The European Model of Transnational Democracy: A Tribute to Ernst-Wolfgang Böckenförde

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Abstract

Ernst-Wolfgang Böckenförde is one of the most eminent German constitutional theorists of the twentieth century. The following article connects with two themes that reappear in Böckenförde's writings. The first theme, which Böckenförde actually borrowed from Hermann Heller, is that democracy presupposes "relative homogeneity." The second theme is that there would not be any principal objection against Europe growing into a nation state.

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A. Two Paths Towards Transnational Democracy

There are at least two different paths of imagining a transnational democracy.[1] While the first path extrapolates the idea from the national practice of parliamentary democracy, the second path dissociates democratic legitimacy from the national setting. As this Article will show, it construes the transnational dimension of democracy by reconsidering democratic legitimacy in non-national terms. The means thereto is to correct a perceived deficit of representation in the national setting.

In the European Union, the first path has become associated with the representation of Europeans in the European Parliament and the second, with constraining—by means of supranational constitutional law—the national political process. Transnational democratic legitimacy is supposed to emerge from putting appropriate shackles on nationally integrated peoples.

The following analysis attempts to sketch these two paths. They will be characterized as proto-national and non-national, respectively. The analysis is followed by an argument that the second path provides us with a more adequate conception of transnational democracy. The argument, however, also reveals that a transnational democracy, properly understood, cannot deliver what we expect a sufficiently *lively* democratic process to achieve.

The analysis concludes, surprisingly perhaps, with the observation that the shape of European transnational democracy suggests that European statehood should not be off the table.

B. The Proto-National Path

I. Sketch of the First Path

The first path views transnational democracy as essentially ensconced in a transnational representative body. This body is supposed to represent the participating peoples. Representatives compete for votes, preferably along political party lines. It is the predicament of this conception of transnational democracy that a democracy of this type either has to remain weak or to become proto-national.

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[1] I shall leave aside, for the purpose of this discussion, ways of imagining a transnational *deliberative* democracy. They are so remarkable that they merit separate discussion. *See, e.g.*, JOHN S. DRYSEK & SIMON NIEMEYER, FOUNDATIONS AND FRONTIERS OF DELIBERATIVE GOVERNANCE (2010).

It has to remain weak for the reasons outlined by Dieter Grimm in his perceptive analysis of the European democracy deficit.[2] A lively democratic process requires more than merely the institutions of parliamentary democracy, such as an assembly and the observance of electoral laws for the purpose of selecting representatives. Without the support of—and various challenges by—civil society, representative institutions would be largely out of touch with the wider public sphere. Worse still, the contact between representatives and citizens may likely be reduced to the shady precincts of lobbying. Democratic politics might then be widely perceived as shrouded in secrecy and prone to corruption. For the same reasons, a lively democracy depends on mass media competing for the public's attention by submitting political processes to unrelenting scrutiny. A democratic political process will only be trusted if the loyalty on the part of the public is the hard-earned fruit of vigilance.

If vigilance and loyalty are in place, parliamentary democracy is unlikely to be considered aloof, but rather regarded as the focal point of political debates.[3]

II. The Substantive Condition of Lively Democracy

Arguably, such strong communicative conditions do not have to be obtained right away in a transnational context. They may—as Habermas[4] objected to Grimm—emerge only after power has become more centralized and the democratic process has begun increasingly to comprise matters that people regard as deeply relevant to their lives. Not every topic, however, is likely to attract, let alone merit, the attention of ordinary people. The details of trade deals and their requisite dispute settlement systems are not without special prompting by "issue groups" on the hearts and minds of the average voter; nor are product safety regulations. If a parliamentary process is concerned with technical issues of this type, it is not to be expected that the type of democratic culture is to emerge which Habermas conjectures merely to lag behind the establishment of parliamentary bodies and procedures.

Apparently, the topics that are capable of garnering the public's sustained attention are matters such as common defense, combating terrorism, mass migration, affordable housing, economic or gender inequality, education, jobs, health care, and the pension system. What these matters have in common is that they concern how loosely or tightly people share their fate with one another.[5] More precisely, they concern the question of what they are ready to

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[2] *See* Dieter Grimm, *Does Europe Need a Constitution?,* 1 Eur. L. J. 282 (1995); Dieter Grimm, Europa ja – aber welches? Zur Verfassung der europäischen Demokratie 121–31 (2016).

[3] For similar observations, preparing the contrast to "post-democracy," *see* Colin Crouch, Post-Democracy 2–3 (2004).

[4] *See* Jürgen Habermas, Die Einbeziehung des Anderen. Studien zur politischen Theorie 191 (1996).

[5] It is submitted, hence, that the topics that are likely to spur vigilance and engagement on the part of the citizenry focus on questions of solidarity. For helpful introductions to this latter topic, *see* Claus Offe, *Pflichten versus Kosten:*

contribute and to sacrifice for the sake of others. Like it or not, common defense is, at the end of the day, about life and death. Public health insurance is about healthy people facilitating the survival and the recovery of the sick. These are deep ways of sharing one's fate.

To a more limited extent, the public also pays attention to morally salient issues, such as gay marriage, burqas and burkinis, or bathrooms for transgender persons. In many constitutional democracies, nevertheless, the resolution of these matters is, eventually, taken out of the hands of the democratic process and handed over to constitutional adjudication. The people may have views, but they do not get to decide.

Most people desire to live safe lives all around. If people, at any rate in Europe, expect politics to deliver significant results then it is in the areas mentioned above for which people negotiate how, and how far, they are willing to share their fate in order to provide for what they consider necessary in order to live well.

As is well known, these are also the areas in which the Union still lacks jurisdiction or in which the problem-solving gap recurs that has been so famously analyzed by Fritz Scharpf.[6] The European Asylum policy is the most recent case in point.

III. Democracy, Solidarity, and Culture

The remarks following in sections *III* through *X* try to elaborate how the vigor of democratic engagements depends on its interaction with a cultural context. The relevant link is the issues involving the extent, and the mode, with which people are ready to share their fate. The point of these observations is to throw into sharper relief how European parliamentary democracy is positioned vis-à-vis the national project. It is argued that invigorating European democracy would involve moving the Union more closely to what underpins a national polity. While this would not seem objectionable to those who harbor more unorthodox views of European integration, it is difficult to reconcile with the diversity of the Member States. Not by accident, in light of this diversity, proto-nationalism is the middle ground toward which European democracy gravitates in the face of persistent reluctance to embrace a "closer union" among its constituents. The European polity seems to be always, and forever, destined to remain shy of a nation state.

For the sake of the argument, it is presumed that a lively democracy is frontloaded with issues that concern how—and how far—people ought to share their fate with one another. Obviously, matters of this type concern people as citizens and not merely as stakeholders.

Typen und Kontexte solidarischen Handelns, *in* Transnationale Solidarität: Chancen und Grenzen 35–50 (Jens Beckert, et al. eds., 2004); Andrea Sangiovanni, *Solidarity as Joint Action,* 1 J. Applied Phil. 340 (2015).

[6] *See* Fritz W. Scharf, Governing Europe: Effective and Democratic? 121, 171, 193 (1999).

They are about the fundamental conditions under which everyone ought to be able to live a safe and whole life. In a sense, they concern what John Rawls has memorably called the "basic structure of society," that is, the rules governing the allocation of the benefits and burdens of social cooperation.[7]

By contrast, a democracy dealing with, say, the mutual recognition of court judgments, international arrest warrants, product designations, food safety, and other technological issues, is destined to provide a template for the "post-democratic" pursuit of projects by interest groups and elite cadres of experts.[8] They have a stake in it. The larger part of the people is not likely to take any interest in it. Of course, a democracy of this type is not undemocratic, for it is still up to the people to throw the scoundrels out; nevertheless, the level of the engagement of citizens is likely to be rather low.[9]

In order to facilitate a sufficiently lively transnational democracy, the question is, of course, under what conditions members of various peoples might be ready to share their fate with others and to cooperate with one another in order to provide for their existential safety. This is the core question of solidarity, also for the transnational level.

It is hence posited, that there is an internal link between democracy and solidarity, and the existence of this link invites our attention to what is going on at the national level.

IV. Sharing One's Fate

Evidently, one such condition—possibly the most elemental and trivial—is that members of a group of people(s) exhibit a modicum of mutual concern for one another. Public insurance schemes, such as systems of health insurance, are institutions by which people put their contributions at stake for the sake of all participants, including themselves. This is even more so in the case of programs funded from the general tax revenue. Those who happen to be healthy end up supporting those who happen to fall ill regardless of whether the members of the latter group might be considered responsible for ailments owing to their choice of a life-style. The non-smokers pitch in for the smokers, the boring people subsidize those who suffer from the adverse consequences of leading enterprising and daring lives.

It is difficult to imagine that the readiness to support others—even if such support may never be returned—and the mutual pledge to step in when things have gone awry could be

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[7] *See* JOHN RAWLS, A THEORY OF JUSTICE 7 (1971).

[8] *See* CROUCH, *supra* note 3, at 20–23.

[9] Regrettably, in the age of global terrorism this appears to be also the case for highly sensible issues, such as the processing of data by institutions, such as Europol and Interpol. More democratic vigilance would clearly be desirable here.

sustained among total strangers. Rather, it works particularly well in the national context in which people believe to be acquainted with how others live and trust that these others will not cheat them.

Arguably, this is the case for three reasons. Above all, the pursuit of political objectives that engage the solidarity of the people rests upon a strong element of *recognition* (see § *V*). It is mediated by sharing certain outlooks on life. The other two reasons concern the expectation that those who participate in society observe the rules of *fair play* (see § *VI*) and take a credible *long-term interest in the place* (see § *VII*).

V. Ordinary, Respectable, and Admirable Lives

Solidarity hinges on viewing the lives of others—whom one may have to support in one way or another—as ordinary, respectable, or even admirable.

Ordinariness translates easily into reciprocity. Diseases related to a sedentary life-style or excessive bodyweight are not uncommon. Because only a few exceptionally ascetic people observe demanding exercise regiments and austere dietary restrictions, nobody is held responsible for their heart disease, diabetes, or strokes. Folks help other folks if what has happened to someone could have happened to anyone.

The adverse long-term effects of hard work at construction sites on the health of workers are considered to be worthy of concerted support. Blue-collar workers earn the respect of those who are lucky to have qualified for lighter pursuits.

Ballet dancers—in Austria at any rate—retire early and collect public pensions for an extraordinarily long period of time. Ordinary people—should they learn about it—would agree that this is a way of rewarding the exceptional professional accomplishments of dancers. It is a way of expressing their admiration.

As the examples show, recognizing something as ordinary, respectable, or admirable builds upon a shared understanding of which life is a good life. A good life is either ordinary or respectable or even admirable. Moral folk psychology suggests that the people living such lives are themselves taken to be ordinary, respectable, and admirable people. These are the people to whom you are not embarrassed to refer as "your own."[10]

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[10] It should be noted that the group that one would be ready to embrace as one's own is perhaps not primarily a composed of fellow nationals. Rather, it is most likely to consist of those enacting various life styles that one considers to be "cool" or "normal." An urban life style, whatever this may precisely be, is not tied to one particular culture. Only secondarily and indirectly, however, does the urban life style become a national affair if a people develops the ability, or at least the desire, to control its existence for reasons having to do with what they believe to be their historical legacy. It is not the case that cultures "are" national, as though this were a given social fact. Rather, the collective ambition to sustain practices and belief for a group of people is what bestows upon various elements of culture a national imprint. National cultures emerge from intermittent endorsements of various

It should not escape our attention that, because it is the good life that matters, culturally specific evaluations enter the perception of what merits recognition and what does not. Hence, systems of solidarity have a significant propensity for cultural intolerance. This is particularly true for the slippage from recognizing ordinary lives to recognizing ordinary people. This slippage can be reversed and result in exclusion. Migrants from distant and culturally foreign places, in particular if they are not well educated, easily fail to pass as ordinary, respectable, or admirable people.

Cultures, no matter how elusive they may be,[11] erect walls between human beings. If one group has no idea how others live and merely fancy them, owing to their origin, to live completely "alien" lives, its members will not reach out to these others. They may even treat them with hostility. The available antidote is frequent personal encounters coupled with the realization that modern capitalism exacts so much rational discipline from human resources that the lives of most people are destined to be entirely predictable, dull, and organized along the lines of either male, or female gender roles.

VI. Fair Play

Fair play is an essential ingredient of solidarity.[12] Those sharing their fate are notoriously wary of freeloaders. This concerns those who participate in systems relatively late in their life or are suspect of seeking only some short-term gain. Again, this wariness exacts costs on outsiders. Those entering from the outside and perceived to be falling into a high-risk category—the risk, for example, of unemployment, illness, or needing support for their dependents—are likely to be held up to opprobrium. Conversely, a more long-term continuity among the participants is likely to render solidarity more stable.

VII. Long-term Commitments: The Seemingly Unconditional Condition of Value

People sharing their fate are concerned about the long-term sustainability of their existential safety and of the culture that is making it possible. They are reluctant to give persons a voice whose long-term commitment to the place appears doubtful in virtue of their mobility or their ostensible lack of local roots.

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cultural fragments. Thus understood, culture becomes an "object of collective preferences." ANDREAS CASSEE, GLOBALE BEWEGUNGSFREIHEIT: EIN PHILOSOPHISCHES PLÄDOYER FÜR OFFENE GRENZEN 155 (2016). *See also* Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, *in* THE RIGHTS OF MINORITY CULTURES 93–119 (Will Kymlicka, et al. eds., 1995); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 85–87 (1995).

[11] *See* CASSEE, *supra* note 10, at 152.

[12] *See* Offe, *supra* note 5, at 42.

They may also be concerned that their culture is being transformed beyond the point of recognition. While conservatives notoriously exaggerate this point, it is not entirely irrational. The strong evaluations[13] that allow us to confer value on certain human pursuits presuppose a shared background.[14] Such valuations concern what we consider worthwhile—or even worthy of praise—such as modes of association (e.g., marriage), goals (e.g., leisure), or careers. Being a professor of law is a great thing in a cultural environment that provides people working in this capacity with opportunities for self-expression and personal growth. The cultural context supplies the semantics and resources necessary to invest life with value. It bestows dignity on existential projects and thereby does more than merely invest them with significance. Everything that is of value to us would disappear if this context were to erode.[15]

Since the cultural background equips human evaluation with conditions of value, this background takes on the *semblance of the unconditional*.[16] By definition, the unconditional exists of necessity. The necessary is that which has to be. It cannot not be. The quasi-noumenal status of a shared background culture—with institutions such as marriage, leisure, and careers—its appearance as the unconditional condition of what is of value in life explains why people yearn to sustain it. Imagine a Western European confronted with a culture that recognizes neither careers nor friendship. Rather, people remain locked into their social station and have to be constantly guarded against annoying encroachments by others. Never do they experience the warmth of mutual sympathy. From the Western European perspective, no life worthy of the high appellation of a *human* life would be possible under these circumstances. Confronted with the choice of which culture she would like to bequeath to her children, the Western European would bid for her own culture because it is, invariably, the source of value.

This explains why people are interested in preserving their cultures for posterity. They cannot want to see their cultural horizon disappear. For them, that would be tantamount to abandoning the unconditional condition of value. This explains why the background conditions of meaningful choices become the object of collective preferences.[17] Because sustaining cultural contexts requires collective agency and such agency is invariably bounded the deliberate continuation of traditions is the work of particular communities.

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[13] *See* CHARLES TAYLOR, *What's Wrong with Negative Liberty?*, *in* PHILOSOPHY AND THE HUMAN SCIENCES 211, 226 (1985).

[14] For the by now classical statement, s*ee,* WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 164–65 (1989).

[15] *See* ALASDAIR MACINTYRE, IS PATRIOTISM A VIRTUE? 11 (1984).

[16] Given that there is no real unconditional form of life, we need, all the more desperately, to cling to the unconditional that is the fruit of particularity.

[17] *See* CASSEE, *supra* note 10; Waldron, *supra* note 10; KYMLICKA, *supra* note 10.

Moreover, culture as a source of what gives value to life is a public good. The more who participate in it, the merrier. The valuation by others reinforces its effectiveness. This ranges from relatively straightforward matters—such as rules of civility—to works of high culture. Plays, operas, and concerts would no longer be performed if the critical mass of people necessary to sustain these pursuits disappeared.

VIII. Beyond Reification and Romanticization

What has been said so far may be falsely taken to suggest that national cultures are monolithic entities, the existence and solidity of which determines the degree of social solidarity, and, a fortiori, the vitality of democratic politics. Yet, one must merely take into account how significant other evaluative backgrounds are for the choice of life projects in order to realize that a national culture is most definitely not the only source of value. In its various instantiations, religion is of at least equal importance. Global cultural industries may already have a stronger impact on human life than the gravitational pull of local custom and national tradition. It would be odd, therefore, to suggest that the struggle over the recognition of life forms is determined by a context that is ideally—and supposedly—coextensive with the territorial bounds of a state.

Indeed, the untenable perspective that casts national cultures as solid entities neglects that fact that the web of culture is the work of shifting endorsements of practices and beliefs. What matters about them is their *form*, that is, the mutual recognition of ordinariness, respectability, and excellence. The decisive step, however, towards addressing a national culture—towards transforming it into an "object"—is taken once the participating individuals attempt to grasp the *substance* of their endorsements reflectively in order to determine what it is that sustains their sharing of their fate at a certain place on earth. We Austrians enjoy hearty meals and drink excessively. It's ordinary. Nobody needs to be ashamed of it. The substance of commitments is constructed and sustained in *narratives* in which members of peoples attempt to persuade one another of how they ought to conceive of themselves collectively and how they ought to live at a certain *place*.

The fabric of a national culture would also be misunderstood if it were considered to be woven of identifications. I do not identify with musicians that are capable of performing great classical music. I admire their excellence. If such admiration is mutually taken to be a matter of course and ends up being endorsed in minute or more far-reaching political choices, such as the choice to provide funding for music festivals from the national budget, the appreciation of classical music may arguably grow into a nationally shared cultural trait. Only after this trait has emerged can people identify with being part of a nation that appreciates great art.[18]

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[18] This identification, with the excellence of fellow nationals, is perhaps the most intriguing and also the most pernicious aspect of nationality. The historical memory of the nation facilitates effortless participation in greatness

Identification is mediated by belonging. Belonging, in turn, is a way of accounting for who one is, inasmuch as one is an episode in the longer train of tradition. The fact that I am constantly expected to explain how I think and what I think with reference to Kelsen's legal theory is what makes me an Austrian legal philosopher. One can—of course, as I do—struggle with one's heritage, but this does not alter the fact that one is regarded to emerge from some tradition. There is, of course, an obvious advantage to endorsing one's belonging. It is a way of outgrowing the confines of individual existence. Belonging is a key to self-transcendence. It is a mode exceeding the obvious insignificance of individuality by participating in something that is larger than the self.

Nevertheless, the national culture is the product of common activities and presupposes the spontaneous flotation of cultural practices. The nation is an imaginary producer and exists only by virtue of a shared awareness of its existence. The producer is, however, also a product of its own history. We are looking at the product when we are trying to account for what it is that we belong to. Austro-Pop is a national phenomenon that would not exist were it not for the prevalence of American cultural industries. And, yes, Austro-Pop is something that I find somewhat embarrassing—unless we are talking about Falco, of course.

It would also be wrong to believe that a national culture is a systematic whole or that its elements would be subject to enumeration. Rather, national characteristics reveal themselves in the face of threats or, less dramatically put, contrasts. Unlike Americans, Austrians generally believe in a sound work-life balance. Not only is this ordinary, as a precept it enjoys the support of various types of social legislation. Unlike the French, however, Austrians are less likely to take to the streets in order to combat retrenchment.

Of course, any generalization about the product—national cultures—is contestable and regularly contested. As Dworkin may have put it, national culture is interpretive "all the way down."[19] Usually, interpretations are driven by the ambition to cast the nation in the best possible light in order to inform its continued existence into an indefinite future.

The relevant synthesis, nevertheless, has to be brought about by someone exercising agency. Unlike market distributions, nations are not the unintended by-product of uncoordinated individual acts. They require shaping by a collective agency of some type. Hence, whoever dissociates the nation from the state,[20] as one such agent, commits a

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and glory. It is this element of individual transcendence that explains why nations may well be secular equivalents of religion.

[19] *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 168 (1985).

[20] *See, e.g.*, JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE (1999).

romantic fallacy by suggesting that the nation is a spontaneous ordering unadulterated by the exercise of public power.

IX. Intermediate Summary

The recognition of life forms, fair play, and sustaining long-term commitments explains why the most engaging issues of public policy are usually tied up with a national culture. The recognition of life forms concerns the cultural conditions of inclusion. As is well known, there is a terribly ugly downside to it, for owing to its built-in slippage from the recognition of actions to the evaluations of persons (see § *V* above) it is prone to cast the outsider as an unordinary and mean person.

The expectation to abide by conditions of fair play implies that people need to *live together* at the same place for a more extended period of time in order to build up the requisite trust.

Sustaining shared cultural conditions of value in the face of their perceived unconditionality explains why the evaluative conditions of life in and of themselves demand transmission from one generation to the next. Asserting them against potential competitors is a consequence of their normative import.

In fact, the impression of the unconditionality of a particular culture is the *root* of national partiality.[21]

The nation provides polities with the requisite cultural context in which solidarity and this type of politics have hitherto existed and flourished. Not by accident, places where people feel existentially safe have drawn upon—or even created—shared cultural resources. The experience of sharing one's fate and mastering the vagaries of life together is preserved in narratives that recount successes as well as defeats, achievements, and moments of downfall.[22] Nations are, at the bottom, communities that exist over time and draw on shared memories in order to sustain commitments among its members.[23] These memories are linked to territories.

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[21] This statement must not be mistaken for a justification of such partiality. It merely aims to account for its significance from the perspective of social psychology.

[22] *See*, DAVID MILLER, ON NATIONALITY 164 (1995).

[23] *See* BERNARD YACK, NATIONALISM AND THE MORAL PSYCHOLOGY OF COMMUNITY 81 (2012).

X. Relative Homogeneity

It would be more than questionable, hence, to denounce as potential fascists[24] those who have claimed that a good democracy presupposes relative homogeneity.[25] What needs to be done, however, is to render this claim as precisely as possible.

First, it is not impossible to imagine democratic governance to work even with a relatively low level of homogeneity. There can be democracies even if the task of democracy is merely to facilitate a *modus vivendi* among contending groups, the members of which may find the lives of others disturbing or outright despicable. The point is, then, either to maximize mutual independence or to facilitate it in areas where it matters the most—religion, education, etc. In these cases, a resort to democratic decision-making may well be a reflection of the fact that none of the contenders has hitherto been strong enough to oppress the others.

Second, the homogeneity in question concerns the recognition of ordinary, respectable, and admirable lives. Such recognition flows out into the friendship that we have had ever since Aristotle considered it to be essential to successful political life.[26] Böckenförde is right in claiming that more homogenous democracies are freer than others, for even members of the minority do not experience the evaluative outlook of the majority as foreign.[27] The degree of homogeneity explains to which extent people agree to have their fate shared and to provide for their existential safety. This does not mean that the extent of integration is uncontested. Actually, it may well be at stake in struggles over constructing the "right" national narrative. Elements of such a struggle are undoubtedly part of European debates, not least when they turn to the so-called "European social model."

Third, homogeneity has nothing to do with uniformity that is sustained by oppressive means. Actually, in an interesting way, it presupposes the antithesis to it. Culturally determined ways of leading ordinary, respectable, and admirable lives do not invest these lives with value unless their value is voluntarily endorsed. This condition has two implications. The first is that any culturally endorsed *habitus* has to pass the test of personal happiness. There is no value to cultural practices that make people miserable. As a result, many such practices

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[24] This is the mistake committed by Weiler in his discussion of the Maastricht decision. *See,* Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision,* 1 Euro. L. J. 219, 223–24 (1995).

[25] *See, e.g.,* Hermann Heller, *Politische Demokratie und soziale Homogenität (1928), in* 2 Gesammelte Schriften 423–33 (M. Drath et al eds., 1971); Ernst-Wolfgang Böckenförde, Staat–Nation–Europa: Studien zur Staatslehre, Verfassungstheorie und Rechtsphilosophie 111 (1999).

[26] *See* Aristotle, Nicomachian Ethics 1160 a 25, p. 178 (Robert C. Bartlett & Susan D. Collins trans., 2011).

[27] *See* Böckenförde, *supra* note 25, at 110–11.

have already disappeared, and others will follow suit, depending on how conceptions of human happiness change. How much and how dramatically they change, however, depends on the availability of alternative evaluative vocabularies. Diversity is not some fetish to cling to; it is good for individuals. The second implication is that there can be no illiberal democracy.[28] It would be a contradiction in terms. In order to secure the spontaneous endorsement of cultural practices, democracies need to raise homogeneity to a higher level of generality. They have to replace "what" with "that." What one says should be secondary to the fact that one says something. What one believes is secondary to the fact that one is a believer. Fundamental rights shelter homogeneity that stems from mutual reinforcement. The more people enjoy the freedom to speak their mind, the more easily everyone can partake of this freedom. It becomes commonplace. The more people regard it as part of their right to privacy to appear naked in designated areas of public parks, the more strongly nudity rises to the level of the ordinary.

Finally, and this point is far from trivial, homogeneity also concerns the socio-economic situation. There is no way for people to share a life if their lives take place in different social strata. A good democracy is no longer possible if one group can easily opt out of sharing their fate with others simply because their members can procure their safety on markets or if their offspring no longer have to participate in the public culture of society because they obtain their education from aloof elite institutions. While the less affluent groups cannot trust the wealthy, the better-off constantly have to worry that the poorer part of society might use political power in order to effect redistribution.

XI. Why the First Path is Indefinite

Against this background, it is difficult to imagine how a transnational democracy could ever be sufficiently strong and energetic if it were not supported by the magical links between shared institutions, practices and ways of life, modes of appropriating them by incorporating them in a collective memory, and imagining special responsibilities for one another and the future.[29] Hence, it is to be expected that the readiness to create a sufficiently lively transnational democracy on the European level would have to involve efforts at "nation-building," *i.e.*, the creation of common memories, identification of shared legacies, and an attachment to a territorial space. Intense political association that comes from sharing one's fate with others is likely to engender lively democracy.

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[28] It also implies that liberal nationalism is not at all a contradiction in terms. *See* YAEL TAMIR, LIBERAL NATIONALISM 35 (1993).

[29] *See* ERNST-WOLFGANG BÖCKENFÖRDE, WISSENSCHAFT–POLITIK–VERFASSUNGSGERICHT 289–90, 474 (2011).

Contrary to widespread skepticism concerning nationality, the construction of a national memory is not a work of fiction.[30] It is an exercise of constructive interpretation[31] that draws on social facts involving people who have, in the past, acted with the intent to advance the interest of their communities. The trickiest question of national history is, of course, to make out which of these communities may legitimately count as part of a larger whole whose memories supposedly matter. The situation is compounded by the fact that overcoming strife among groups is a staple of national historiography.

If this observation is correct, then a strong transnational political representation requires sharing some cultural space.[32] It follows that those who praise transnational parliamentary democracy may well delude themselves over the fact that a democracy of that type—if it is not going to be secluded from public debate—will have to be supported by memories of the type characteristic of national polities. The first path to transnational democracy has to be either implicitly proto-national or doomed to leave democracy in the alienated state in which it exists in the eyes of those who deplore Europe's democracy deficit.

Democracy in the European Union appears to be stuck in the middle. It lacks readiness to let go of traditional national loyalties and fears that the leap forward might be either impossible or destructive. Hence, the situation is almost comical. Committed Europeans sustain the dream of a transnational democracy, the realization of which would give the lie to this very dream, for it would transform the Union into another, larger, and federal nation state. Those harboring unorthodox views of European integration,[33] which could have even been the views of the founders, may not at all be unhappy about it.

C. The Non-National Path

I. Collective Self-Determination

Lively national democracies, aside from investing people with the cultural wherewithal to share their fate, allow people to live autonomous lives. It will be remembered that Böckenförde hinted at the fact that members of relatively homogeneous societies are freer than others.[34] We may now be in a position to state more clearly what this means.

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[30] See MILLER, *supra* note 22, at 36–40.

[31] See DWORKIN, *supra* note 19, at 168.

[32] See BÖCKENFÖRDE, *supra* note 25, at 100 (quoting Jean Monnet saying that if he had to start the integration process over again he would begin with culture).

[33] Böckenförde, for example, believes that the creation of a European nation state is not at all precluded. *See, e.g.*, BÖCKENFÖRDE, *supra* note 25, at 101–02; BÖCKENFÖRDE, *supra* note 29, at 475.

[34] See BÖCKENFÖRDE, *supra* note 25, at 110–11.

The legitimacy of democratic decisions is anchored in collective self-determination.

Generally, one is collectively self-determined if one yields to the determinations made by a collective unit for the reason that one belongs to it.

Collective self-determination is not different from individual self-determination. Indeed, it is just a variety of it. If one yields to the choice of others without sharing their views, one is self-determining by virtue of identifying with being in communion with them, that is, with being one citizen among equal others. Being a citizen is then part of one's personal identity. Embracing being part of a community as one's own identity, mitigates the tension between one's own views and those of fellow citizens. Just like yielding to an inclination on the basis of one's practical identity[35]—buying an opera ticket as an opera aficionado—is an act of self-determination, so is letting the majority have its way.

Identification is the key to self-determination, not least because, as an activity, identification sustains the difference between the identifier and the identified. Nevertheless, identifying with others is easier the more one finds the views of fellow citizens to be ordinary or respectable. It retains, however, an element of obedience, *i.e.,* of mere "external" compliance. Defeated citizens keep the will of the majority substantively at arms-length. The identification does not go beyond the level marked by legality of behavior.

Evidently, for collectively self-determining persons, who must always expect to be defeated in a vote, belonging to the community is of greater importance than having their views accepted. There is nothing mystical about this. People live at places, and if these are not solitary islands they are inhabited by others, too. People see their life going on at a place where they live with others. It matters a great deal to them where they live, not least because it deeply engages their self-love. Because people view themselves at—and within—places, yielding to the determination of others is not necessarily alienating. If people have no problem with yielding, they do possess what the Republican tradition hailed as *l'amour de la patrie*.[36] People would not want to live outside of their country even if they cannot prevail politically.

II. The Homeland as a Superego

An analogy to how individual conscience works may help to elucidate the issue. The inner voice is one's own voice by virtue of having made the voice of others one's own.

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[35] *See* CHRISTINE M. KORSGAARD, SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY (2009).

[36] *See* JEAN-JACQUES ROUSSEAU, POLITICAL WRITINGS: DISCOURSE ON INEQUALITY, DISCOURSE ON POLITICAL ECONOMY, ON SOCIAL CONTRACT 70 (J. Conaway Bonadella trans., 1987).

This much, at any rate, can be learned from how Freud imagined the Superego to emerge from the resolution of the Oedipus complex.[37] The child desiring one parent becomes vengeful towards the other who possesses the desired object. At the same time, the child also loves this other parent whom he or she envies. The conflict between love and hatred can be resolved by identifying with parental moral demands and by suppressing the morally inappropriate lustful desire. The hatred becomes thus redirected towards sexual drives. The result of the identification with parental demands is the Superego, which is, in a sense, a persona within the self. It is the synthesis of the divestment of libido from an object and its reallocation to a synthesis that merges the admonishing voice of the parents into an inner voice. It is by virtue of such a transformation that the parents are always with the child. The child is ***never alone***. The existence of the Superego dissipates the anguish of existential aloneness.

In a like manner, one is, paradoxically, really at home at the place where one is self-determining by yielding to the will of others. The country to which one belongs plays, in a sense, the role of one's parent. One is not alone when one lives among others and adapts to their ways. One complies, however, without endorsing the underlying view, just as yielding to the dictates of conscience will never lose an air of enslavement.

III. Boundaries: From Conditio Sine Qua Non *to Problem*

Dissociating democracy from the nation state gives rise to an entirely different picture. Indeed, it gives rise to what must appear to be the most radical shift in our political thinking that we have experienced in centuries.[38]

First, the boundedness of democracy loses its apparent naturalness. This is a quality that it inherits from the alleged naturalness of nations. Once the nation is taken out of the picture, the bounded quality of democratic decision-making and the limited access to participation pose serious problems. The unit—within which democracy appeared to be possible— suddenly turns out to be problematic from the angle of democracy itself. The pre-politically grounded and unquestioned unit of collective self-determination disappears along with the nation. Democracy is set into a context that comprises all humans as beings that are free and equal.

Second, those who are supposedly collectively self-determining lose the equivalent of their Superego. They no longer belong to a certain place where they do not feel alone and, hence, at home, even if they merely have to obey. They no longer appear to possess a political

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[37] *See* Sigmund Freud, *Der Untergang des Ödipuskomplexes*, *in* 5 STUDIENAUSGABE 243, 248 (J. Strachey ed., 1982).

[38] For a pioneering foray into this field, see JAMES BOHMAN, DEMOCRACY ACROSS BORDERS: FROM DÊMOS TO DÊMOI (2007); *See also* Sofia Nässtrom, *Democratic Representation Beyond Election*, 22 CONSTELLATIONS 1, 1–12 (2015).

identity, at any rate, not in a sense characteristic of the national context. They seem to be *essentially* private persons.

Third, with the richer cultural context disappears a condition on the basis of which people are willing to share their fate. The polity appears to be composed of various ethnic groups, genders, and other bearers of "identities" who may have severe misgivings when it comes to trusting others. Solidarity is no longer so easily conceived.

Hence, the prospect for a non-national democracy must appear to be arduous from the outset. And yet, owing to the problematization of boundaries and the demise of national cohesion, democracy—non-nationally understood—is in and of itself transnational.

IV. The Infinite Constituency

If boundaries pose the first and possibly most serious problem, the primary question is what, if anything, might render a bounded democracy legitimate.

Maintaining a bounded political community gives rise to adverse effects—"externalities"—for outsiders. Because national partiality drops out **qua** potential justifying factor, the imposition of such effects needs to be based on a reason that does not merely claim that democracies are free to do what they want to do as long as they do not aim to harm others. In fact, it may seem that externalities would be democratically legitimate only if the outsiders were included into the domestic political process that authorizes the actions that give rise to adverse effects. Clearly, democratic legitimacy requires at least participation by those who are potentially affected by decisions. Because, however, conceivably everyone might be affected by decisions adopted by democratic majorities, the ultimate democratic constituency would have to be composed of all people living and, indeed, even of members of future generations. The ultimate constituency would thus have to be *infinite*.

An infinite constituency, however, cannot adopt decisions, for an infinite number of votes is also indefinite and cannot be counted. From this, it follows that democracies have to be bounded in order to exist and to be capable of action. Bounded peoples, that is, have to exist in order to make democratic politics possible.

There is an important consequence of the boundedness of democracy, for it permits tackling problems that could not even be adequately addressed, let alone solved, using the structures of voluntary transactions. By counting votes instead of collecting bids, a group of people can shift from the horizontal to the vertical level of human association and control matters in a top-down fashion. Boundaries are necessary in order to establish and to sustain *political* control.

From a consistently non-national perspective, the prospect for individuals to be able to participate in processes of bounded political control explains why there have to be peoples.

Non-nationally considered, the existence of peoples says nothing about ties to a place or identification with a national narrative. They are *essentially* contingent. The existence of peoples is only justified generally, but this does not warrant the existence of any people on particular grounds.

It is noteworthy that what thereby supersedes the nation—is what one might call, borrowing Hegelian terminology—the external people or a *Not- und Verstandesvolk*.[39] The external people is supposed to facilitate the collective self-determination of citizens that are essentially private.

V. The Inclusion and Representation of Outsiders

The first question of non-national democratic legitimacy, therefore, is not to ensure that a people is reasonably politically self-determining, but rather to guarantee that a democracy adequately takes heed of the burdens that it might impose on outsiders.

The existence of boundaries poses the twofold problem of exclusion and adverse effects on outsiders.

The primary problem gives rise to questions of membership or of eligibility for services. What are the conditions governing access to rights of political participation? With the demise of nationality as the mediating factor, long waiting periods for permanent residents appear to be unnecessarily onerous. Any expectation that candidates prove proficient in matters of national history, or culture, must also seem completely out of place. On the contrary, democratic legitimacy appears to require quick access to political rights,[40] not least because the resident population is generally most intensely affected by the power of the state. Disenfranchising foreigners for a period longer than the time required to find your way around in a foreign country would offend the non-national idea that collective self-determination does not have to be anchored in blending into the thicker context of a common culture. Likewise, it would be unreasonable to expect foreigners to convert into nationals and to strip themselves entirely of their affiliation with their country of origin. On the contrary, a non-national democracy would regard dual citizenship as a perfectly normal case.[41]

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[39] On Hegel's external state, see G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 221 § 183 (H.B. Nisbet trans., 1991).

[40] The question may be asked whether this does not privilege insiders at the expense of outsiders. Would it not be fairer to strip insiders of all political rights, too?

[41] *See* DORA KOSTAKOPOULOU, *THE FUTURE GOVERNANCE OF CITIZENSHIP* 104 (2008); Peter J. Spiro, *Dual Citizenship as Human Right*, 8 INT'L J. CONST. L. 111, 122, 129–130 (2010).

The second question concerns the internal representation of the interests of outsiders. Such a representation can be affected either by means of rights or by means of participation.[42]

Rights are the preferred way of representing interests if there is reason to fear that the political process may systematically neglect or ride roughshod over these interests. The fundamental right to private property is a safeguard against zealous plans for the redistribution of wealth. It protects the few against the many. In the transnational context, the greatest concern has to be that the interests of outsiders are likely not to be accorded equal, or appropriate, weight in the domestic political process.

The right to be free from discrimination on the grounds of nationality is, therefore, the most elementary form of interest representation. It can be complemented with other rights designed to accord to the interest of outsiders their pertinent standing, such as the right to file for asylum.

The representation of outsider interests through participation can complement the protection of rights. This is the domain of international relations or, beyond that, of supranational institutions where democracies avail themselves of a permanent template to strike mutually beneficial deals.

It must seem obvious, therefore, that federalism—far from being a self-standing political idea—is a necessary condition of democratic legitimacy.[43]

VI. The External People: Deputy Foreigners

The story to be told about the external people is straightforward. Once the nation disappears from the political horizon, the members of bounded political units are no longer linked together by cultural ties. There is nothing that unites them but their interest in jointly exercising political control.

People of that kind do not share memories, traditions, or any cultural vocabulary. Possibly, the only culture that they share is the culture of modern capitalism with its unrelenting work

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[42] *See* ALEXANDER SOMEK, THE COSMOPOLITAN CONSTITUTION 249 (2014).

[43] It should be borne in mind that the representation of citizens depends on whether matters are still up for resolution or have already been resolved. If citizens are represented in parliamentary assemblies, they are represented as citizens. Their views matter, nevertheless, with the understanding that they are amenable to making deals or being persuaded. They are represented not only through delegates, but also through processes. It is through representative institutions that democracies become republics. Once citizens are represented through governments, the type of representation changes. It is no longer clear that your government represents your views. You are rather represented inasmuch as you are yielding to others. Your identity is represented. This means you are more present as a political being—in your loyalty—in acts of your government than you are present as a citizen in parliament. In a federal system you encounter your loyalty to your own polity in the respect of your state.

ethic, the universal ambition to attain social status, and the lure of consumerism. For that reason, a non-national people may well be quite homogeneous (see above § B(*V*)).

What is more, the members of non-national peoples are entirely replaceable. It does not matter who one's fellow citizens are. It does not matter because it must not. One might speculate that people should be allowed to crowd together according to their political preferences. Hence, all the social democrats should feel free to move to Sweden and all libertarians to Slovakia. A *fortiori*, the Swedes would design their immigration policy such as to reflect their social democratic world-view and limit immigration from Eastern Europe. Such a practice, as absurd as it might seem, would nevertheless run afoul of the principle of inclusion, for it would not fairly represent the interests of libertarian outsiders—or Eastern Europeans, for that matter—to establish themselves in Sweden, for whichever reason.[44] This explains why under non-national conditions any citizen is as good as any other and, therefore, entirely replaceable.

From this, it follows that any people is as good as any other. In principle, however, the peoples are alike, for their members are by default private persons and therefore not guided by what they take to be their national Superego—"Our tradition requires," "It would be totally un-[fill in nation here] to do this and that." The relatively haphazard nature of the people is, of course, consistent with personal mobility. One's own nationals are, in a sense, *deputy foreigners*.

VII. Strong Constitutional Constraints

As the members of the external people are by default private, nobody can expect any other to be particularly public-spirited. This does not preclude that as a matter of good liberal personal ethic some non-national citizens take a lively interest in their place or the wellbeing of their fellow citizens. But this is a matter of personal ethic, at best; for in fact, everyone has to be guarded against encroachments by others. One has to expect that the readiness, on the part of members of a non-national people, to share their fate with others is rather low. Hence, one has to expect also that the groups existing within a non-national people will join forces in order to pursue their own interests. This raises the specter of the "tyranny of the majority." What a non-national democracy needs—perhaps even more than a national democracy—is a sufficiently strong protection of fundamental rights. Fundamental rights are signaling devices designed to ensure that democratic majorities do not behave tyrannically.

Non-national democracies do not avail of an anchor in a people as the ultimate arbiter of constitutional issues. Their supreme law is not based upon the exercise of the constituent

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[44] The question is whether the social-democratic Swedes would have to tolerate being conquered by libertarian fellow Europeans. Arguably, the non-national outlook would leave the matter to fair political contests.

power. Hence, the only check available in order to safeguard the constitutional system against corruption is the peer review among like-minded non-national societies. Any external people is as good as any other, and none better than any other. Hence, observing certain standards of fundamental rights protection is best relegated to international monitoring bodies, such as courts or various expert commissions.

It follows that the focus of democratic legitimacy shifts from the liveliness of the democratic process to how a democracy addresses externalities and prevents the emergence of tyrannical majorities.

A non-national democracy, therefore, is discernible by those concerns that originate from the core question of what it takes to justify, democratically, the operation of a bounded democracy to outsiders. It is all about adopting and enforcing constraints and not about fostering political liberty.

VIII. Juristocracy

Non-national democracy is an alternative perspective on democratic legitimacy. It is the very point of the second path towards European transnational democracy to superimpose this outlook on national constitutions. Supranational law is an engine of legal transformation that is deployed in order to attain this objective.

Evidently, Europe is composed of democracies that are underpinned by nationhood. They are bounded. Yet, the idea underlying the second path towards European transnational democracy is that the national practice of democracy is unobjectionable only so long as the partiality inherent in its bounded operation is neutralized by non-national principles. Finland first, Austria first—yes, but only within limits.

Generally, the key to tempering national zeal is submitting partiality to universalization.

There are two ways of giving effect to such a universalization. They are by no means mutually exclusive. The first precedes the non-national outlook and consists of recognizing national cultures. This is the approach of classical nineteenth century liberalism.[45] The idea is that each nation ought to be equally independent and able to enjoy self-determination. The second expects—as we have seen—to see the nation state stripped of its adverse and exclusionary effects. Whereas the first approach celebrates boundaries *qua* indispensable constructs that make national self-determination possible, the second views them as means to inflict harm on others and to create obstacles for them.

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[45] *See* Wolfgang Mommsen, 1848: Die ungewollte Revolution 311–312 (1998).

The traditional perspective that celebrates national boundaries endorses partiality. It does so for a teleological reason. More things can be accomplished by drawing on common cultural semantics than without it. If it were not for its existence, we would be left with the bleak world of neoliberalism.

The non-national approach, by contrast, seeks to overcome partiality. To that end, the second path of the European model of transnational democracy relies on strategies of inclusion and representation reinforcement by means of individual rights. The power of this form of democracy is not vested in assemblies, but in courts, for it is entirely concerned with controlling and disempowering the peoples that cooperate within boundaries. Unsurprisingly, European non-national democracy is juristocratic.

IX. Effecting Inclusion and Representation Reinforcement

As is well known, the strategies of inclusion most evidently manifest in the jurisprudence on free movement and on European citizenship. In various instances, the European Court of Justice has created access to non-contributory benefits available to European citizens that are not nationals of the relevant Member State. The result is the creation of a virtual European Welfare State that piggybacks on existing national regimes. The problem is, apparently, that it is difficult to make out principles as to how far the European Court of Justice is supposed to go.

With regard to representation reinforcement through rights, Miguel Poiraes Maduro's audacious claim is correct that the rights associated with freedom of movement are political rights.[46] They are—put in the terms of John Hart Ely's theory of judicial review—rights that force national legislatures to take the interests of those into account that are only inadequately represented.[47] Representation reinforcement of this type can move through different stages.[48] While protection against discriminatory treatment demands the like treatment of those who are in like situations, the protection against obstacles that arise from the coexistence of various regulations in different countries mitigates the systematically discriminatory effects inherent in a system of nation states.[49] Conceivably, nevertheless, one could also protect transnationally mobile persons against being worse off than those who stay put, or offer judicial solicitude to those suffering disadvantage in their "internal

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[46] *See* MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC INSTITUTION (1998).

[47] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1982).

[48] *See* SOMEK, *supra* note 42, at 260–61.

[49] Addressing externalities has the salutary effect that the views of disaffected minorities might also be represented again. Not just the external outsiders, the internal outsiders can be given a voice, too.

situation" compared with people in other countries owing to more stringent regulatory regimes at home.

All of this is well known to students of European Union law. It does not bear repeating here. What may not be so obvious, however, is that democracies find themselves in a rather awkward situation once the non-national discipline has been supranationally imposed on them.

X. The Existence qua Justification of Democracy

The first principle of non-national democracy is that the justification for the existence of a bounded democracy is the existence of democratic *tout court*. There can be no democracy without boundaries. Hence, democracies may draw a line distinguishing the inside from the outside. But boundaries may not be used to sustain illegitimate forms of partiality, for this would violate the second principle of non-national democracy according to which the world is composed of equal individuals. Behind the setting of bounded democracies is an infinite constituency to which every individual belongs. But this implies that bounded democracies exist only because the infinite constituency is incapable of decision and action. They have to act, as it were, on behalf, and in the interest of, the infinite constituency that ultimately matters. This explains why existing democracies can only pass as legitimate if they internalize boundary correction in order to represent the infinite constituency within bounded spaces. This explains the major focus of non-national democracy. The perforation of boundaries—by means of inclusion and representation reinforcement—nevertheless, must not go so far as to threaten the existence of bounded democracies, for these strategies merely supplement[50] the infinite constituency's incapability of decision and action.

Against this background, one encounters a remarkable indeterminacy in the conception of non-national democracy. While it is straightforward that the boundedness of democracy is justified only because without boundaries no democracy could exist, the open question is what it means for a democracy to *exist*.

The question is whether "existence" is to be taken "in particular" or "in general." Does it mean that a democracy—as a self-determining body—exists only if it exists in the manner in which it has designed itself to exist? This would imply that the limits a democracy imposes on inclusion and representation-reinforcement may permissibly reflect its *particular political ambition*. If a society, for example, chooses to make higher education available to all of its nationals free of tuition charge and extends this benefit to nationals from other Member States this would predictably occasion the collapse of this system. Then the democracy

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[50] Yes, indeed, in a Derridian sense.

would have the right to use its boundary to exclude outsiders.[51] Presumably, however, the non-national outlook would not permit this. The only reason for the existence of boundaries is to guarantee the existence of democracies, not what a particular democracy fancies to accomplish *by means of excluding* outsiders. The exclusion of outsiders—according to non-national orthodoxy—is permissible only as long as it is necessary to sustain a democracy in general. Conceivably, a democracy can sustain itself by choosing a less exclusive system of education, for example, by introducing admission tests that are available to all on equal terms. The existence of a democracy is a weighty ground of exclusion only if democracy would collapse if a particular policy were not pursued.

This raises the bar of justification to a level that can scarcely be met. As is well known, the European Court of Justice has never really gone that far, and, indeed, pursued a course that is not consistently non-national, for it has also recognized national traditions. In principle, however, democracies may be partial and exclusionary only inasmuch and insofar as their existence is at stake. Access to military service would be a case in point. The justification of the exclusionary use of boundaries has in principle been instrumentally related to maintaining the existence of boundaries. This is the gist of the non-national approach.

Evidently, following through on this approach would exercise enormous downscaling pressures. Social benefits and high product standards would only not create a disadvantage on the relevant state if the benefits did not attract newcomers and the standards did not harm the country as a place of business. Hence, in neither respect must democracies stand out. Of course, social assistance schemes would never entirely disappear, for any smart liberal society would provide the uneducated and the unemployed with cheap entertainment—games, drugs, and porn—and resources to anaesthetize the pain of their social embarrassment—antidepressants or cheap liquor.

D. Conclusion

The upshot of this sketch is nothing short of amazing. Non-national democracy is in and of itself transnational inasmuch as it gives rise to constitutional shackles on bounded democracies. Their point is to make the necessary existence of boundaries acceptable in a world that is in principle composed of individuals who are virtually assembled in the infinite constituency. These shackles, however, do nothing to contribute to the normative appeal of

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[51] The example demonstrates how skewed the idea of representation re-enforcement really is when it becomes equated with protection from discrimination on the grounds of nationality. It suggests that the outsiders would choose to be included and thus to take a free ride on the education system of another state. It does not register that it would not be fair, on the part of the outsiders, to deplete the resources of another state. If, however, the idea is that the insiders and the outsiders are part of a larger constituency the indefiniteness problem would arise again. And even if it did not arise and one assumed that the citizens of the country in question should be viewed as part of one larger constituency that would, at the end of the day, vote against free university admission, then the others would have been given the power to make these citizens worse off.

non-national democracy. Rather, their existence suggests that interacting democratic regimes are likely to downscale the extent to which nationals share their fate to the residual level marked by the liberal social model.[52]

In the face of this rather dystopian consequence, we are confronted with a reversal. While the second path of European transnational democracy is theoretically much more consistent, owing to its decisive break with the relevance of nationality, the first path appears to be more promising, for it suggests that more can be accomplished by transforming the Union into a political entity that appeals to shared memories of achievements and failures in how Europeans share their fate with one another. The question would remain, however, whether, if the Union succeeded at that, the European model of transnational democracy would turn out to have never been one.

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[52] *See* GOSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM 26–27 (1990).