tendencies, after all, are frequently to interpret value systems in a way which would be self-serving. There is a self-disciplining virtue to grant normative authority, in selective fields, precisely to a demos of shared political commitments but different cultural sensibilities.

There is another sense in which the European construct is different from the American model. The values one is discussing may be seen to have a special European specificity, a specificity I have explored elsewhere but one dimension of which, by simple way of example, could most certainly be that strand of mutual social responsibility embodied in the ethos of the Welfare State adopted by all European societies and by all political forces.

The Treaties on this reading would have to be seen not only as an agreement among states (a Union of States) but as a "social contract" among the nationals of those states -- ratified in accordance with the constitutional requirements in all Member States -- that they will in the areas covered by the Treaty regard themselves as associating as citizens in this civic society. We can go even further. In this polity, and to this demos, one cardinal value is precisely that there will not be a drive towards, or an acceptance of, an over-arching organic-cultural national identity displacing those of the Member States. Nationals of the Member States are European Citizens, not the other way around. Europe is "not yet" a demos in the organic national-cultural sense and should never become one.

One should not get carried away with this construct. Note first that the Maastricht formula does not imply a full decoupling: Member States are free to define their own conditions of membership and these may continue to be defined in Volkish terms. (But then we know that the conditions of nationality and citizenship differ quite markedly from one Member State to another.) Moreover, the gateway to European citizenship passes through Member State nationality⁷². More critically,

⁷² It is remarkable that there is a historical precedent for this in 19th century Germany: 1867 and 1871. German citizenship depended upon citizenship of the states forming the federation, there was no initial centralized German citizenship. see Laband, Paul, *Das Staatsrecht des Deutschen Reiches*, 5th ed., Tübingen 1911, Vol. 1, p. 134; Magiera, Siegfried, *Die neuen Entwicklungen der Freizügigkeit für Personen: Auf dem Wege zu einem europäischen Bürgerstatut*, *Europarecht* 1992, 434, at 446; Hobe, Stephan, *Die*

even this construct of the European demos, like the Volkish construct, depends on a shift of consciousness. Individuals must think of themselves in this way before such a demos could have full legitimate democratic authority. The key for a shift in political boundaries is the sense of feeling that the boundaries surround one's own polity. I am not making the claim that this shift has already occurred. Nor am I making any claims about the translation of this vision into institutional and constitutional arrangements. I am making, however, the following claims: A. We don't know about public consciousness of a civic polity based demos because the question has to be framed in this way in order to get a meaningful response. B. This shift will not happen if one insists that the only way to understand demos is in Volkish ways. C. That this understanding of demos makes the need for democratization of Europe even more pressing. A demos which coheres around values must live those values.

There is one final issue which touches, perhaps, the deepest stratum of the No Demos thesis. It is one thing to say, as does Maastricht, that nationals of Member States are citizens of the Union. But are not those nationals also citizens of their Member State? Even if one accepts that one can decouple citizenship and nationality and that one can imagine a demos based on citizenship rather than on nationality, can one be a citizen of both polities? Can one be a member of not one but also a second demos? We have already noted the great aversion of this strand of German constitutionalism to multiple citizenship.

I want to address this question in two different ways. One is simply to point out the fairly widespread practice of states allowing double or even multiple citizenship with relative equanimity. For the most part, as a matter of civic duties and rights this does not create many problems. This is true also in the Community. It is true that in time of, say, war the holder of multiple citizenship may be in an untenable situation. But cannot even the European Union create a construct which assumes that war among its constituent Member States is not only materially impossible but unthinkable? The sentiment against multiple citizenship is not, I think, rooted in practical considerations.

Instead, at a deeper level the issue of double citizenship evokes the spectre of double loyalty. The view which denies the status of demos to Europe may derive

Unionsbürgerschaft nach dem Vertrag von Maastricht. Auf dem Weg zum Europäischen Bundesstaat?, *Der Staat* 1993, 245, at 252 et seq.

thus from a resistance to the idea of double loyalty. The resistance to double loyalty could be rooted in the fear that some flattened non-descript unauthentic and artificial "Euro-culture" would come to replace the deep, well articulated, authentic and genuine national version of the same. It could also be rooted in the belief that double loyalty must mean that either one or both loyalties have to be compromised.⁷³

On the first point I do not believe that any of the European organic national-cultural identities is so weak or fragile as to be risked by the spectre of a simultaneous civic loyalty to Europe. I have already argued that the opposite is also likely. Unable to rest on the formal structures of the State, national culture and identity has to find truly authentic expressions to enlist loyalty which can bring about real internally found generation. What is more, the existential condition of fractured self, of living in two or more worlds can result not in a flattening of one's cultural achievement but in its sharpening and deepening. Can anyone who has read Heine, or Kafka, or Canetti doubt this?

But what about the political aversion to double loyalty? This, paradoxically, is most problematic especially in a polity which cherishes organic national-cultural homogeneity as a condition of membership. It is hard to see why, other than for some mystical or truly "blood thicker than water" rationale, say, a British citizen who thinks of herself as British (and who forever will speak with an English accent) but who is settled in, say, Germany and wishes to assume all the duties and rights of German citizenship could not be trusted in today's Europe loyalty to do so? Moreover, we have already seen that European citizenship would have a very different meaning than German citizenship. The two identities would not be competing directly "on the same turf". It seems to me that the aversion to double loyalty, like the aversion to multiple citizenship itself, does not seem to be rooted primarily in practical considerations. It rests I think in a normative view which wants national self-identity -- identified with the State and its organs -- to rest very deep in the soul, in a place which hitherto was occupied by religion. The imagery

⁷³ The 'danger' of double-loyalty was also the main argument behind the reasoning against a right to vote for foreign citizens on the communal level in Germany, see Isensee, *Abschied der Demokratie vom Demos*, supra note 20, at p. 733 ("Der Ausländer bleibt dagegen seinerseits seinem Heimatstaat personenrechtlich verbunden und diesem nach Maßgabe seines Rechts zur Loaylität verpflichtet. Mit der Zuweisung des Wahlrechts im Aufenthaltsstaat ist der rechtliche wie der politische Loyalitätskonflikt programmiert.")

of this position -- turning to Fate -- is occasionally evocative of those sentiments.⁷⁴ The reason for this, I think, derives from the recognition of the greatest pull of nationalism. It is by evoking fate and destiny that nationalism can respond the deepest existential yearning, that of giving meaning and purpose to life which extend beyond mere existence or selfish fulfillment. Religion, with greater legitimacy, occupies itself with these deeper recesses of the human spirit and, consequently makes these claims for exclusivity. The mixing of State loyalty and religion risks, in my view, idolatry from a religious perspective and can be highly dangerous from a political one. Historically, it seems as if Volk and Staat, Blood and Soil, did indeed come to occupy these deepest parts of the human spirit to the point of being accepted "über alles" with terrifying consequences. My view of the matter is not that the very idea of Volk and Staat was murderous nor even evil though, as I think is clear from this essay, my preference is for multiple loyalties, even *demos* within the State. It is the primordial position which Volk mixed with Staat occupied, instilling uncritical citizenship which allowed evil, even murderous designs to be executed by dulling critical personal faculties, legitimating extreme positions, subduing transcendent human values and debasing one of the common strands of the three monotheistic religions that human beings, all of them, were created in the image of God.

How then do we achieve "critical citizenship"? The European construct I have put forward, which allows for a European civic, value-driven *demos* co-existing side by side with a national organic-cultural one (for those nation-states which want it), could be seen as a rather moderate contribution to this goal. Maybe in the realm of the political, the special virtue of contemporaneous membership in an organic national-cultural *demos* and in a supranational civic, value-driven *demos* is in the effect which such double membership may have on taming the great appeal, even craving, for belonging and destiny in this world which nationalism continues to offer but which can so easily degenerate to intolerance and xenophobia. Maybe the in-reaching national-cultural *demos* and the out-reaching supranational civic *demos* by continuously keeping each other in check offer a structured model of critical citizenship. They might even induce us to look for meaning and purpose not simply or primarily to statal structures at either European or State levels. Maybe we should celebrate, rather than reject with aversion, the politically fractured self and double

⁷⁴ Cf. Insee, *Abschied der Demokratie vom Demos*, supra note 20, p. 709 ("Sie [= die Nation] schafft sich den Staat nach ihrem Bilde") connected with a somewhat mystic connotations of Volk as a community of fate ("Schicksalsgemeinschaft") - *ibid.*, p. 709/710.

identity which multiple membership involves which can be seen as conditioning us not to consider any polity claiming our loyalty to be "über alles". Maybe this understanding of Europe makes it appear so alluring to some, so threatening to others.



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