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Constitutional patriotism, citizenship, and belonging

David Abraham*

Is constitutional patriotism a basis for a politics of solidarity and redistribution? May more particularistic historical and cultural principles be added to the abstract and formal-legal demands of constitutionalism without fundamentally undermining it? As we know, the political left, more than once, has sought to speak for “the nation” as a concrete historical entity while, at the same time, holding fast to universalist, constitutionalist principles. Indeed, it has been argued that the left’s most successful moments—from the French Revolution to the interwar popular fronts, to Chinese and Vietnamese communism—have been at those times when nation and class, the unique and the universal, the concrete and the abstract, have been ostensibly joined. And, of course, the left in postwar Germany has lived with a very difficult relationship to its particular history and nation, as is apparent in the 1948 Grundgesetz, as well as in many of the Habermasian formulations of constitutional patriotism with which we have become familiar.

If “constitutional patriotism” is to mean something more than or different from, say, civic nationalism, and if *Verfassungspatriotismus* is to signify more than just the specific legal-political life of the liberal-socialist phase of the Bonn Republic, it must offer something beyond mere resonance with one or more distinct nation-state histories.¹ It must somehow both accommodate and integrate them.

To begin with, solidarities and collective identities, no matter how constructed, simply have not gone away. Even the hippest pre-9/11 postnationalists, such as Arjun Appadurai, had to claim that countries were “one *node* in a

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¹ Jan-Werner Müller, *On the Origins of Constitutional Patriotism*, 5 *CONTEMP. POL. THEORY* 278, 285–287 (2006). Müller concludes that the fact of a specific genealogy cannot discredit the broader application and availability of *Verfassungspatriotismus*. This is certainly true. It seems to me, however, that this conclusion is itself severely undercut by the masterfully sensitive understanding of the Bonn Republic laid out in the essay.

post-national *network* of diasporas.”² In this posited transnational world, belonging—for the individual—is multiple and variously institutionalized but still concrete and less than volitional. Riva Kastoryano claims, for example, that “the country of origin becomes a source of identity, the country of residence a source of rights, and the emerging transnational space, a space of political action combining the two or more countries.”³ If these claims are even partly true, we have to ask what or which solidarity it is that might, legitimately, dare to demand the sacrifice of some individual and/or most competing collective identities. Christendom, the *Volk*, subjects of His Majesty, the proletariat, the polis, France, people of color, *le peuple*, the Constitution, the West are, today, not all equally appealing organizing principles, though each of them has been successful in the past.

It may be argued that the very notion of a collective identity based on and reinforcing solidarity is itself a fraud, the fruit of successful power and governance claims by self-interested or hegemonic power blocs. “We, the People,” a cultural community exercising self-government through popular sovereignty, simply may not exist. Though associated with elements of the political right, the claim has also come from segments of the left—namely, that there is no such thing as society, only individuals (or classes) who (sometimes) choose to subject themselves to a nexus of contracts that regulate but do not frame their lives.⁴ Not much fellow feeling or solidarity or willingness to sacrifice may be expected from mere cohabitation for individual instrumental purposes, even if that cohabitation takes place under shared constitutional and legal rules.

Transnational ties, for example, cut across the vertical solidarity of the nation-state and weaken state–society relations. Rights, whether achieved by ascription or through conquest, like the assumption of duties, require some measure of *fraternité*, belonging, fellow feeling. Rights are related to

² Arjun Appadurai, *The Heart of Whiteness*, 16 *CALLALOO* 796, 798, 803 (1993) (emphasis added). Appadurai, self-described repentant nationalist, avers that “[w]here soil and place were once the key to the linkage of territorial affiliation . . . key identities and affiliations now only partially revolve around the realities and images of space.” Now “diaspora runs with, not against, the grain of identity, movement, and reproduction.” Diaspora seems to be construed now not as an exile from which one will eventually return but rather as a kind of postnational hybridity—one is tempted to say a cosmopolitanism for Everyman. The world may look more like this when seen from the “platinum elite” frequent-flyer lounge than when seen from the polyglot streets.

³ See Riva Kastoryano, *Settlement, Transnational Communities and Citizenship*, 52 *INT’L SOC. SCI. J.* 311 (2000) (describing transnational activity in several forms, including a focus on the “home” country, Europe, and even Islam).

⁴ See WILHELM VON HUMBOLDT, *VERSUCH DIE GRENZEN DER WIRKSAMKEIT DES STAATES ZU BESTIMMEN* [THE LIMITS OF STATE ACTION] (Cambridge Univ. Press 1969) (1792), for the modern version of the classical view that human social interdependency and solidarity, facilitated by a state, were prerequisites for *Entfaltung* (self-fulfillment). See also JOHN RAWLS, *A THEORY OF JUSTICE* 524 (Harvard Univ. Press 1971) (restating this view).

belonging. Certainly each ascending step in the staircase of rights laid out in T. H. Marshall's classic formulation⁵—civil rights to political rights to social rights—assumes a greater measure of solidarity than the step below. Thus, civil rights may be granted even by an undemocratic and unrepresentative sovereign to citizens and subjects alike; political rights mostly presume some measure of self-governance as well as membership; and social rights, in addition, a willingness to be the keeper of others as a matter of shared minimum expectation.

Some sense of historical community and shared destiny or of citizenship is a prerequisite for social rights. These cannot be awarded simply as a matter of rule or constitutional mandate. Those who value social justice must have an historically and geographically defined place for its exercise. This sentiment can be designated, in the Mazzinian tradition, as “patriotism” (Viroli) or as that of the “cosmopolitan patriot” (Appiah) or, in an older vocabulary, even as an “internationalist.”⁶ Affection, loyalty, history, literature, language, traditions, and so forth—these are the passions of a proper patriotism. Perhaps this is all merely talk of an “imagined community,” a collective imaginary fit for the era of print capitalism as Anderson would have it. But perhaps not. The imaginary national identification actually may be a continuously constructed, contested, negotiated, and historically contingent, path-dependent project.

Popular front strategies, as already noted, have attempted to capture national community sentiment on behalf of an agenda combining social justice, class, and national interests.⁷ In the case of the U.S., for example, Paul Robeson conveyed a sense of this amalgam in his immensely successful popular front ballad “The House I Live In,” a song that defined commonality and shaped it around both *abstract* constitutional principles and *concrete* historical and cultural experiences:

What is America to me?
A name, a map, a flag I see,
A certain word, “Democracy.”
The words of old Abe Lincoln,
of Jefferson and Paine

⁵ T. H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (Pluto 1950). Though endlessly criticized from nearly every possible perspective, Marshall's paradigm remains at the center of the discussion.

⁶ MAURIZIO VIROLI, *FOR LOVE OF COUNTRY: AN ESSAY ON PATRIOTISM AND NATIONALISM* (Oxford Univ. Press 1995); K. Anthony Appiah, *Cosmopolitan Patriots*, in *COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION* (Pheng Cheah & Bruce Robbins eds., Univ. Minnesota Press 1998). Appiah seeks to connect species-wide community with the actual politics and restraints found on the ground locally. But “think globally, act locally” is also what Paul Robeson—quoted *infra*, note 8—was saying. It was also the internationalist message of the socialist Second International: “Workers of the World Unite: Go Home and Organize.” See JAMES JOLL, *THE SECOND INTERNATIONAL* (Routledge 1955).

⁷ *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–80* (Steve Fraser & Gary Gerstle eds., Princeton Univ. Press 1989).

of Washington and Douglass
and the tasks that still remain.

....

The house I live in,
My neighbors white and black,
The people who just came here
and from generations back

....

A house that we call "freedom,"
the home of liberty,
But especially the people,
That's America to me.⁸

Violi and Appiah may be construed in much the same way, placing specific cultural and historical flesh on a framework of norms. Such a position has also been restated, recently, by Alexander Aleinikoff:

The idea of belonging is . . . intergenerational. One is a citizen of an ongoing historical project that looks back to the settlement of the continent, the creation of the nation, and seminal events in the past. No matter when their ancestors arrived . . . Americans can claim the Founding Fathers as their own without a sense of irony.⁹

Lincoln, for one, in his first inaugural address, famously called upon his fellow citizens' "mystic chords of memory" to undergird and strengthen their fragile constitutional patriotism.¹⁰

Robeson's words point clearly to a regime of universal (and necessarily revisable) principles specified by a particular political community through democratic procedures, one that has a history and that newcomers can and should join and shape. They join a work-in-progress, if not one that is arbitrarily or indeterminately contestable. When Robeson beckons listeners to join at "Gettysburg and Concord, where Freedom's fight began," he echoes the principle that newcomers "too were at Mt. Sinai."¹¹ The particular culture and

⁸ PAUL ROBESON, *The House I Live In, on SONGS OF FREE MEN* (Columbia Records 1947) (lyrics by Lewis Allan). Robeson also sings of battles, Lexington, Concord, Gettysburg, and Bataan, as well as of farmers, workers, and neighbors. See also Daniel Levy, *The Transformation of Germany's Ethno-Cultural Idiom*, in *CHALLENGING ETHNIC CITIZENSHIP* 232 n.1 (Daniel Levy & Yfatt Weiss eds., Berghahn 2002) (speaking similarly of a "changeable product of collective self-identification").

⁹ ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY* 478 (Harvard Univ. Press 2002). See also JOHN RAWLS, *LAW OF PEOPLES* 23, 44 (Harvard Univ. Press 1999) (observing that such pride and achievements may produce what John Rawls called a "proper patriotism" and John Stuart Mill labeled "common sympathies," presumably real or imagined, into reality). Indeed, one way to understand "Constitutional patriotism" is as the sum of "proper patriotism" + "common sympathies" + Founding Fathers.

¹⁰ President Abraham Lincoln, Inaugural Address (Mar. 4, 1861).

¹¹ ROBESON, *supra* note 8.

tradition that makes “our” constitution ours must be constructed on a foundation of equal liberal rights for all (that is, liberty), democracy, and a capacious sense of identity. Together these make and are made by “the people,” which is to say, a contingent community of memory and experience united also—if not only—by shared attachment to a body of principles. In this view, national identity becomes a mutable product of collective self-identification.

A nation, as Ernest Renan observed more than a century ago, is a “daily plebiscite” in which values and consent and “the desire to live together” are repeatedly adopted or rejected. However, as Renan also observed, today’s nation “is the culmination of a long past of endeavors, sacrifice, and devotion” that go beyond any shared political principles or constitutional patriotism to create an inherited cultural identity.¹² This inherited cultural identity of “endeavors, sacrifice, and devotion” is also, for Renan at least, the history of struggles for sovereignty and for popular self-determination.

We might usefully view the modern nation and its citizens as the products of four actual or metaphorical centuries and of the concerns that characterized each: first, the construction of order and security within a territory; next, the search for a viable contract of consent among those present within a territory; third, the assertion of popular sovereignty and self-rule in politics and economics by those within the territory; and, finally and most recently, the struggle between the imperatives of liberty and those of governance. It is as a product of the particular forms these experiences take that the citizen emerges.

Who is the citizen—the resident of “the house I live in”—of the commonality made of the plurality transcending particularity, as Robeson could have put it? The collective and legally recognized identity of the “citizen” is and always has been unstable and contested.¹³ Still, as Max Weber noted already in 1921, citizenship is a constructed position defining status, one that interacts with

¹² Ernest Renan, *What Is a Nation?*, in *NATION AND NARRATION* 19 (Homi Bhabha ed., Routledge 1990). See also Bernard Yack, *The Myth of the Civic Nation*, 10 *CRITICAL REV.* 198 (1996). Yack underscores that, alongside the ethnic-nation myth of inherited cultural identity, there is a civic-nation myth suggesting that “national identity is nothing but your choice: you are the political principles you share with other like-minded individuals.”

¹³ For the U.S., see, most recently, ROGERS SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (Yale Univ. Press 1997); for the earlier period, see JAMES KEITNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870* (Univ. North Carolina Press 1978). For advocacy of a new universal nationalist citizenship, see MICHAEL LIND, *THE NEXT AMERICAN NATION* (Free Press 1996); for a rejection of such a conception, see Iris Marion Young, *Polity and Group Difference; A Critique of the Ideal of Universal Citizenship*, 99 *ETHICS* 250 (1989). For an overview of the concept in Israel, see Ayelet Shachar, *Citizenship and Membership in the Israeli Polity*, in *FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD* 386 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., Carnegie Endowment for International Peace 2000). For Germany, see ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* (Harvard Univ. Press 1992); *OFFENE STAATLICHKEIT: FESTSCHRIFT FÜR E.W. BÖCKENFÖRDE [THE OPEN STATE: COLLECTION IN HONOR OF E. W. BÖCKENFÖRDE]* (Rolf Grawert & Bernard Schlink eds., Duncker & Humblot 1995); and KAI HAILBRONNER & GÜNTHER RENNER, *STAATSANGEHÖRIGKEITSRECHT [CITIZENSHIP LAW]* (C.H. Beck 1991).

and mitigates other positions, such as those involving class and power. This is why elites, with considerable force at their disposal, generally attempt to weaken citizenship status, and why subversive forces interested in organizing and acting on the basis of class often consider citizenship a false consciousness, a (mere) bourgeois-nationalist patriotism turned against class interest.¹⁴

Citizenship, active social membership, and solidarity generate rights, and these rights often provide the basis for an assortment of claims. Not so long ago it seemed uncontroversial that the demand for equal citizenship, for political equality under a constitution, would turn into a demand for a different kind of society altogether.¹⁵ Such claims are raised in a common public realm and profess to be for the collective good. For citizenship to work, subidentities or community identities must remain peripheral or, at least, amenable to overarching ideologies, such as constitutional patriotism, that can encompass all of the citizenry. The recent weakness of egalitarian ideologies and parties owes at least something to the rejection of common and equal citizenship.

Democracy, as a form of life based on active consent and participation, has receded while citizenship is distributed on the basis of passive criteria of belonging, territorially or ethnically. For the most part, this decline in the civic republican has been accompanied by a decline in the ethnonational. The civic fades into the civil while the distinction between citizen and alien fades in a way redolent of the decline of estate, rank, and order. Instead, everyone emphatically has rights, and individuals and groups compete on the basis of them.¹⁶

The outcome of the American liberal legal transformation since the civil rights era has been, above all, the creation of a rights culture, one which is overwhelmingly universalist and individualist. This marks a substantial departure from the jurisprudence of the Depression, the New Deal, and war years,

¹⁴ In Europe and America, this sentiment peaked around World War I, and conflicts over what to do split and destroyed international socialism. The *union sacrée* and the *Burgfrieden* and their flag-waving repressive analogue in the U.S. worked in this way, and “internationalism” has not been more than a slogan since then.

¹⁵ This “classic” position can be found in REINHARD BENDIX, *NATION BUILDING AND CITIZENSHIP* 86–126 (Anchor 1969).

¹⁶ The individualistic and individualizing apolitical side of rights and of the “rights revolution” in the U.S. has been the subject of analysis by conservatives and radicals alike. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (Free Press 1991); STUART SCHEINGOLD, *THE POLITICS OF RIGHTS* (Yale Univ. Press 1974); Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363 (1984); Morton Horwitz, *Rights*, 23 *HARV. CIV. RTS.-CIV. LIBERTIES REV.* 393 (1988); Anthony Chase, *The Left on Rights*, 62 *TEX. L. REV.* 1541 (1984); David Abraham, *Are Rights the Right Thing?*, 25 *CONN. L. REV.* 947 (1993). The situation in Germany is still quite different, notwithstanding the enlargement of individual rights there over the past thirty years. This will be addressed below. The individualizing force of rights-consciousness has been very visible and important in Israel over the past decade. See *THE NEW ISRAEL: PEACEMAKING AND LIBERALIZATION* (Gershon Shafir & Yoav Peled eds., HarperCollins 2000); Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform*, 44 *AMER. J. COMP. L.* 485 (1996); Chaim Edelman, *The Judicialization of Politics in Israel*, 15 *INT'L POL. SCI. REV.* 177 (1994).

which was, for the most part, more collectivist and national.¹⁷ A similar, though later, story may also be told of Germany and other countries.

Human rights and state sovereignty claims may come into conflict with each other; however, it is important to remember that the latter may also be a vehicle for the former. This relationship has been difficult since the revolutionary Declaration of the Rights of Man and Citizen of 1789. Why would the universal rights of man require the particularism of citizenship? As Hannah Arendt explained it, “abstract” human beings existed “nowhere.” Hence,

The whole question of human rights . . . was quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one’s own people, seems to be able to insure them.¹⁸

A cosmopolitan world society of rational individuals cannot exist in anything like a democratic world of mass participation. Even at their most ambitious, post-World War II hopes for the United Nations and world government were predicated on democratic national polities, federating as units, in order to establish international governance. National communities seem necessary to support those very rights and freedoms promised to all in the Declaration of the Rights of Man and Citizen and similar documents. Today, most nation-states, in fact, justify their legitimacy on the basis of universalist human rights principles mediated through their particular histories and institutions. As Seyla Benhabib has observed,

The tension between the universalistic scope of the principles that legitimize the social contract of the modern nation, and the claim of this nation to define itself as a closed community, plays itself out in the history of the reforms and revolutions of the last two centuries.¹⁹

One risk in this, of course, is that nation-states may equate the citizen with the member of the historical or ethnic nation, thereby collapsing a worthy

¹⁷ This is a substantial claim but, on balance, right. See NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* (Princeton Univ. Press 2002); LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed., Touchstone 1986) (1973); KERMIT HALL, *THE MAGIC MIRROR* 247–332 (Oxford Univ. Press 1989); ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (Knopf 1995). The ACLU has played a remarkable role in the successes of the individual-rights culture; see SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (2d ed., Southern Illinois Univ. Press 1999) (1990). The German and Israeli law systems may well be following the same trajectory but are lagging behind. Weimar law and early Israeli law were certainly more like American collectivism at its peak. See GÜNTHER FRANKENBERG & ULRICH RÖDEL, *VON DER VOLKSSOUVERÄNTÄT ZUM MINDERHEITENSCHUTZ [FROM POPULAR SOVEREIGNTY TO MINORITY PROTECTION]* (Europ. Vlg.-Anst. 1981); MENACHEM HOFNUNG, *DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL* (Dartmouth 1996); PNINA LAHAV, *JUDGMENT IN JERUSALEM* (Univ. Calif. Press 1997).

¹⁸ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 291 (Harvest 1979) (1951). See William Sewall, *Le Citoyen/la Citoyenne: Activity, Passivity and the Revolutionary Concept of Citizenship*, in *THE FRENCH REVOLUTION AND THE CREATION OF MODERN POLITICAL CULTURE: THE POLITICAL CULTURE OF THE FRENCH REVOLUTION* 105 (Colin Lucas ed., Elsevier 1988) (on how this citizenship activates and is activated).

¹⁹ Seyla Benhabib, *Citizens, Residents and Aliens in a Changing World*, 66 *Soc. RES.* 735 (1999).

political and legal category into an inegalitarian schema of first-class and second-class semicitizens sorted by nationality or ethnicity. Here Arendt's experience as a refugee, someone made stateless on account of her ethnicity, led her not to turn against states and toward human rights internationalism but, rather, to insist that states be civic polities with citizenship based on legal criteria. Indeed, all those born into a territorial state had the human right to citizenship in it.

Universalism and constitutionalism would thus temper the demos. This position found its way into the Universal Declaration of Human Rights, article 15 of which proclaims that everyone has a right to a nationality, something not otherwise to be taken for granted.²⁰ The development of an international human rights regime has been pushed forward and earned praise from many quarters; nonetheless, ordinary citizens, who might have some voice in a democratic nation-state, are here unrepresented.²¹

How closed are the "closed" communities Benhabib refers to, and how, potentially, do abstract principles such as civic nationalism or constitutional patriotism facilitate entry and coherence? In the view of many, the U.S. is characterized by a "thin" equal protection model of citizenship involving mostly negative rights. Civil rights and physical and social mobility are almost all that autonomous individuals need. Legal equality is about due process and equal protection for persons. The antidiscrimination model of equal protection is hegemonic and makes group rights problematic; at the same time, it also impedes the elaboration of social rights to education, housing, and so on. The American immigration regime, in turn, "pays little attention to the thin fabric of social and political rights that US citizenship

²⁰ Universal Declaration of Human Rights, art. 15, General Assembly Res. 217A (III), U.N. GAOR 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948); see Thomas Kleven, *Why Immigration Law Favors Emigration over Immigration*, 33 UNIV. MIAMI INTER-AMER. L. REV. 69, 82 (2002). In September 2002, in the midst of severe Palestinian-Israeli violence, the Israeli interior minister, claiming to base himself on clause 11/B of the Citizenship Law, moved successfully to strip several native-born Arab Israelis of their citizenship, arguing that they had left the country to work with its enemies. The Association for Civil Rights in Israel sued, claiming that it "violated the basic human right to hold citizenship" as well as the Universal Declaration, *Ha'aretz*, (Sept. 10, 2002). See also Yoav Peled, *Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime*, 8 THEORETICAL INQUIRIES IN LAW 603-628 (2007); Yousef Jabareen, *An Equal Constitution for All?* 61-67 (Mossawa Center 2007), available at <http://www.mossawacenter.org/files/files/File/An%20Equal%20Constitution%20For%20All.pdf>.

²¹ Compare the claims of Peter Spiro, who champions non-governmental organizations and other groups as platforms, and Ruti Teitel, who claims that most polities cannot internally generate norms as effective and progressive as those imposed through international claims. See Peter Spiro, *The Citizenship Dilemma*, 51 STANFORD L. REV. 597 (1999); RUTI TEITEL, *TRANSITIONAL JUSTICE* (Oxford Univ. Press 2000).

entails” and, instead, tries to “create many jobs and keep them relatively open to international labour.”²²

Thus, the American system is about large numbers of immigrants; large numbers of available jobs; the easy adjustment between types of status and visa permissions; the easy transition to citizenship through naturalization and immediate *jus soli* birthright citizenship; poor border control; overburdened administrative apparatuses; negligible deportation rates; paltry social benefits; and minimal benefit from obtaining citizenship.

By contrast, German citizenship, like (Jewish) Israeli citizenship, is perceived as “thick,” with sharper exclusions and greater and more explicit social rights and duties. Until very recently, Germany’s entry regime, in turn, was marked by strong border and internal administrative apparatuses, little likelihood of adjustment between and among categories of visa permissions, an exceedingly low naturalization rate, no *jus soli* birthright citizenship, highly regulated labor markets, a strong system of available social welfare benefits, and a high salience extended to citizenship.²³ Where U.S. citizenship is putatively constitutional and consensual, Germany, like Israel, has privileged ethnocultural identity and national belonging within formal democracy.²⁴ Indeed, in the Israeli case, Jewish nationality was historically essential for legal entry into the country, and service in its military the chief method for entrance into its welfare system. In contrast, American citizenship is a lesser marker, though easy to obtain; German and Israeli a greater, although more difficult marker to acquire.

Eroded in numerous ways, from above and from below, the salience of citizenship seems to be declining, even in Germany, where the process of becoming a citizen by birth or naturalization is now much easier. The force of citizenship is giving way, in the worried view of many nationalists, to the free market, on the one hand, and to group recognition and calls for ethnic and

²² See Thomas Heller, *Change and Convergence: Is American Immigration Still Exceptional?*, in *CITIZENSHIP IN A GLOBAL WORLD: COMPARING CITIZENSHIP RIGHTS FOR ALIENS 196–197* (Atsushi Kondo ed., Palgrave Macmillan 2001). Heller’s emphasis on “exit” and mobility in the U.S. regime—as opposed to “voice” and engagement in the European—is redolent of Sombart’s focus on immigration as one reason there was no socialism in the U.S. See also ROBERT WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* (Univ. Chicago Press 1995).

²³ Heller argues that membership came to mean more in Europe because: population was denser; effective bureaucracies already existed; external threats required a standing military; states had to compete for loyalty from populations whose identities had been fluid or local for a long time; mercantilist and imperial traditions has established interventionist government; and political rights were slow in developing. See Heller, *supra* note 22, at 214.

²⁴ For interpretations of “ethnic democracy” in Israel, see Sammy Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 *ETHNIC & RACIAL STUD.* 389 (1990); Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship*, 86 *AMER. POL. SCI. REV.* 432 (1992); and OREN YIFTACHEL, *ETHNOCRACY: LAND, AND THE POLITICS OF IDENTITY ISRAEL/PALESTINE* (Univ. Penn. Press 2006).

religious group rights and concomitant parochialism, on the other. “McWorld” confronts “Jihad” as material global integration confronts ethnic and cultural fragmentation.²⁵ We have been reminded that there are many things for which people will die or kill, the nation-state being only one and hardly the worst. The continued growth in human migration under conditions of a weak state, or states that choose to act as if they were weak, will accelerate or exacerbate these tendencies, both benign and ghastly. We might worry, therefore, less about the construction of the nation and more about citizens’ democratic control over the state, a control that itself requires a measure of solidarity to achieve. Whether constitutional patriotism can offer an adequate counterweight to centrifugal tendencies of this sort is far from certain.

Germany: From rights to citizenship

Jus sanguinis has stood at the center of German nationality (*Staatsangehörigkeit*) and citizenship (*Bürgerschaft*). But it would be a mistake to conclude that only ethnonationalism drives the German sense of belonging. Through the middle of the nineteenth century, German identities were state-centered. Indeed, since most German areas were overpopulated, rulers were content to shed emigrants. On the other hand, the Prussian Emancipation Edict of 1812 granted Jews citizenship without regard to ethnicity, and, earlier still, Prussia had welcomed French Huguenots and Salzburg Protestants. Political loyalty rather than ethnic affinity drove this phase of state building. As Hegel’s 1821 *Philosophy of Right* made clear, the state was the culmination of the “ethical life”; concepts of nation or folk were not up to such a task, and forget the demos. And so it was that the 1842 Prussian *Untertanengesetz* (Law on Subjects of the State) came to reflect this view.

It was in 1848, however, at the Paulskirche in Frankfurt that this began to change. Up to the middle of that year the goal of a united and/or liberal Germany included multinational Austria. The *kleindeutsch* solution—ethnic and spatial homogeneity—only triumphed among the democrats and “small German” radicals in response to their abandonment and defeat by the forces of aristocracy and empire.²⁶ The North German Confederation and then, after 1870, the German Empire adopted the territory-based rule of citizenship. It was only after the rightward turn of the German conservatives, trying to catch up with right-wing populism after 1895, that “blood” became a key concept in

²⁵ See BENJAMIN BARBER, *STRONG DEMOCRACY* (Univ. Calif. Press 1984); and BENJAMIN BARBER, *JIHAD VS. McWORLD* (Crown 1995).

²⁶ The classic discussions of these developments remain: THEODORE HAMEROW, *RESTORATION, REVOLUTION, REACTION* 95–196 (Princeton Univ. Press 1958); LEONARD KRIEGER, *THE GERMAN IDEA OF FREEDOM* 273–397 (Beacon 1957); HANS KOHN, *PRELUDE TO NATION STATES* (D. Van Nostrand 1967). For the conventional starting point, see BRUBAKER, *supra* note 13.

German citizenship.²⁷ In this atmosphere, the 1913 *Reichs- und Staatsangehörigkeitsgesetz* finally went fully ethnic.

Nationality as a “national bond” between the German Empire and Germans living abroad was confirmed and was not dissolved even when the period of residence abroad was long-term. To ensure state control, at all times, over the naturalization of immigrant workers, the principle of family, ethnic descent was reasserted against territorialism, with the law confirming a basic ethnocultural notion of citizenship as a national community of descent.²⁸

The loss of German territories and populations after 1919 (and 1945) made revision of the 1913 principles difficult since revision would have meant renouncing rather large territorial claims and accepting substantial population losses. Efforts by Social Democrats and others during the Weimar Republic to reintroduce jus soli principles into citizenship law failed, in part, because efforts to democratize the country generally were stymied by the forces of right-wing reaction²⁹ Friedrich Meinecke’s widely propagated postwar view of Germans bound together by culture was as partial and distorted as his pre-war view that Germans were constituted by blood and tribe.³⁰

After 1945, with the country both divided and flooded with refugees from territories no longer under its control, the 1913 principles were reinstated with only the Nazi exclusion and racial expulsion principles stripped away. In addition, of course, the Basic Law of 1949 required Bonn to look after the interests of both halves of the country—the “two German states” view emerging only very late in the game.

As a result, and despite the rapid growth of the foreigner population, until 2000 a child acquired German citizenship only by descent from a German parent. Naturalization was contemplated in the law, but as a rarity: with ten

²⁷ See P.G.J. PULZER, *THE RISE OF POLITICAL ANTI-SEMITISM IN GERMANY AND AUSTRIA* 118–126, 226 (John Wiley & Sons 1964); JACK WERTHEIMER, *UNWELCOME STRANGERS: EAST EUROPEAN JEWS IN IMPERIAL GERMANY* (Oxford Univ. Press 1987).

²⁸ Dieter Gosewinkel, *Citizenship and Naturalization in Modern German and Austrian History* 3 (July 2001) (unpublished manuscript, on file with author). Elsewhere, he stresses that the ethnonationalist victory of 1913 was a narrow one and hardly irreversible; see Dieter Gosewinkel, *Citizenship and Naturalization Politics in Germany in the Nineteenth and Twentieth Centuries*, in *CHALLENGING ETHNIC CITIZENSHIP*, *supra* note 8, at 59; and DIETER GOSEWINKEL, *EINBÜRGERN UND AUSSCHLIEßEN: DIE NATIONALISIERUNG DER STAATSANGEHÖRIGKEIT [NATURALIZATION AND EXCLUSION: THE NATIONALIZATION OF CITIZENSHIP]* 278–368 (Vandenhoeck & Ruprecht 2001).

²⁹ On immigration reform efforts in the Weimar years, see Klaus Baade, *Immigration, Naturalization, and Ethno-National Traditions in Germany*, in *CROSSING BOUNDARIES: THE EXCLUSION AND INCLUSION OF MINORITIES IN GERMANY AND AMERICA* 29 (Larry E. Jones ed., Berghahn 2001); and Jochen Oltmer, *Migration and Public Policy in Germany, 1918–39*, in *CROSSING BOUNDARIES*, *id.* at 50.

³⁰ See FRIEDRICK MEINECKE, *COSMOPOLITANISM AND THE NATIONAL STATE* 9 (Princeton Univ. Press 1970). For Meinecke’s prewar view, see FRIEDRICK MEINECKE, *THE GERMAN CATASTROPHE* (Harvard Univ. Press 1963). On the interaction of culture and economy, see RALF DAHRENDORF, *SOCIETY AND DEMOCRACY IN GERMANY* 5, 21 (Anchor 1967); HAROLD JAMES, *A GERMAN IDENTITY* 3 (Routledge 1989).

years' problem-free residence in the country, a foreigner could apply for a discretionary (that is, not of right) grant of naturalization. Renunciation of other loyalties was essential, but more importantly, applicants had to show a "turn to Germanness" (*Hinwendung zum Deutschtum*), including language proficiency and declared constitutional loyalty.³¹ A mutual lack of interest led to an average of only 15,000 naturalizations annually between 1974 and 1984. With the reduction of "administrative discretion" in 1984, the number climbed to 35,000 in 1985, and by 1997 it had reached 80,000, so that, by 2000, over one million people had naturalized as German in the Bundesrepublik.

While German citizenship law evolved only slowly from its original ethnic premises, there developed, in parallel, a theory of abstract, universalist popular sovereignty that came to be identified with "constitutional patriotism." Especially after the post-1968 reforms—and not withstanding such moments of regression as the 1972 Anti-Radicalism Decree (*Radikalerlass*), the Professional Disqualification Policy (*Berufsverbot*), and the like, the integument of West German society, generally, became civic, voluntary, nonbiological, and a matter of communicative reciprocity. Constitutional patriotism makes of national belonging a form of rational attachment that is compatible with liberal commitments to individual rights as well as with social commitments to equality. The Constitution is, in Germany at least, a liberal democratic and social democratic commitment, and, therefore, German constitutional patriotism goes beyond civic nationalism.³²

Verfassungspatriotismus reached its apogee in Germany in the years just before and just after unification. Sometime in the 1990s, however, it came to appear ahistorical, proceduralist, formalistic, and cold. The civic, it turned out, is necessary but not sufficient. Habermas, for one, concluded as much, and he tried to show that even constitutionalism can become more substantive, embedded, thicker, and communitarian exclusionary.³³ And even civic national identities are culturally inherited artifacts, developing as they pass from generation to generation. Like historically embedded cultures, they belong to some people but must be learned by others, even if only through a process of "naturalization" or *Einbürgerung*, the effectiveness of which we

³¹ Most of the data here is drawn from POLICY AND LAW CONCERNING FOREIGNERS IN GERMANY (Bundesministerium 2000) and Rainer Münz, *Ethnos or Demos? Migration and Citizenship in Germany*, in CHALLENGING ETHNIC CITIZENSHIP, *supra* note 8, at 19, 25.

³² For a representative discussion, see Donald Kommers, *Germany: Balancing Rights and Duties*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 161 (Jeffrey Goldsworthy ed., Oxford Univ. Press 2006).

³³ Habermas elaborated on the concept of constitutional patriotism over a number of years; see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 491–515, 566–567 (MIT Press 1996). By the end of the 1990s, Habermas had become aware that even constitutional procedural principles required some historical, cultural embeddedness. See JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER 105–154 (MIT Press 1998).

might be able to test.³⁴ Civic national identities are simply not as contractual as constitutional and procedural agreements may be.

For Germany, but not only for Germany, national belonging is a more-than-rational attachment; it encompasses “the contingent inheritance of distinctive experiences and cultural memories that is an inseparable part” of every national identity.³⁵ As admirable as constitutional patriotism is, as a theory for organizing a polity, national belonging needs—and assumes—more. It assumes some overarching, shared prepolitical community, subsuming formal agreements on legal-procedural rules and making, thereby, a nation something more than a political community organized around voluntary association.

The shortcomings of constitutional patriotism as a social integument were obscured by the economic strength of the German welfare state and by its treatment of the state’s denizens; the limits have since been laid bare in the course of immigration reform.³⁶ Millions came from abroad to work in the Germany of the economic miracle. By the time recruitment was stopped in 1973, there were four million foreigners in West Germany. Family unification and formation could be made difficult but not stopped, so the numbers continued to grow. And life without citizenship was not life without any rights or without solidarities. In 2000, there were approximately 7.5 million foreigners living in Germany or nearly 10 percent of the population—of these nearly 1.5 million, or 20 percent, were born in Germany. In fact, one-third of all foreigners have been in Germany for over twenty years; 40 percent for over fifteen years, and half for over ten years. About 30 percent of foreigners are Turkish, 15 percent Yugoslav, and 24 percent EU, with a third of that being Italian.

Long-term foreign residents, or denizens, have enjoyed the same labor-market regulations and preferences as Germans and the same social benefits, as well.³⁷ Given a much higher density of unionized workers than in the U.S.,

³⁴ It is, as they used to say, “not an accident” that in both Germany and the U.S. there is today a great deal of concern over *testing* the competence or fidelity of those going through a naturalization or *Einbürgerung*. And these tests are about both the Constitution and cultural *Landschaft*. For an extreme version of the claim that citizenship is a falsely universalist claim that suppresses immigrant and minority cultures, see Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES IN LAW 571 (2007).

³⁵ Bernard Yack, *The Myth of the Civic Nation*, 10 CRITICAL REV. 197 (1996); cf. MICHAEL IGNATIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM (Farrar, Straus, & Giroux 1993). As Yack notes, it is hard to understand German reunification, as opposed to the democratization of East Germany, along Habermas’s lines. Popular sovereignty is, Yack insists, more than “consensus [] achieved in the course of argument . . . from an identically applied procedure recognized by all.” See Yack, at 201 (quoting Jürgen Habermas, *Citizenship and National Identity*, in THEORIZING CITIZENSHIP 259 (Ronald Beiner ed., SUNY Press 1995)).

³⁶ See Müller, *supra* note 1 (describing *Verfassungspatriotismus* as the foundation of West Germany’s legitimacy). One might argue that, until the 1980s at least, the economic miracle, frontline anti-communism, and philo-Americanism were the pillars on which (West) Germany rested.

³⁷ THOMAS FAIST, SOCIAL CITIZENSHIP FOR WHOM? (Avebury 1995).

for example, and a more centralized bargaining regime, as well as tougher government enforcement of labor standards, the disparities between domestic and foreign workers, while real, are less than those in the U.S. Indirect wages for noncitizens are high by American standards, just as they are for native workers. Benefits are uniformly available, including child benefits, health insurance, school and job-education allotments, long vacations, pensions, and so forth. Shopkeepers and other petit bourgeois and business people are eligible for and protected by the same programs as the security-obsessed *Kleinbürgertum*. As to civil and political rights, the picture resembles that of the U.S.: on nonimmigration issues, foreigners enjoy the same civil liberties as Germans; with rare exceptions non-EU foreigners may not vote or occupy upper-level civil service or political offices.

With security of residence, moderate family-unification rights, social rights, civil liberties, and a high standard of living, why take the extra step of becoming German? Why risk losing benefits and rights in your country of origin—as is often the case—in order to become part of a people who seem ambivalent about having you? For one thing, Germany *is* now home to many, and the new Nationality Act finally recognizes that:

Children born in Germany to foreigners living here permanently are to be given the chance to grow up in Germany as German nationals from the outset. . . . *The acquisition of nationality marks the beginning of social integration.* If children born in Germany go to nursery school here and receive all their schooling and vocational training in a German environment and already grow up in the awareness of being Germans with all the rights and obligations this entails, they will develop important bonds and feelings of identification with Germany and the German way of life.³⁸

Moreover, an amended Foreigners Act (§85) now allows for naturalization after eight years, subject only to a sufficient command of the German language and acknowledgment of the Basic Law.³⁹ The new immigration laws (*Zuwanderungsgesetz*) of 2004 and 2005 are not at all clear on this matter, however, although recent administrative modifications all tend in the

³⁸ Now, furthermore, “all those wishing to identify with . . . Germany as a democratic and constitutional state are welcome as citizens with equal rights.” POLICY AND LAW CONCERNING FOREIGNERS, *supra* note 31, at 54 (emphasis added).

The new Nationality Law (§4, ¶3) stipulates that children born in Germany to a parent who has had an unlimited residence permit (*Aufenthaltserlaubnis*) for at least three years or residence right (*Aufenthaltsberechtigung*) for eight years will acquire German citizenship at birth. If they also acquire another nationality, they will need to choose between the two upon reaching majority. Nationality Act, July 22, 1913, RGBl. at 583.

³⁹ Gesetzes zur Neuregelung des Ausländerrechts [Foreigner’s Act], July 9, 1990, BGBl. I, at 1354, 1356, §85 (last amended 2004).

direction of greater integration pressure, pressure that might extend beyond *Verfassungspatriotismus*.⁴⁰

What has been striking, particularly in the last several years, is the emphasis on foreigners “integrating,” something both sides ostensibly must want. Less clear is whether foreigners are being invited to join an ongoing German project, as it currently exists, or to join Germans in charting a future course for themselves as seemingly equal partners in something new—the difference is important. Nevertheless, an emerging consensus situates “nationhood in distinctively nonethnic terms revolving around social norms” so that nonethnic criteria at least complement descent.⁴¹

The German Basic Law, the font of constitutional patriotism, anticipates and facilitates a strong welfare state.⁴² Social minima and social consumption require social consensus and solidarity. The distributive logic is one of closure, not of market-style openness. Citizens and resident foreigners must be inside the same closed system. The welfare state “seeks to take care of its own”; it is “a kind of safe house in which to shelter its members from the outside world” that they may be immune to competitive disadvantages and capital flight.⁴³ The segmentation of labor markets must be avoided.

In the face of an eroding welfare state, it becomes more important to integrate so-called foreigners fully into the solidarity of the social life. Failure to integrate at this point is an invitation to reaction,⁴⁴ among both natives and

⁴⁰ See, e.g., *Novellierung des Zuwanderungsrechts und Nationaler Integrationsplan verabschiedet* [Amendment of Immigration Law and Integration Plan Decided Upon], 6 MIGRATION UND BEVÖLKERUNG [MIGRATION AND POPULATION] (Focus Migration, Hamburg Institute of International Economics, Hamburg, Germany) Sept. 2007, at 1–3, available at <http://www.focus-migration.de/index.php?id=913&L=0> (in German). For a more detailed discussion of the new citizenship and immigration laws, see David Abraham, *After Ethnicity and Constitutional Patriotism: Searching for a Capacious German Membership*, in TOWARD THE COMPLETION OF EUROPE 88–100 (Joaquin Roy ed., Univ. Miami European Union Center 2006).

⁴¹ See Levy, *supra* note 8, at 230 (documenting both elite and popular sentiment). See also CHRISTIAN JOPPKE, *SELECTING BY ORIGIN: ETHNIC MIGRATION IN THE LIBERAL STATE* (Harvard Univ. Press 2005). Updates on the integration debate can be found at <http://www.einbuergern.de>.

⁴² The ways in which this is true and in which a more communitarian society with a greater sense of solidarity is mandated cannot be addressed here. See David Currie, *Positive and Negative Constitutional Rights*, 53 UNIV. CHICAGO L. REV. 864 (1986); David Abraham, *Liberty without Equality: The Property-Rights Connection in a Negative Citizenship Regime*, 21 LAW & SOC. INQUIRY 1, 32–38 (1996); Kommers, *supra* note 32.

⁴³ Gary Freeman, *Migration and the Political Economy of the Welfare State*, 485 ANNALS OF THE AMER. ACAD. OF POL. & SOC. SCI. 54 (1986).

⁴⁴ *Id.* at 61, 62. Freeman puts it this way: “. . . reduce the power of organized labor by dividing the working class into national and immigrant camps, by easing tight labor market[s] . . . and by provoking a resurgence of right-wing and nativist political movements. . . . By making racially diverse societies . . . migration has complicated social and political cleavages [and] helped shift the ideological center of European politics to the right.”

foreigners. It is unclear whether “constitutional patriotism” is up to that task. A much more individualized, neoliberal “thinner” society may be in a better position to pursue integration around civic-constitutional and cultural principles than the “thicker” social vision that was also a part of constitutional patriotism in its heyday. This understanding, recently and very interestingly, has led the German left away from multiculturalism and toward “mainstreaming.”⁴⁵ A house to live in.

⁴⁵ For a clear hint of this integrationist turn, see 7 *MIGRATION UND BEVÖLKERUNG* [MIGRATION AND POPULATION] (Focus Migration, Hamburg Institute of International Economics, Hamburg, Germany) Sept. 2002, at 6, available at <http://www.focus-migration.de/index.php?id=913&L=0> (in German). By 2007, “integration” had moved to the center of the immigration docket. Cf. the earlier praise of multiculturalism in DANIEL COHN-BENDIT & THOMAS SCHMID, *HEIMAT BABYLON: DAS WAGNIS DER MULTIKULTURELLEN DEMOKRATIE* [THE BABEL HOMELAND: ADVENTURES IN MULTICULTURAL DEMOCRACY] (Hoffmann und Campe 1992); and CLAUD LEGGEWIE, *MULTIKULTI: SPIELREGELN FÜR DIE VIELVÖLKERREPUBLIC* [MULTICULTURALISM: RULES FOR A MULTINATIONAL REPUBLIC] (Rotbuch 1993).