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Denizenship and the Deterritorialization in the EU

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Abstract

The category of the denizen is becoming increasingly important in the identity politics of the EU. EU law and policy over a number of years has encouraged the development of a new hybrid status of the permanent resident who possesses many legal and social rights but lacks full political citizenship. Thinkers and politicians differ over the implications of this development, some seeing it as a temporary status on the way to full citizenship, others seeing it as a permanent sub-citizenship status, and others still seeing it as a way of moving beyond the citizenship/non-citizenship dichotomy in understanding the relationship between individuals and political communities. The paper explores this third alternative at some length, and concludes that the figure of the denizen may indeed be an appropriate archetype for imagining political community at the supranational level.

Keywords

European law - European citizenship - immigration policy - identity - diversity.

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Neil Walker

1. Locating the Denizen

The concepts of *denization* and *denizenship* find their legal origins in a process of the English common law dating from the 13th century by which a foreigner could gain some of the privileges of an English subject through the operation of the royal prerogative, including the right to hold land. Common law denization fell into disuse when statutory mechanisms began to develop for the naturalization of putative subjects who were born neither within national territory nor to parents who were already full subjects, although at the same time denizenship acquired new statutory meanings complementary to the naturalization process. For example, in the English Settlement Act of 1701 the term denizenship was used to describe naturalized foreigners who remained excluded from appointment to certain public offices.

From the beginning, therefore, the idea of a denizen, like the *metic* of the classical Greek city state, was intended to capture the situation and status of someone who was neither citizen nor non-citizen. For the most part, the idea developed within a context of migration and residence, and indeed the broader non-legal meaning of denizen remains that of resident or dweller. Yet the term has also from time to time been used of other 'half-way' situations where socially accredited position and the entitlements associated with that position are neither fully present nor entirely absent, such as that of free blacks prior to the abolition of slavery in the United States.

The residence-based meaning is the one that has dominated in current academic, legal and political discourse. When the Swedish political scientist Thomas Hammar reintroduced the term in the context of contemporary Europe,¹ he was referring to the situation of migrant workers who came to Western and Northern Europe from the 1960s onward in order to find employment or protection and who stayed to become long-term residents. These immigrants typically came to enjoy a full set of negative freedoms, including free access to the labour market, and they also gradually acquired a reasonable level of positive social security rights, limited political participation rights, and protection against sudden expulsion from the country. Yet, crucially, the development from mid-century onwards of this catalogue of rights in the states of Western Europe, and increasingly through international organisations such as the Council of Europe and

¹ T. Hammar, "Legal Time of Residence and the Status of Immigrants," in R. Baubock (ed.) *From Aliens to Citizens. Redefining the Status of Immigrants in Europe*, (Vienna: European Centre, 1994) pp. 187-198

supranational organisations such as the EU, was not and has never since become conceptually linked to the acquisition of citizenship through any of the obvious avenues, of which we may identify four. In brief, denizenship has been understood and treated (i) neither as an *incident* of citizenship, (ii) nor as fully *constitutive* of citizenship (iii) nor as *tantamount* to citizenship, (iv) nor even as having the acquisition of citizenship as its designated or probable *terminus*.

The purpose of the present paper is to explain and pursue why this renewed understanding of denizenship – as something proximate to but stubbornly irreducible to our conventional understandings of citizenship - is such a suggestive concept both for those interested in the relationship between the law and politics of migration at a point when the categorical background against which we understand the movement of populations is in flux, and more generally, for those concerned with the making and sustaining of democratically warranted political community in the context of a contemporary multi-tiered Europe. The basic answer is a simple one, even if it soon becomes more complicated. The idea of denizenship, of a form of stable association with the polity other than through the medium of citizenship, breaks or at least tests the frame of our traditional understanding of membership of political community, with all that that implies in terms of rights and obligations, participation and belonging. It is an ‘in-between’ concept,² one that challenges the series of binary oppositions – not just citizen/alien but also insider/outsider, national/international, territorial/extraterritorial, domestic/foreign, franchised/disenfranchised - that organise and reflect the political imaginary of the Westphalian system of states. In particular, it disturbs the classical idea of statehood and national citizenship as involving a form of political organisation based on certain exclusive and exclusionary, and so also mutually exclusive and mutually exclusionary properties; namely membership, territorial jurisdiction and political authority.

What is more, denizenship has various advantages over other ‘in-between’ putatively frame-breaking concepts. It speaks, like the concept of citizenship itself, in three registers, objectively, subjectively and inter-subjectively. It refers; objectively, to a bundle of rights and correlative obligations; subjectively, to a form of self-identification and, inter-subjectively, to a mark of social recognition. It also speaks to the inter-relationship between these three registers, and so in the round to a *social status*. It thus holds an explanatory and performative edge over other concepts which lack this particular and comprehensive combination of references and resonances. Unlike more abstract or more general terms like ‘cosmopolitan’ or ‘migrant’ it is grounded, through its articulation of an objective bundle of rights and obligations, in practical reason – it has immediate action-consequences. Unlike institutional terms such as ‘post-sovereignty’ or ‘supranationalism’, it speaks directly to the subject and to the transformative potential inherent in the ‘double shift’ in her self-recognition and recognition by others.

In turn, the combination of practical significance and the potential for altered self- and other-recognition, together with its basic transgressive ‘in-betweenness,’ helps account for the open-ended social and political potential of denizenship. It cannot readily be assigned to any teleological chapter within the Westphalian narrative – to any familiar

² H. Oger, “‘Residence’ as the new additional inclusive criterion for citizenship” (2003) 5 *Web Journal of Current Legal Issues*.

story of means and ends. By the same token, however, it inhabits the same ideological and authoritative spaces as more traditional Westphalian narratives and power structures, and both competes and mingles with them. Accordingly, denizenship has an indeterminate, and potentially deeply contested significance. One set of tensions and contestations concerns the perennial pressure to reduce and return it to the binary Westphalian logic – either to fast-forward denizenship to citizenship or to rewind it to alienship. Another, though closely intersecting set of tensions and contestations concerns the elusive terms of any possible transcendence of the Westphalian frame. In what follows, I will try to demonstrate how this compound set of tensions unfolds through mapping the variety of possible trajectories of denizenship. Thereafter, the problems and opportunities that flow from this are resituated in the volatile polity-constitutive politics of today's EU.

2. Trajectories of Denizenship

In seeking to grasp the referential range of the denizenship idea we can make a useful preliminary distinction between those conceptions of denizenship that are reducible to the basic paradigm of the nation state and those that seek a new political imaginary which goes beyond that paradigm. Here, we may draw upon Will Kymlicka's distinction between 'taming' and 'transcending' liberal nationalism.³ According to Kymlicka, recent developments in the law and politics of membership in the EU can be read in different ways, but for him the key battleground remains within the framework of the liberal national project. He points to the fact that many rights which we typically understand as part and parcel of national citizenship – including residence rights, liberal freedoms and some social rights and political rights, have become gradually "unbundled"⁴ from citizenship. He then draws a distinction between what we might call a 'tiered membership' model and a 'proto-citizenship' or 'emergent citizenship' model for understanding the position of the denizen as holder of these unbundled rights. Under the first model, unbundling is the cue for vertically differentiated (i.e., more or less, unqualified or qualified) membership of the polity, while under the second, which he favours over the first, unbundling is just a phase in a process which – to return to an earlier formulation – has as its *terminus* the "rebundling" of these rights "in the form of full and equal citizenship within the framework of liberal nationhood."⁵

On the other 'transcending' side of Kymlicka's divide, we can begin to trace a variety of alternative trajectories of denizenship. We can do so by parsing the Westphalian frame of national citizenship into its various components, and asking which element or combination of elements of the frame is the focus of challenge. To recall, the Westphalian model of citizenship is premised on three different aspects of exclusivity and mutual exclusivity, and thus of exclusion and mutual exclusion – namely of membership, of territorial jurisdiction and of political authority. Adapting a distinction

³ See e.g. W. Kymlicka, "Liberal Nationalism and Cosmopolitan Justice" in R. Post (ed) *Another Cosmopolitanism* (Oxford: OUP, 2006) pp. 128-46.

⁴ *Ibid.* p. 138.

⁵ *Ibid.* p. 139.

drawn by Dora Kostakopoulou,⁶ we may differentiate between ‘transnational membership’ and ‘postnational membership’ models depending on whether just the first or all three of these elements of exclusivity is challenged

According to the ‘transnational membership’ model developed by writers such as Rainer Baubock,⁷ intensified transnational migratory movement and greater interaction between national societies creates more porously bordered societies. An increasing number of individuals develop attachments and make investments in more than one national society, whether simultaneously or consecutively. It follows that, however gradually and unevenly, these societies, while retaining exclusive or dominant political authority and jurisdiction over persons within their territory, become more receptive to the idea of those mobile individuals possessing and acquiring membership rights and status in more than one polity. At one pole lies the status of ‘dual citizenship’, but short of that high-point of plural recognition we can observe all sorts of positions and combinations of positions on the denizenship continuum.

According to the ‘postnational membership’ model developed by writers such as Yasemin Soysal,⁸ not only is membership no longer mutually exclusive, but the exclusivity of territorial jurisdiction and political authority is also increasingly challenged. In particular, the EU offers a model of supranational authority and jurisdiction, as well as a model of membership, which speaks to a more general deterritorialization of political community. What is more, other and sub-state rather than super-state levels of local (city, regional or national) membership, territory and authority are also relevant here in eroding the state-centred structures of mutual exclusivity. Indeed, in the EU context the sub-state and supra-state level may be understood not merely as complementary but also as mutually reinforcing challenges to the citadels of exclusive state prerogative.⁹

Ideas of postnational *citizenship* – and in particular EU citizenship with its necessary and sufficient grounding in national citizenship¹⁰ and its address to a supranational polity with territorial jurisdiction and authority that overlaps that of the member states, also attract much academic and political attention here.¹¹ Again, however, citizenship provides only one model, and an extreme one, with a whole range of other positions on the denizenship continuum also available. Indeed, it is arguable that, particularly through Directive 2003/109 EC,¹² the most significant developments in the

⁶ D. Kostakopoulou, “Thick, Thin and Thinner Patriotisms: Is This All There Is?” (2006) 26 OJLS 73-106, at 83.

⁷ See e.g. R. Baubock *Transnational Citizenship* (Aldershot: Edward Elgar, 1994). The direction of Baubock’s subsequent work is very much towards the ‘postnational membership’ model discussed in the text below. See e.g. R. Baubock, “Political boundaries in a multilevel democracy” in S. Benhabib and I. Shapiro (eds) *Identities, Affiliations and Allegiances* (Cambridge: Cambridge University Press, 2007)

⁸ Y. Soysal “Changing Parameters of Citizenship and Claims-Making: Organised Islam in European Public Spheres (1997) 26 *Theory and Society* 509-527;

⁹ See e.g. S. Tierney, “Reframing Sovereignty: Sub-State National Societies and Contemporary Challenges to the Nation-State” (2005) 54 ICLQ 161-83.

¹⁰ Art. 17 EC Treaty.

¹¹ The literature is massive. For a recent overview, see the Special Issue of the *European Law Journal* on *EU Citizenship*; Vol. 13(5) 2007, edited by Samantha Besson.

¹² OJ 2004 L 16/44.

membership politics of the EU in recent years have been as regards long-term third country residents with neither Member State national nor (it follows) European supranational citizenship – a category which clearly falls within the denizenship definition. The grant of long-term resident status to third country nationals with five years of lawful residence in a Member State, together with a whole range of other rights and protections more or less equivalent to those of national citizens including the right to work and to study, marks a significant if still limited watershed in a protracted politics of recognition. In this regard, it arguably outstrips anything achieved in the same period at the level of European supranational citizenship. Indeed, since the European citizenship term was coined in the Maastricht Treaty in 1992 (and modestly refined in the 1997 Amsterdam Treaty) to formalize existing mobility rights and to supplement these with a menu of political rights including the right to stand and vote in local and European (but not national) elections, with the exception of an incremental ECJ-inspired strengthening of the scope and financial security of mobility and residence rights,¹³ little more has been achieved by way of systematic improvement of the membership rights of EU supranational citizens living or travelling in EU countries other than those in which they are national citizens.¹⁴ What is more, quite apart from the sharper transformative edge of legal developments within the third-country denizen category, demographic factors mean that the net impact of changes in the standing of denizens is greater than the changes affecting the second-country European citizen category. In the EU of today, after all, it is estimated that of the 5% or so of residents who do not possess citizenship of the state in which they live, more than twice as many (3.4%) have third country denizen status than (1.6%) possess EU citizen status.

Beyond transnational and postnational membership models of the relationship between denizenship and political community we can, finally, also locate on the liberal nationalist-transcending side of the divide a host of positions tending towards what we might, somewhat provocatively, call a ‘post-membership’ model.¹⁵ The key to this is not the redundancy of territorially located and enduringly authorized political communities. Short of a comprehensive cosmopolitan vision, distinct if increasingly overlapping political communities will remain situated in a particular space and in a particular time. Rather, it involves the decreasing salience of the very idea of membership of a political community. That is to say, if we think of the three factors which make up the social status (citizen, denizen or alien) which marks the relationship with political community within the current political imaginary, namely the bundle of rights and obligations, the self-understanding, and the recognition by others, under the post-membership model these are, or should be, decreasingly mediated through an idea of membership. The rights (and obligations) associated with presence and dwelling may be more accessible, either without a membership card or with one increasingly easily acquired (perhaps through brief residence). The sense of membership may become less

¹³ For a discussion of recent case-law, see F. Jacobs. “Citizenship of the European Union – A Legal Analysis” (2007) 13 ELJ 591-610.

¹⁴ On the highly uneven record of the EU member states in implementing or extending the Treaty voting rights, see J. Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge: CUP, 2007).

¹⁵ Authors I would locate here in terms of their general focus, though they themselves might well not endorse the ‘post-membership’ label, include Kostakopoulou n6 above; see also her “European Union Citizenship: Writing the Future” (2007) 13 ELJ 623-646; S. Benhabib, “Another Cosmopolitanism” in R. Post (ed) n3 13-80; S. Sassen, *Territory, Authority, Rights* (Princeton: PUP, 2006).

tied to the broader practical identity of the resident right-holder. And finally, the affirmative recognition of the member *qua* member by other members and, equally, the pejorative recognition of the non-member *qua* non-member by members, and the associated conveyance of symbolic capital or deficit, may gradually diminish or dilute.

Overall, then, whereas in the other two transcendent models of denizenship - the transnational and the postnational models - the rights associated with membership are split and diversified, here membership ceases to be a significant status-shaping code and medium at all. The very idea of membership, with its ordering of a binary legal distinction (member/non-member), with its connotation of highly specified entry and exit rules and regimes, and with its symbolic self-and other-interpolation of belonging and not-belonging, is arguably too rigid and too enveloping a notion for a world of more diverse and fluid commitments. Of course, considerations both of continuity and security of social identity at the individual level and of a viable threshold of capable-of-putting-things-effectively-in-common political community at the collective level - with a premium placed on the generation and sustenance of the minimum of trust, respect, and mutual sympathy necessary for that viability - mean that such common commitments will inevitably remain important.¹⁶ Political community can never be made out of co-presence alone. But arguably a graduated language that speaks, through the receptive medium of denizenship, of (degrees of) association and (levels of) investment is better able to depict the nuances of our increasingly non-exclusive and fluctuating relationship to collective community than the dichotomizing language of membership.

And as one consequence of this, it may be that the very idea of a distinction between citizenship and denizenship becomes increasingly fuzzy (at the objective level) and overstated (at the subjective and inter-subjective levels), and perhaps in time even redundant. In these circumstances, denizenship, or its functional and imaginary equivalent, might even seek to assert itself as the master category of association with and investment in political community rather than a residual sub-category.¹⁷ In other words, within its most radically transformative trajectory, the idea of denizenship ceases simply to be a label for describing, emphasizing and reordering known dimensions of regulation and experience, and instead becomes the key to a new regulatory and experiential map.

So, in summary, the denizen can be imagined, conservatively, within a proto-citizenship trajectory or an indefinitely tiered membership trajectory. Or, in more transformative vein, the denizen may be imagined within a transnational membership trajectory, a post-

¹⁶ See e.g. M. Canovan, *The People* (Cambridge: Polity, 2005).

¹⁷ Of course, other labels might be preferred. In particular some, while sharing the view that the position of 'denizens' within the 'political community' should be significantly upgraded, would prefer to retain the notion of 'citizenship', now conceived of much more inclusively, as a master category to mark and embrace this upgrading. See e.g. R. Baubock's discussion of inclusive third country national initiatives within the EU under the rubric of 'civic citizenship' in "Civic Citizenship: A New Concept for a New Europe" Report commissioned by the Bertelsmann Foundation, Brussels, in R. Süßmuth and W. Weidenfeld (eds.) *Managing Integration. The European Union's Responsibilities towards Immigrants*, (Bertelsmann Stiftung: Gütersloh, 2005). See also the ground-breaking earlier discussion of J. Weiler, *The Constitution of Europe* (Cambridge: CUP, 2009) esp. ch.10. But given the importance of the subjective and inter-subjective dimensions within membership status, it is arguable that the concept of citizenship, however carefully qualified, simply carries too much "'Westphalian' freight to capture the novel 'in-betweenness' of denizenship as a self-identifying and reputational category.

national membership trajectory and even, if in a more embryonic fashion, within a post-membership trajectory. In the first case the denizen is climbing the ladder to the highest political status known in the global Westphalian system – national citizenship – and in this regard the only novelty prompted by the renewed prominence of the idea of denizenship is the increased visibility, internal order and, perhaps, accessibility of the rungs on the ladder. In the second case the denizen is nested between the citizen and the visitor and alien in a new but relatively fixed graduated hierarchy of national membership status. In the third case, as we move to the transformative side of the divide, the denizen is a mobile player on the transnational circuit and seeks to take at least some advantage of membership rights and status at all her staging posts. In the fourth place the denizen is a typical inhabitant of a more complex postnational constellation, simultaneously present within and belonging to different and overlapping political communities. And in the fifth and final case the denizen reflects and helps precipitate the marginalization or demise of the very idea of political membership. She possesses a status that transcends fixed status, a membership only of the society of non-members, in a new and more fluid configuration of political association and investment.

3. The denizen and the future of the EU

In this final section, I want to draw out some of the implications of the open-endedness of the idea of denizenship for the remaking of political community in the multi-level polity of the EU. Three linked and cumulative points will be developed. These will deal in turn with the strategic, the ideological and the generative dimensions of the debate over denizenship. In each case, as we can see, the idea of denizenship, reflecting the uncertainty and contestation at the heart of this ‘in-between’ concept, has an ambivalent significance, suggesting both new openings as well as very old forms of closure of political community.

Let us start with the strategic dimension. The key point to stress here is that of deferral. Because particular policies and legal initiatives associated with the membership politics of the European Union have for long been so fragmented across different national sites (given the general reservation of national jurisdiction over the constitutional core of membership status) and supranational sites (in the EU, both within and outside the context of the Area of Freedom, Security and Justice, and across First, Second and Third Pillars;¹⁸ and also in the Council of Europe, particularly in the area of electoral law through its Venice Commission¹⁹) as well as within different functional registers – political rights, social welfare provision, free movement, migration, crime – there remains little sense either of co-ordinated policy projection, or of co-ordinated opposition. Particular policy moves, such as the 2003 EU Directive on Third Country Nationals, or the development of a common visa and asylum policy, or various national, supranational and international initiatives on voting rights, may thus, if considered discretely, be compatible with very different models and trajectories

¹⁸ See e.g. N. Walker, ‘In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey’, in N. Walker (ed.) *Europe’s Area of Freedom, Security and Justice*. (Oxford: Oxford University Press, 2004) pp. 3-41, 5-28.

¹⁹ Shaw above n 14.

of membership politics – trajectories that, as we shall develop below, may or may not stress the idea of denizenship or an equivalent term or sensibility. What is more, the fact that all such models are both *projected* – they presuppose (highly contingent) concerted effort to produce long-term consequences, and are more often left *implicit* than made explicit – they do not specify the idea of political community on which they are based and may indeed lack any such coherent idea, reinforces the scope for ambiguity-in-the-present and deferred conflict. In this regard, the discourse of denizenship joins a number of other contemporary discourses on the EU – including these on enlargement, (deep and wide for integrationists, shallow and wide for intergovernmentalists) on differentiated integration, (multi-speed for integrationists, deep diversification for intergovernmentalists) and on subsidiarity (integrationist administrative decentralization, state-based intergovernmentalism or regionalism), where the key concept may give nominal direction to but actually radically underdetermines quite diverse, and often opposing, polity visions.²⁰

In that strategic deferral and open-endedness, moreover, lie the seeds of starkly different patterns of overall policy development. We can see both the possibilities for positive reconciliation across discrete policy fields – a gradually emerging permissive consensus – and the dangers of incoherent or unacknowledged drift – a conflicted or stalled mobility politics or even an incremental creep towards a highly restrictive approach. Yet if we introduce our second dimension of debate, and add to the strategic issue of deferral an ideological propensity towards positive symbolic investment in a generous politics of mobility in the EU, the picture becomes more nuanced.

What is meant by this idea of a positive symbolic investment is the emergence of an overlapping commitment across most (if by no means all) shades of political opinion in the European Union to portray and present its mobility and membership politics in affirmative terms. Why is this so? In the first place, it is the compensatory flip-side to the coin of immigration restrictions. It represents the ‘light-side’ of relatively generous inclusion of those who have already established some level of settlement in the EU to accompany and mitigate the ‘dark-side’ of a politics which, in its economic and security-driven sensitivity to the possibility of mass movement to the EU from both the South and the East,²¹ has developed a strong “first gate”²² of primary immigration regulation through common and lowest common denominator visa and asylum policies and procedures and, indeed, increasingly through the extra-territorialization of control under the auspices of Frontex. The counterbalancing pressure for mitigation towards those who have successfully negotiated the strong first gate is reinforced by the perceived need to counter allegations of double standards, and, indeed, to answer charges of a more general betrayal of the EU’s founding principles. The post-Maastricht dual citizenship model, whether portrayed in expansive post-national terms or in more restrictive transnational terms or even in the state-conservative terms of liberal national proto-citizenship, undoubtedly speaks to an openness to progress beyond the stark dichotomies of singular and exclusionary citizenship *within* the EU, especially given its original and abiding commitment both to the ‘four freedoms’ and to

²⁰ See e.g. N. Walker, “Constitutionalising Enlargement, Enlarging Constitutionalism” (2003) 9 *ELJ* 365-85.

²¹ V. Guiraudon, The constitution of a European immigration policy domain: a political sociology approach (2003) 10, *Journal of European Public Policy*, 263-282.

²² Hammar, above n. 1.

an open-ended mission of Europe-wide enlargement. So it becomes difficult not to countenance the overcoming of that same binary logic in respect of third country nationals themselves with a strong *de facto* claim to be considered similarly 'internal' to the EU.

Yet, for all the spread of a more inclusive membership discourse, the danger with such an ideologically inflected politics is obvious. The division between citizen and alien may no longer look so stark, yet this does not mean that an axiomatic distinction between insiders and outsiders no longer holds. Rather, it may simply be in the process of being displaced, the neuralgic point of migratory politics and membership access gradually shifting backwards from the phase of settlement to questions of initial entry and reception.²³ On this view, denizenship is no longer an impossible category, but it is still liable to be treated as a scarce resource and as an exceptional condition. It threatens to become an elite – and so marginal – status within a multiple lock system of movement rather than the emblem of a commitment to move beyond such a restrictive regime.

This ideological reinforcement of the double-edge of membership and mobility politics brings us, finally, to what may be termed the generative dimension of the denizenship debate. What we are concerned with here is the way in which perspectives on denizenship are both informed by and in their turn inform broader 'existential' contestation about the nature of the EU polity. If we treat the emergence of the EU constitutional debate in the opening years of this century not as an isolated 'moment' but as the product of a deeper historical dynamic, what may prove to be its most telling legacy – even allowing for the symbolic banishment of the Constitutional Treaty in by the European Council in the summer of 2007 following the prolonged ratification crisis and its replacement with an old-fashioned (and as yet unratified) Reform Treaty – is the way in which it has helped to establish as a lasting item on the supranational political agenda a type of reflexively generative politics.²⁴ By this I mean a politics which, on account of the cumulative growth in the breadth and depth of the supranational economic and social agenda over 50 years, has undergone a qualitative shift. It is a politics which, in the face of such remorseless expansion, can no longer treat the EU as the simple creature or delegate of other (national) polities, and so has been gradually forced to confront and engage with the question of EU's own status as a distinct (and distinctive) polity, and so, it follows, with its *constituent* arrangements *qua* polity – with the proper generative source of its programme politics. It is a politics in which, therefore, any attempt to ignore or avoid this 'polity turn' and to seek to stick or to revert to an older and more modest model whereby the legitimacy of the EU among *all relevant constituencies* may be secured or sustained in purely programme content and "output"²⁵ terms, seems doomed to insufficiency. It is a politics, moreover, which, just by virtue of this 'polity turn,' has come to posit and presupposes a collective "we" as

²³ See e.g. the essays collected in D. Bigo and E. Guild (eds) *Controlling Frontiers* (Aldershot: Ashgate), 2005.

²⁴ N. Walker, 'After finalité' The Future of the European Constitutional Idea' in G. Amato, H. Bribosia and B. de Witte (eds), *Genèse et destinée de la Constitution européenne* (Brussels: Bruylant, 2007). See also A. Somek "Postconstitutional Treaty" (2007) 8 GLJ

²⁵ F. Scharpf *Governing in Europe: Effective and Democratic?* (Oxford: OUP, 1999).

the ongoing author and subject of the EU – a first person plural which both frames and is reframed by the generative process.²⁶

The politics of denizenship impact upon this broader generative process at two levels. First, and most obviously, denizenship politics provides a tangible instance of contestation over the reflexive “we” of the EU polity. As the complex, uneven, multi-site debate over electoral rights at subnational, national and European levels demonstrates, part and parcel of a generous recognition of the status of denizens is the permission and encouragement of them to become co-legislators of their own developing status, practical identity and rights provision. Equally, part and parcel of a less generous recognition is to deny this self-legislating imperative.²⁷ In either case, of course, there may be a (virtuously or viciously) circular tendency for the method of inclusion/exclusion chosen in pursuit the politics of membership to corroborate the conception of membership which underpins the method chosen.

Yet this is just the most visible tip of the iceberg. The idea of denizenship is important not only for denizens themselves – and for their place in the generative politics of the EU, but also for the fate of these generative politics more generally. As the constitutional debate demonstrated, a reflexively generative politics both requires and stimulates different conceptions of the compound European ‘demos’ – different models or imaginaries of self-authorization. And paradoxically, precisely because the question posed is concerned to identify the deepest basis of supranational authority and the most authentic expression of collective selfhood, there can be no *pre-authorized* way to secure a definitive resolution to the contest between these different imaginaries. The recent and more intense constitutional phase of the reflexively generative politics is indeed witness to this. It has seen the stressing and reinforcement of the lines – always part of the background shading of EU politics – separating one cluster of views which – under the liberal national sign – holds that the EU should remain largely a state-derivative organisation based on the aggregation of *demos*, from another cluster of views which – under the liberal national-transcendent sign – holds that the EU should rest on a multi-level and overlapping configuration of *demos* at both national and supranational levels, and, finally, from a third perspective which – in a manner which threatens to become liberal nationalism writ large – tends to comprehend the EU in terms of the incipient development of a single, all-embracing EU-wide *demos*.²⁸ The danger, of course – one that became palpable in the public reception of the Constitutional Treaty and which, since the polity legitimacy of the *existing* EU order was precisely what was put squarely at issue there for the first time, can find no long term relief and resolution in the failure of that Treaty – is that the EU’s existential question becomes an existential crisis; that its reflexively generative politics becomes stalled – stuck in an antagonistic groove.

²⁶ See e.g. H. Lindahl, (2007) “The Paradox of Constituent Power: The Political Self-Constitution of the European Union” 20 *Ratio Juris*

²⁷ Shaw n14 above

²⁸ For discussion of the different polity visions pursued in the Constitutional Treaty debate, see e.g. N. Walker, “Europe’s Constitutional Momentum and the Search for Polity Legitimacy” (2005) 4 *International Journal of Constitutional Law*, 211-238. For a taxonomy of views on EU citizenship which closely tracks the three main polity visions – see S. Besson and A. Utzinger “Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora’s Box” (2007) 13 *ELJ* 573-590, at 588.

On what basis, if at all, is a movement towards reconciliation of the different imaginaries of self-authorization possible? What is telling is the extent to which the dominant imaginaries of self-authorization, or at least those that dominate public debate, continue to be coded and calculated through citizenship. Whether or not a confederal, a multi-level or a proto-federal solution is imagined, the basic ingredients of the various self-authorizing solutions tend to be understood in terms of citizenship and the kinds of fixed and high qualification criteria and encompassing modalities of status and self-understanding, and so strong conceptions of political identity, we associate with citizenship – even under the EU’s explicitly postnational and dualistic model. And given that these putative solutions tend to distinguish and distance themselves from the others in just such terms – either by virtue of attachment to a dominant collective political identity (in the confederal and federal models) or in recognition of a particular accommodation of multiple but strong collective political identities (as in the multi-level model)), the contributory influence of the basic ingredient of citizenship towards a fractured generative politics is hard to deny.

It is against this backdrop that it becomes possible to imagine the idea of denizenship being introduced as a more or less significant leavening agent in the recipe of polity legitimacy. The emergence of a new basic template (or even of a significant supplementary template) of political attachment by voluntary association and investment rather than by fate or affinity, and one that operates as a matter of degree rather than kind, simply provides far fewer cues for the kind of antagonistic posing of different imaginaries of supranational self-authorization than do more traditional templates of collective identity.

But of course, even to voice the potential of the denizenship idea to unblock the generative politics of the EU is to underline how difficulty it would be for that potential to be fulfilled. If the strategic and ideological politics of denizenship, for all their limitations, possess a progressive dimension, the connection between denizenship politics and more fundamental generative politics seems at first sight less promising. For what makes the denizenship solution attractive here, namely its apartness from the powerful and resilient tendency of contemporary generative politics to be coded in the less fluid and more distinguishing and divisive language of citizenship, is the very same factor that makes us doubt its plausibility. The danger is that the denizenship question will, at best, remain marginalised from and overshadowed by the concerns of generative politics, and at worst will be used negatively to reaffirm certain fixed positions, especially those on the nationalist end of the spectrum of imaginaries of self-authorization.. For instance, if we look at the French and Dutch referendum debates of 2005, the denizen – whether as Polish plumber, secular Turk or Middle Eastern Muslim - was often employed as a key negative archetype – an important figurative resource in the offensive against more inclusive positions within the EU’s generative politics.²⁹

Yet we should not conclude from this experience that the denizenship discourse is fated to marginalization or pejorative manipulation. We should not make light of the strategic and ideological considerations in favour of a more progressive use of denizenship

²⁹ See e.g. M. Berezin "Appropriating the 'No': The French National Front, the Vote on the Constitution", and the 'New' April 21." (2006) 39 *Political Science and Politics* 269-272 .R. Dehousse 'The Unmaking of a Constitution: Lessons from the European Referenda' (2006) 13 *Constellations*, 151-164.

discourse, nor dismiss the cumulative impact of the gradual recognition of the denizen voice within European electoral laws. Neither should we underestimate the significance of the hour, and of supranational Europe's rising and unabated anxiety of collective identity. The idea of denizenship may remain an unlikely medium for overcoming old and resilient oppositions within the European polity debate, but it is both the predicament and the opportunity of such a frame-breaking 'in-between' concept to suggest 'unlikely' new legal and political horizons where the more 'likely' candidates remain in thrall to the old.