Nation-State and Normative Diversity

Dissertation

to obtain the Qualification of Doctor of Laws

presented to the Faculty of Law
of the University of Fribourg, Switzerland

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of
Untersiggenthal/AG
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## INTRODUCTION

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A


B


BASTA, Lidija R. 1999. The Role of the Constitution in Central and Eastern Europe in Transition: From the “politique constitutionnelle politisée” towards the “politique


CONNOR, Walker. 1994a. A Nation is a Nation, is a State, is an Ethnic Group, is a ... In Nationalism, 36, eds. John Hutchinson & Anthony D. Smith. Oxford, New York: Oxford University Press.


G


K


Catherine Bosshart-Pfluger & Albert Tanner. Zürich: Chronos Verlag.


P


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### ABBREVIATIONS

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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>AI</td>
<td>Appenzell Inner Rhodes (Swiss Half-Canton)</td>
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<td>BE</td>
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<td>BGE</td>
<td>Bundesgerichtsentscheid (Decision of the Swiss Federal Court)</td>
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<td>D</td>
<td>Deutschland (Germany)</td>
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<td>DÖV</td>
<td>Die Öffentliche Verwaltung, Zeitschrift für öffentliches Recht und Verwaltungswissenschaften</td>
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<td>UNO</td>
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Yale J.L. & Human.  Yale Journal of Law and the Humanities
ZSR  Zeitschrift für Schweizerisches Recht
INTRODUCTION

§ 1. Short Introduction into the Subject and Theses

Modernity aimed at integration\(^1\). Postmodernity embraces diversity\(^2\). This analysis will confront the modern phenomenon of the nation-state as organization of integration with the postmodern paradigm of normative diversity.

A nation-state is the state of and for one nation. Nationalism united former strangers and created a new form of social integration: the nation. Nation-building established the prerequisite unity for common action and therewith for democracy. With the incorporation of the nation as one of its constitutive elements the state became an organization of integration\(^3\).

The pressure for integration (modernity) created a counterreaction (postmodernity) which demands the respect and pursuit of difference\(^4\). Experienced diversity\(^5\) whether within states or based on supranational integration led to a quest for models, which recognize diversity\(^6\). Self-conscious groups within the nation-state and nations that face supranational integration demand that their identity is not only

\(^1\) See e.g. Walker 2001, 624: "The nationalist construction of 'the nation' ... was accompanied by the ruthless homogenizing drive of the modern state. This reflected the state's intolerance of difference and its drive for uniformity..."

\(^2\) See e.g. Turner 1994, 154: "By the postmodernization of culture, I shall mean: an increasing fragmentation and differentiation of culture ... the celebration of the idea of difference and heterogeneity (against sameness and standardization) as minimal normative guidelines in politics and morality."

\(^3\) See e.g. Habermas 1994, 22: "Nationalism is the term for a specifically modern phenomenon of cultural integration."

\(^4\) See Rattansi 1994, 16-17, 22-26.

\(^5\) In 1999 there were about 184 independent states, containing over 600 language communities and 5000 ethnic minorities. Figures in Vincent 2001, 608.

tolerated, but also accommodated and promoted. In this case factual diversity implicates normative diversity.

At the same time, however, there is awareness that a certain degree of integration is necessary for concerted political action\(^7\). Therefore this analysis will look at the phenomenon of the nation-state as organization of integration and will conceptualize the relationship between the nation-state and normative diversity\(^8\).

A successful combination of the concept of the nation-state with the principle of normative diversity could offer an alternative to secession as a group’s way to achieve political relevance and autonomy\(^9\). In different words, a concept of a nation-state that realizes normative diversity could give some ideas on how to manage the peaceful living-together of different self-conscious cultural groups within a common state.

There are different concepts of the nation. The concept of the nation influences the notion and the strategies of the state. Different nation concepts will lead to different strategies concerning diversity. The relationship between nation-state and normative diversity will be analyzed based on three case studies: The United States of America, France, and Germany. These three countries were selected because they rely on very different nation concepts.

Integration or the feeling of belonging together can be created through different means. German, French, and American nationalism created a German, a French, and an American nation respectively but the way of creating the feeling of unity was very different. Especially the differences concerning culture is of importance for our purpose.

\(^7\) See e.g. PREUSS 1994, 147-48: “To gain (or regain) an active role in the organization of individual’s lives and their social relations with each other, the society, which is not a homogeneous entity, has to develop its capacity to act as a collectivity.”

\(^8\) Quite often it is assumed that the nation-state cannot adopt the policy of normative diversity. For instance HABERMAS speaks of “Sprengkraft des Multikulturalismus”: HABERMAS 1999, 141; see as well VINCENT 2001, 609.

\(^9\) Similar idea in LAKOFF 2001, 102.
The German nation excluded all, who did not share the German culture\textsuperscript{10}.

In the United States the exclusion of culture from politics was the means that created national unity\textsuperscript{11}.

France created the nation based on political will by creating an own national culture and by suppressing divergent cultures.

These means however prove to be responsible for Germany’s, the United States’, and France’s systemic limits concerning normative diversity.

Diversity is viewed as questioning the nation state. The stress on one exclusive culture had devastating consequences for minorities in Germany.

Diversity is viewed as irrelevant for state actions. The complete exclusion of culture from national identity in the United States, however, proved partly illusory and not very satisfactory, either.

Diversity is viewed as a sign of the malfunctioning of nation-building according to the French concept. In France the belief in the willing adoption of French culture and values was partly disappointed and the assimilationist approach is increasingly criticized.

Postmodern theories will be used to analyze the potentiality and necessity of change and Switzerland will be used as a verified counter approach. Postmodern theories can show points of departure how to reinterpret the nation-state concepts so that they can at least partly

\textsuperscript{10} Same approach in \textsc{Preuss} 1994, 150. In a historical perspective of the development of the term ‘nation’ nation was first equated with sovereign people. Later on in some cases it gained an ethnic component. In Germany the ethnic component is the decisive one. There are some who are part of the \textit{demos} but who are not regarded as belonging to the nation because they do not share the German ethnicity or are not assimilated to German culture.

\textsuperscript{11} The American way of life is here not viewed as culture because it is not culture in a structural sense. Is is not based (at least in theory) on language, ethnicity, or religion.

The American nation excluded however the First Nation Peoples.
realize normative diversity. Switzerland is a real world example where some postulates of normative diversity are realized. Paradoxically Switzerland’s reluctance to modernize or in different words its premodernity is responsible for the creation of institutions that facilitate diversity in unity.

First I will regard the phenomenon of the state and the nation-state and especially the nation in general (part I) before discussing the American, the French, and German nation-states specifically (part II). After this discussion I will reconsider American, French, and German nationalism by comparing their strengths and deficiencies with special regard to their strategies concerning diversity. Postmodern theories and the real-world example Switzerland will be used to argue how the nation-state concepts would have to be redefined as to be able to achieve normative diversity (part III). Conclusions will follow.

§ 2. Clarification of Terminology

Before I will start with a closer look at the nation-state it is necessary to clarify the terminology used in this thesis.

In every-day language the terms ‘nation’, ‘state’, and ‘nation-state’ are often used as synonyms. In this analysis the term ‘nation’ however will be exclusively used as the denomination of a community that believes in belonging together and that wants to go on and decide about their own destiny through concerted political action directed at achieving, maintaining, and strengthening statehood\(^\text{12}\). It is not used as a synonym for the state or for the nation-state as such.

One further necessary clarification concerns the term ‘people’. There are two different definitions for the term people. People can be understood as ethnos or as demos. The people as demos (Staatsvolk) is the totality of the citizens\(^\text{13}\). People as ethnos (Volk) is a community

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\(^{12}\) For the definition see more detailed below at § 5.

\(^{13}\) Instead of many see KRIELE 1994, 88.
based on the belief in a common descent or culture\textsuperscript{14}. To avoid confusion it will be specified whenever necessary whether people is meant as \textit{demos} or \textit{ethnos}.

The fundamentally different perceptions of the \textbf{nation} as \textit{demos} that is as a sovereign people or as \textit{ethnos} in the meaning of a unique people based on a unique culture\textsuperscript{15} creates further possible confusion. In this thesis the term \textit{nation} will be used as \textit{ethnos} or \textit{demos} depending on the self-perception of the nation. References to the German \textit{nation} will therefore always refer to the nation as \textit{ethnos} and will not be used as a denomination of Germany’s \textit{demos}. ‘Nation’ will only be used as equivalent for ‘\textit{demos}’ when it corresponds with the self-perception of the nation as \textit{demos} like in the case of the American nation.

Consequently the terms ‘\textbf{nationality}’ and ‘\textbf{citizenship}’ are not used as synonyms, either. Nationality refers to the membership in the nation while citizenship has the meaning of state membership combined with rights of political participation. In the case of the United States and of France citizenship is identical with nationality but this is not the case for many other countries e.g. Germany. In Germany citizenship and nationality does not necessarily coincide.\textsuperscript{16}

\textbf{Diversity} shall denominate the \textit{cultural} variety of a population. In respect to normative diversity \textit{culture} will be understood so as to include ethnicity, religion, traditions, and customs\textsuperscript{17}. Therewith \textit{cultural} diversity is not understood to incorporate so-called life-style differences. Some conclusions might however equally be true for life-style differences.

\textsuperscript{14} Instead of many NAWIASKY 1952, 14-16.
\textsuperscript{15} See below at § 5 II.1.B.
\textsuperscript{16} See below § 14 IV.3.
\textsuperscript{17} This understanding of culture is broader than many definitions because it includes ethnicity and religion and narrower because it excludes life-style differences.
The term ‘normative diversity’ expresses that diversity is wanted and aimed at\(^\text{18}\). A state that adopts normative diversity will aim at maintaining and promoting diversity.

§ 3. Methodology

The multifaceted subject of this analysis necessitates a comparative approach. The analysis will rely mainly on macro comparison insofar as the basic structures of the states and legal systems will be considered. Only for the better understanding will there be to a limited extend micro comparison to analyze the law and institutions of the state\(^\text{19}\).

As far as possible the comparison will be based on a functional method. The functionality of the approach shall prevent a formalistic comparison but will look instead for functional equivalents\(^\text{20}\). For instance for a definition of the nation that is acceptable not only in the European continental but as well in the Anglo-American tradition the function of what is normally called nation will be regarded so as to be able to find an abstract definition applicable to both traditions.

The analysis will use a contextual approach taking into account law and legal theory but as well history, political science, and sociology. Only the context can explain why developments took place at a certain

\(^{18}\) Cf. VINCENT 2001, 589 who states that ‘normative’ “[describes] theories concerned with setting standards and prescribing conduct (and not empirically describing events in the world).”

\(^{19}\) For macro and micro comparison see e.g. SOMMERMANN 1999, 1017-18; WALKER 2001, 623-24.

\(^{20}\) For the contextual functional approach see e.g. SOMMERMANN 1999, 1021-24.
time in a certain way. The context can lead to a broader understanding of the different nation-state concepts than a conceptual analysis alone could offer. The contextual or empirical approach has a second positive effect. The theories can be tested in how far they are in congruence with reality. Therefore this analysis will be able to develop theories and to provide their empirical validation.
PART I
SETTINGS: STATE - NATION - NATION-STATE

First the state as the qualified element of the nation-state will be regarded (§ 4). Later the nation as qualifying element shall be introduced (§ 5) and by creating a connection between nation and state the nation-state will be conceptualized (§ 6).

§ 4. The ‘State’

I. Introduction

At this point our interest in the state is a necessary but limited one. The state shall be the empty vessel to be filled with meaning by the introduction of the nation as qualifying element.

A definition of the term ‘state’ shall be adopted which is open and inclusive. It shall be open so as not to exclude any type of state organization. For instance the definition of the term ‘state’ must be open to the very different understandings of the state or government in the Continental European resp. in the Anglo-American tradition\textsuperscript{21}. At the same time the definition shall facilitate to establish the linkage between state and nation.

There are many different definitions of the state. Possible definitions will be regarded with respect to their usefulness in the context of the subject.

\textsuperscript{21} See more on this difference below at § 4 III., § 11.
1. Categories of Definitions

There are three categories of definitions for the state: legal, phenomenological, and teleological definitions. Lawyers are interested in a legal definition of the state mainly to have criteria to distinguish the state from other forms of political organization. The question posed by lawyers is much more: when does a state exist? than what is a state? They avoid as much as possible criteria relying on value judgements in favor of objectively assessable criteria. Phenomenological definitions try to describe the state without evaluating it. In contrast to phenomenological and legal definitions teleological definitions of the state rely on ethical postulates.

After a short history of the term ‘state’ different definitions will be regarded. I will argue in favor of the legal definition of the state based on the three-element theory, first expressed by Jellinek. Then I will regard other legal definitions before giving some examples of phenomenological as well as teleological definitions together with the indication in how far they can be of use for this analysis.

2. Short History of the Term ‘State’

The history of the term shows that the term ‘state’ was adopted as to have a common expression for different types of territorial organizations. The term ‘state’ derives from the Latin word ‘status’. The term status was neither in classic nor in post-classic Latin used in the meaning of the term state but meant status or constitution. In the

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22 This classification relies on Kriele 1994, 73-76. The third category, which is here called teleological, he calls political (verfassungspolitisch). Because this type of definitions envisages an objective, e.g. to have a just state, these definitions are in this analysis called teleological definitions.


24 See Kriele 1994, 73-74.

Middle Ages the term already described the estate or as well directly the higher estates or orders\textsuperscript{26}. Only after the Middle Ages some authors used the term status as equivalent to res publica. Finally it was Machiavelli who introduced the expression ‘lo stato’ in political literature and only then it became part of every day language\textsuperscript{27}.

Machiavelli created with the term ‘lo stato’ a vague expression that could be used for a great variety of political regimes\textsuperscript{28}. Earlier terms had been limited to only one form of political organization. For instances \textit{civitas} was only used for city-states and \textit{terra} only for political organizations covering a huge territory. The types of political territorial organization in Italy were however so numerable and varied that none of the terms used at that time were appropriate for all the existing entities. It needed a term that was neutral enough to take reality into account and that could therefore include the multiplicity of organizational forms\textsuperscript{29}. ‘Lo stato’ was this neutral term adopted and later translated into many languages.

II. Legal Definitions

Lawyers are interested in the term of the state in so far as legal but as well political decisions depend on it. The main interest does not lie in a final description or the definition as such\textsuperscript{30}.

The following will not be an exhaustive array of possible definitions but will regard two abstract general definitions. Abstract general definitions try to include all possible variations of state organization. Specific concrete definitions of the state define one specific state while concrete general definitions define one category of states for instance
the category of democratic states\textsuperscript{31}. For the purpose of the analysis at this stage a possibly broad definition of the state shall be searched. A bit later additionally the concrete general definition of the nation-state will be introduced\textsuperscript{32}.

1. The Three Element Theory by JELLINEK

The three-element theory developed hand in hand with public international law. The more universal public international law became the more abstract and the more formalistic definitions of the state had to become. There was not only a phenomenological interest to find a universal definition but even an absolute need\textsuperscript{33}.

According to KRIELE it is necessary for the world peace to agree on a definition of the state which does not rely on substantive criteria\textsuperscript{34}. The definition must not rely for instance on the legitimacy of the regime or the concept of the nation but is abstract, minimalist, and formalistic so

\textsuperscript{31} See KRIELE 1994, 10-13.

\textsuperscript{32} For these distinctions see KRIELE 1994, 75-76.

\textsuperscript{33} See DOEHRING 2000, 19.

\textsuperscript{34} See KRIELE 1994, 70-72: The non-recognition as a state limits the possibility to claim rights and duties based on public international law which principally only regards states as addressees. Political regimes which are neither bound by nor can rely on international public law for safe-guarding their interests can be a threat for peace in the relevant region but even in the world. They can feel threatened by their neighbors more easily and neighbors will hesitate less to interfere in internal affairs of the political regime because the neighbors have to fear less sanctions based on international law. Same conclusion in DOEHRING 2000, 19-20.

This is one reason why there are trends like for example in the Geneva Conventions to enlarge the scope of international public law so as to include as well de-facto regimes.
as to include most political regimes. A state should not be forced to prove its existence with power politics.

According to the minimalist definition first adopted by Jellinek and today accepted by public international law a state exists when three elements are present: A state has a people, a territory, and sovereignty. The three elements must be present cumulatively and are interrelated.

The people must be understood in the way that the state must have subjects or citizens over whom the state is exercising its sovereignty and who can be regarded as belonging to the state. The state must have members. The people must not be defined as citizens with political rights, as ethnus, or as a nation, so as not to introduce ethic or political criteria.

Several theories had tried to define the state while relying only on one of the three elements. One of these attempts was to define the state as a

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36 In most secessionist movements the will to form an independent state is however proven with force.

37 The international community however took the decision to recognize a state as possibility to put pressure on the new state. For instance the United States recognized Panama based on the concession that American law would apply for the construction of the Panama Canal. The decision on recognition is as well used to demand the introduction of rule of law, democracy, human rights, and minority rights. For instance the European Union issued a directive that only those Eastern European countries should be recognized that fulfill the above enumerated values. The recognition is however only declarative and does not decide whether a state exists.

38 See Jellinek 1919, 183: He defined the state as “die mit ursprünglicher Herrschermacht ausgerüstete Körperschaft eines sesshaften Volkes”. The wording of his definition opened however possibilities for misuse arguing for so-called ‘natural’ borders because of his phrase ‘sesshaftes Volk’ settled people. Jellinek’s definition does not clarify whether the people should be understood as population, demos, or ethnus.

Instead of many see Doehring 2000, 21-41, esp. 21-24 and Fleiner-Gerster 1995a, 126.
people. JELLINEK attacks this theory on the basis that the will of individuals can never lead to a decision unless there exist rules of the game. A people alone without any kind of organization do not form a state. The three elements are necessarily interrelated. Sovereignty must encompass a people on a defined territory.

According to Thomas FLEINER additionally to the criteria people, territory, and sovereignty a forth element should be present. The state needs institutions, which can represent the state externally and internally. However some kind of institutions are a prerequisite for sovereignty. Without institutions sovereignty stays a fiction and therefore as an inherent part of sovereignty there must be some kind of a political organization. Institutions for internal and external representation are here regarded as being included in the three elements established by JELLINEK.

JELLINEK’s definition is a general abstract definition and is open to many different kinds of political regimes and political organizations. Additionally his definition is very apt to be qualified by the introduction of the nation as a constitutive element. The substitution of the element of the people with the element of the nation can transform the definition of the ‘state’ in a definition of the ‘nation-state’.

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39 These attempts can be understood from a historical perspective. For most of history the liens between the people and the ruler was more important than e.g. the territory. See DOEHRING 2000, 20-21.
40 See JELLINEK 1919, 144-45: “Willensakte verschiedener Menschen können nicht in der Weise addiiert und subtrahiert werden, dass solchen Rechenoperationen auch ein realer Vorgang entspräche. Vielmehr muss ein bereits feststehender Rechtssatz anordnen, dass relative, absolute, Zweidrittel-, Drei viertel- usw. Majorität als Gesamtwille zu gelten habe... Die auf den ersten Blick so realistische aussehende Lehre vom Staat=Volk erweist sich daher bei näherer Untersuchung als eine unrein gedachte juristische Lehre.”
41 See FLEINER-GERSTER 1995a, 126-27.
42 See FLEINER-GERSTER 1995a, 126.
43 Similar approach in DOEHRING 2000, 22.
2. Other Legal Definitions

According to DOEHRING the three-element theory is a minimalist but the only universal definition of the state. All other universal definitions can be subsumed under JELLINEK’s definition\(^{44}\). Kelsen’s legal definition shall serve as an example.

KELSEN’s definition is like JELLINEK’s general and abstract. KELSEN views the state as a phenomenon deriving from the legal system. He goes even further. According to his view both the state and the legal system are more or less the same and interchangeable. He understands the legal system as an order of compulsion and the state as an apparatus of compulsion. The apparatus of compulsion is only the reflection of the order of compulsion\(^{45}\).

KELSEN’s theory is fascinating because it is convincingly logically argued. KELSEN empties the term of the ‘state’ of any content. Through this argument even the state can be understood as deriving from the highest basic norm which postulates only normativity as such.

KELSEN’s theory of the state can be attacked based on the same arguments as his legal theory in general. KELSEN’s understanding of the state is either an empty formula or a definition that is far removed from experience\(^{46}\). As a means to distinguish his definition does not seem to be very helpful and appears to be at least for this analysis difficult to handle and not useful. The relationship between nationality and citizenship cannot be elaborated based on this definition of the state because in contrast to the three-element theory it is impossible to take

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\(^{44}\) See DOEHRING 2000, 24. There is however as well a growing a criticism of JELLINEK’s theory, mainly based on the decrease of sovereignty in a globalized world. See e.g. SALADIN 1995, 16-37.

\(^{45}\) See KELSEN 1993 [1925], 17: “Wenn die herrschende Staatslehre den Staat als ‘Zwangsapparat’, die traditionelle Rechtslehre das Recht als Zwangsordnung charakterisiert, so zeigt sich darin, dass beide im Grunde genommen, denselben Gegenstand begreifen wollen, denn der Zwangs’apparat’ ist ja nur ein Bild der Zwangs’ordnung’.”

\(^{46}\) See for the critique of KELSEN’s legal theory FLEINER-GERSTER 1995a, 198-99; see as well DOEHRING 2000, 13.
this definition as a basis to conceptualize the relation between the state and the people.

According to DOHRING KELSEN’s definition must be understood in the context of the three-element theory and is only an interpretation of JELLINEK’s definition. He argues that for the use of KELSEN’s definition three questions must be answered. Who or which people can establish the norms, on which territory are the norms binding, and who has the sovereignty to execute the norms.

III. Phenomenological Definitions

Phenomenological definitions try to describe the phenomenon ‘state’ as comprehensively as possible. Here only one approach will be regarded.

HERZOG criticizes the three-element theory and KELSEN’s definition of the state. He is searching for a definition which takes reality more into account and wants to describe the state based on its qualities, its working, and its purpose and proposes this description as a definition even though he acknowledges that his definition can only be a subjective one.

His definition addresses the internal working of the state. HERZOG may have captured the reality with his approach. However his definition bears the danger to unnecessarily limit the term ‘state’.

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48 See HERZOG 1971, 84-117, esp. 110-17: He argues for instance based on Thomas HOBBES’ understanding of the state of nature and defines peace-keeping as the main function of the state. See for instance at 110: “Man braucht das von Thomas Hobbes gezeichnete Bild des im ‘Naturzustand’ der Menschheit herrschenden Kampfes aller gegen aller nicht bis zu m letzten Pinselstrich ernstzunehmen, um zu erkennen, dass das Friedensproblem in dieser Menschheit nicht ausschliesslich durch die missionarische Verbreitung von Friedfertigkeit zu lösen ist, sondern dass es dazu auch der Gewaltanwendung, d.h. der gewaltsamen Unterdrückung des Unfriedlichen bedarf” (emphasis in original, footnote omitted). He continues to argue that for internal peace the state has to provide social welfare (at 116) and has to promote progress (“allgemeine Fortschrittvorsorge”) (at 117).
While Kelsen’s definition of the state was too vague and open, Herzig’s definition is too concrete and too limited. The purpose and the tasks of the state differ depending on the political forces and movements, which assign them.

For instance in the Anglo-American perspective the tasks of the state are viewed differently than in the European continental tradition. The notion of the state in the Continental European tradition is influenced by the French Revolution. The state was here used as an instrument to develop and even to change society. In accordance with the theory of Thomas Hobbes’ in order to fulfill a peace-keeping function the state is only limited by morals but not by law. The state has unlimited sovereignty and is the sole source of law. Therefore the state accords e.g. freedom rights. Herzig follows Hobbes perception of the function of the state. For Herzig the main function of the state is to promote peace.

Influenced by the American Revolution the Anglo-American notion of the state is very different. The colonists came with rights. For them the law and the state were not necessarily linked. The state itself was viewed, as limited by the liberties and it was the task of the state to guarantee these liberties. This view is represented by the theory of John Locke.

The American Revolution was a revolution against the British State, which was regarded as intrusive. Until today already the term ‘state’ is viewed with suspicion. The Americans prefer to talk of ‘government’. This analysis will still use the term ‘state’ as functional equivalent to ‘government’ as well for the United States. This use of language is however not understood to prejudice the understanding of the tasks of the state.

49 See Doehring 2000, 22.
50 See Damaska 1986, 71-80; Fleiner 1999, 415-16.
52 See Herzog 1971, 84-117, esp. 110-17 and FN 48 above.
53 See Locke 1992 [1690], 121; Richards 1994, 86-142.
A descriptive definition that could take both different traditions into account would have to generalize and could therefore no longer fulfill HERZOG’s ends.

Phenomenological definitions have the same drawback as earlier terms which described political organizations. It will be nearly impossible to find a phenomenological definition of the state, which is able to reflect all different forms of political organization.

IV. Teleological Definitions

Teleological definitions include normative criteria as constitutive elements. Based on the argument that the state is bound by natural law or pre-positive principles state quality is only accepted when the state acts in accordance with these principles. Only the good or just political organization will be accepted as state.

HALLER and KÖLZ define the state as a continuous league of persons on a defined territory that protects the liberty of the individuals, preserves its independence while respecting international law, pursues the common good, and enforces these aims if necessary with force.

While the first part of the definition resembles the three element theory the following addresses the objective or tasks of the state as understood by the authors by including a description of a state who fulfills the tasks assigned to it. Teleological definitions lead to a fusion or maybe confusion of the purpose or the demanded or even actual acting of the state and the state itself.

Thomas FLEINER adopts for his Allgemeine Staatslehre as well the three-element theory. Later however he introduces legitimacy as a
criterion to distinguish the state from other organizations. KRIELE
describes the legitimacy as the other side of the coin of sovereignty.
According to his view sovereignty can only persist for a longer time
when it is accepted as legitimate. Though this relationship between
sovereignty and legitimacy does indisputably exist legitimacy as a
criterion need not enter the definition of the state. Even when
illegitimate sovereignty in an authoritarian or totalitarian regime
pervades, the existence of the state should not be negated.

DOEHRING criticizes the theory of SMEND who defines the state as an
organization of integration based on the same argument of legitimacy.
Even when the state is not integrated it does exist though the survival of
the regime and the state is questioned. The element of legitimacy and
integration will indirectly be added when the element of the nation is
introduced.

DOEHRING himself introduces however this qualification when he
demands the equation of people and nation. He argues that the feeling
of belonging together of the members of the state is so important that
one had to negate the existence of the state without this special feeling
of unity. According to his view a state cannot exist without a
population which has the will to form a nation.

He bases his argument on the right to self-determination of nations and
people that must be respected by all states. He therefore denies that the
German Democratic Republic ever existed. Here he is introducing the

58 For SMEND’s theory of integration, see SMEND 1994 [1956], 475-81.
59 See DOEHRING 2000, 22-23.
des Staatsvolkes, seine Gesamtheit zu bejahen. Auch das mag früher
zweifelhaft gewesen sein, doch muss man wohl heute davon ausgehen, dass ohne
den Willen des Staatsvolkes, eine gesonderte Nation zu bilden, seine Qualität als
Staatsmerkmal zu verneinen wäre. Zumindest gilt das für den Fall der Entstehung
von Staaten. Wenn es in früherer Zeit wohl noch möglich war, dieses subjektive
Erfordernis zu leugnen, ergibt es sich doch heute aus der Erstärkung und
Anerkennung des Selbstbestimmungsrechts der Völker und Nationen”
(footnote omitted, emphasis in original).
same fusion of facts and norms concerning the definition of the state he so much criticized before. To assert the existence of a state one had always to determine the sociological, subjective feeling of belonging together and based on it to analyze whether the state respected the right to self-determination.

For the purpose of this analysis teleological definitions are too limited. Political regimes in which nationalism took xenophobic features and was used to introduce authoritarian or totalitarian regimes and to suppress minorities would have to be excluded from the scope of this analysis when these political regimes could no longer be regarded as states.

However teleological definitions of the state can be very useful when an existing state shall be evaluated. In this case the definition is not used to decide whether the state exists but as means to evaluate whether the state fulfills the demands. In the last part of this analysis a teleological definition of the state will be introduced to evaluate the American, French and German nation-states in respect to a model nation-state which realizes the optimal relationship between nation-state and normative diversity.

V. Here Used Definition of the Term ‘State’

As a starting point it is important to use a definition of the state which is open so as to introduce no unnecessary qualification. Only a legal definition can offer the necessary openness. Both phenomenological as well as teleological definitions are too limited.

Phenomenological definitions would have to rely on a high degree of abstraction so as to achieve openness similar to legal definitions. In this case however phenomenological definitions could no longer be distinguished from legal definitions.

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62 As well his view of the right to self-determination is disputable because he links it with a feeling of belonging. A people as demos who do not have a feeling of belonging together but decide to be ruled by common institutions could not rely on the right to self-determination.
Teleological definitions introduce ethic or normative postulates. To a great extend this analysis will deal with the limit of the nation-state in realizing normative diversity. A definition that includes ethic or political postulates runs the risk to exclude some nation-states because of their reduced legitimacy due to inherent limits in regard to diversity accommodation.

The legal definition by JELLINEK is a minimalist definition. Therefore it is open and inclusive. The three-element theory distinguishes three constitutive elements of the state: territory, people and sovereignty. It does not favor one specific understanding of the state, e.g. as unlimited in the Continental European or as limited state in the Anglo-American understanding of the state or government.

Next to its openness the definition has a further advantage. Because it relies on the people as one of its elements the definition can serve as a basis to conceptualize the relationship between nation and state in the nation-state. In the nation-state the people will be substituted by the nation. Because of these reasons the three-element theory will be used as definition of the state.

A state has cumulatively as constitutive elements a people, territory, and sovereignty.

Later the concrete general definition of the nation-state and the teleological definition of a nation-state, which realizes normative diversity, will be introduced.
§ 5. The ‘Nation’

The nation is a phenomenon that is still partly unexplained. There is no generally accepted definition of the term ‘nation’ and it is as well disputed precisely what historical or ideological events led to the creation of nations. According to KRIELE the nation is neither a purely legal nor a purely empirical term63.

To be able to better understand the function and development of nations the preconditions for nation building shall be regarded (I). Afterwards the nation will be defined (II/III).

I. Nation-Building

1. Introduction and Methodology

Nations are a product of modernity64. It is a modern idea that a body of people is capable of acting collectively and in particular of conferring authority on political institutions65.

There is however still no overall accepted theory of how and why nations came and come into existence. A general theory of nation building faces a problem. Nation building is influenced by various factors. The development of each nation in the world was a unique process influenced for instance by history, the availability of certain sets of ideas and ideologies, preexisting conditions like territory or already existing strong communal bonds, and influences of surrounding national movements. Sometimes national movements demanded democracy, in other instances democratic movements created nations. The discussions about nation building in specific countries later in this analysis will show how very different the developments were. A comparison must rely on abstraction to find common points.

63 See KRIELE 1994, 91.
64 See e.g. KREIS 1998, 35-41
I will argue that nation building is the reaction to a deep identity and legitimacy crisis. This identity and legitimacy crisis can be created through events that decisively unsettle existing social and political structures. The creation of a nation promises a new identity and a new source of legitimacy. Nation building is influenced by economic motivation, however, opportunistic considerations alone cannot account for the complex sociological process of identity formation.

Nation-building went hand in hand with the internalization and application of theories of popular sovereignty. Therefore the discussion will start with a short look at theories of popular sovereignty (2). In a next step I will base my argument on Ernest Gellner’s functional theory of nation building (3) and will continue with some examples that show the limits of his theory (4) before determining the common traits of nation building (5).

2. Popular Sovereignty

Theories of popular sovereignty were debated before nations came into existence. These theories were however essential for nation-building. They are the theoretical basis for national sovereignty. In the beginning the idea of popular sovereignty was supposed to explain and justify a new legitimization of power. Social contract theories were used to argue for the secularization of power and for the transfer of sovereignty from the monarch to the people. From theories of popular sovereignty the right to self-determination was developed.

Here only a short overview of the development of these theories and ideas will be given so as to provide a theoretical framework for the theory of nation-building depicted below.

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66 See Vincent 2001, 605-06.
A. The Basis: Bodin’s Theory of Sovereignty

Theories of sovereignty developed in the debate on the role and power of the church in the state. The state wanted to achieve state power that was independent of the church in its constitution and functioning. Jean BODIN (1530-1596) made the theoretical breakthrough in this debate with his theory of sovereignty. He called the absolute and constant power of the state sovereignty and instituted the monarch as bearer of this sovereignty. Whoever was able to achieve the absolute power over a territory was deemed to be sovereign. The state was therefore no longer God-given but states could be founded and borders changed. BODIN did however not argue for a complete secularization of state power. He did not eradicate religious legitimation but he made legitimation independent from the church. The monarch did no longer receive his worldly power as a fief but he became the representative of God on earth. Now everybody who resisted the monarch resisted God. The people were subjects and owed obedience to the monarch.

68 See FLEINER-GERSTER 1995a, 148-51, cf. HALLER 1971 [1934], 104-06: He argues that the conflict between church and state was inherently founded in the Christian religion. Monotheistic (universal) Christianity that stressed the value of the individual had to repudiate the total state even as religious state.

69 See BODIN 1976 [1583], 19.

70 BODIN does not clearly distinguish between the internal or external sovereignty of the state and institutional sovereignty (the institution with the highest power, in his theory the monarch). For this critique see FLEINER-GERSTER 1995a, 153.

71 See FLEINER-GERSTER 1995a, 155: Because of this the theory of sovereignty could be used as basis for colonialism and annexation.

72 See BODIN 1976 [1583], 20: “Souverän ist nur derjenige, der allein Gott als Grösseren über sich anerkennt.”

73 See BODIN 1976 [1583], 39: “Da es auf Erden nach Gott nichts Grösseres gibt als die souveränen Fürsten, die Gott als seine Statthalter eingesetzt hat…”

74 See BODIN 1976 [1583], 39: “Wer sich gegen den König wendet, versündigt sich an Gott, dessen Abbild auf Erden der Fürst ist.”

75 BODIN however called them citoyens (citizens) but defined citizens as free subjects. See BODIN 1976 [1583], 14-15.
According to BODIN the sovereignty of the monarch was **indivisible**. Because the monarch was viewed as the representative of God nobody could equal his powers. The monarch stayed bound by natural and religious law, however he or she gained the **power to make law**, even unjust law that was binding because of his or her will that it be so. BODIN viewed this law-making power as the main attribute of sovereignty.

In accordance with BODIN’s theory of sovereignty the monarch became independent towards the outside and the sole bearer of power in the state who was only responsible to God.

**B. Complete Secularization of Sovereignty**

In the next step sovereignty became completely secular. The monarch did not any longer receive the sovereignty from God but from the people as representative of the people. **Social contract theories** were the basis for a shift from absolutism to the sovereignty of the people and therewith the necessary basis for modernization and democratization.

**Thomas HOBSES** argued that fear and violence marked the state of nature. Without a limiting power there would be war of all against all. To escape the state of nature, or in different words to establish peace the people concluded a social contract. In this contract each

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76 Including e.g. pacta sunt servanda, see BODIN 1976 [1583], 31-38, esp. 36.
77 See BODIN 1976 [1583], 19-38, esp. 25-26. BODIN’s theory was therewith the basis for absolutism, see as well below at § 9 I. for absolutism in France.
79 See FLEINER-GERSTER 1995a, 154.
81 See HOBSES 1970 [1651], 114-15: He distinguishes competition, distrust, and striving for glory as main reasons for perpetual conflict.
82 See HOBSES 1970 [1651], 115: “Hieraus ergibt sich, dass ohne eine einschränkende Macht der Zustand der Menschen ein solcher sei, wie er zuvor beschrieben wurde, nämlich ein Krieg aller gegen alle.”
person ceded his freedoms and powers to one person or a community (Leviathan) under the condition that the others do the same. Through this contract the people founded the state and submitted themselves to the rule of the Leviathan. In order to assure peace the new power holder could decide on right and wrong and on the rights and duties of the subjects. Rights were therefore not inherent but given by the state. The highest representative of the state had undivided and unlimited sovereignty.

John Locke started with the idea that human beings were by nature free, equal, and independent. The only way to renounce the natural freedom was to form a political community based on an agreement with others with the aim to promote peace, safety, and to enjoy property.

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83 See HOBES 1970 [1651], 155: "Um aber eine allgemeine Macht zu gründen .. ist der einzig mögliche Weg folgender: jeder muss alle seine Macht oder Kraft einem oder mehreren Menschen übertragen, wodurch der Willen aller gleichsam auf einen Punkt vereinigt wird, so dass dieser eine Mensch oder diese eine Gesellschaft eines jeden einzelnen Stellvertreter werde und ein jeder die Handlungen jener so betrachte, als habe er sie selbst getan … Dies fasst aber noch etwas mehr in sich als Übereinstimmung und Eintracht; denn es ist eine wahre Vereinigung in einer Person und beruht auf einem Vertrag eines jeden mit einem jeden…"

The social contract of Hobbes has therefore two parts. In the first part the people form a political community in the second they subject themselves to the Leviathan. Later his social contract was reinterpreted as two independent contracts so that the existence of the state was independent from the regime and a change or regime could take place without the questioning of the state. See JELLINEK 1919, 207-11.

84 See HOBES 1970 [1651], 156-66.

85 See LOCKE 1992 [1690], 4-14, at 43 he defines freedom: "Freiheit [bedeutet] innerhalb der erlaubten Grenzen jener Gesetze, denen er untersteht, über seine Person, seine Handlungen, seinen Besitz und sein gesamtes Eigentum zu verfügen, damit zu tun, was ihm gefällt, und dabei niemandes eigenmächtigem Willen unterworfen zu sein, sondern frei dem eigenen folgen zu können." This excerpt shows additionally the importance of rationalism for his social contract theory.

86 See LOCKE 1992 [1690], 73: "Die einzige Möglichkeit diese natürliche Freiheit aufzugeben und die Fesseln bürgerlicher Gesellschaft anzulegen, ist die, dass man mit anderen Menschen übereinkommt, sich zusammenzuschiessen und in eine Gemeinschaft zu vereinigen, mit dem Ziel, behaglich, sicher und friedlich miteinander zu leben - in dem sicheren Genuss des Eigentums und in größerer Sicherheit gegenüber allen, die ihr nicht angehören."
The established government was bound by natural law but was otherwise the sole bearer of power\textsuperscript{87}. Sovereignty was undivided but not unlimited.

Though both HOBBES and LOCKE based the sovereignty on the people the power of the representative(s) of the state were viewed as unlimited respectively as only limited by some natural rights\textsuperscript{88}. Within these limits the power-holder(s) could decide and act, as they wanted.

The social contract theories of LOCKE and HOBBES could still be used to justify absolute monarchies. Even though some decisions of the representatives of the state might be detrimental to the people's interests HOBBES did not accept a right to resistance while LOCKE was ready to accept it but only in cases of emergency\textsuperscript{89}.

At the same time however these theories were the first step to make political power-holders and their decisions accountable to the people. Both had argued that the state was good for the people and that the people founded the state because the individuals had realized that it was to their benefit\textsuperscript{90}. As representatives of the people the power-holders were supposed to further the good of the people and secularized ideas of the common good could develop\textsuperscript{91}.

Jean-Jacques ROUSSEAU (1712-1778) introduced the volonté générale, the general will as the expression of the common good. Laws and

\textsuperscript{87} See LOCKE 1992 [1690], 121; Natural law could now become rationalized in so far as it could be understood as inherent to rationality instead of as law given by God. For this aspect see HALLER 1971 [1934], 106-07.

\textsuperscript{88} See FLEINER-GERSTER 1995a, 175.

\textsuperscript{89} See FLEINER-GERSTER 1995a, 179: According to HOBBES all law is emanating from the state. The state is the only source of the law. The state cannot make unjust laws because it is the state who defines rights and wrong. HOBBES consequently negated a right to resistance. HOBBES regarded the misuse of power as side-effect that had to be accepted. LOCKE on the other hand regarded the state as limited by natural rights and he therefore accepted as well a rights to resistance as emergency measure.

\textsuperscript{90} See JELLINEK 1919, 214: Social contract theories relied on the ratio of each individual.

\textsuperscript{91} See FLEINER-GERSTER 1995a, 157; cf. below at § 9, § 10 the explanations for France and Germany.
decisions of the state had to be based on the common decision of the sovereign people in all forms of government. For him the rational and just state was governed by direct democracy. Simplified the shift in sovereignty is expressed in the following way: While Bodin still relied on the notion of the rule over the people, Hobbes and Locke introduced the rule for the people and Rousseau argued in favor of the rule for the people by the people.

In the French and in the American Revolution the idea of popular sovereignty was implemented. The French Revolution relied mainly on the theories of Hobbes and Rousseau while the American Revolution wanted to implement the ideas of Locke.

C. The People’s Right to Self-Determination

Social contract theories had created the foundation for a people’s right to self-determination. When a people is sovereign than it has the right to determine its own fate.

The Charter of the United Nations is one of the legal texts in which the people’s right to self-determination is recognized. Other examples are to be found in the International Covenant on Civil and Political Rights or in the First Protocol to the Geneva Convention.

92 See Jellinek 1919, 212-13.
93 See Fleiner 1999, 415-18; and above at § 4 III and below at § 8, § 9.
94 Charter of the United Nations, signed at San Francisco on 26 June 1945, entry into force 24 October 1945. See esp. Art. 1 [2.] UNO-Charter: To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace… (emphasis mine).
95 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. See esp. Art. 1 [1.]: 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
96 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and
Two fundamental questions are however still open in relation to the right to self-determination.

- There is no agreement on who is the people.
- Additionally a consensus on the content of the right to self-determination does not exist. It is not clear whether this right means political rights, a right to autonomy, or even to own statehood.

According to Thomas Fleiner, Hobbes stole God the unlimited sovereignty over mankind and gave it to the Leviathan, the state, and the people who concluded the social contract like Prometheus had stolen the fire from the Gods to give it to men. Power now emanated from the people. Therewith democracy became possible. However Hobbes' gift was poisoned. Hobbes did not specify what community, population, people, or nation should be a bearer of sovereignty.

The United Nation Charter does not distinguish between nation and state or between the people as ethnos and as demos. The Charter foresees the right to self-determination of peoples. The United Nations accepts as members only states. The Charter uses the terms 'people', 'nation', and 'state' without defining them or without being consistent in their application.

Whereas the right of the population to decide on the form of their government is normally accepted - even though there are disputes

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97 See Fleiner 1996b, 18.
99 Art. 3 and 4 UNO-Charter.
100 See Fleiner-Gerster 1995a, 123: “Diese Begriffsverwirrung (...) zeigt mit aller Deutlichkeit, wie schwierig und problembeladen der moderne Staatsbegriff ist. Es besteht Unklarheit darüber, welchem Territorium und welchem Volk die ‘Staatlichkeit’ zukommt bzw. wann Staat und Volk identisch, wann sie verschieden sind. Wer kann sich beispielsweise auf das Selbstbestimmungsrecht berufen? Die Mitgliedstaaten oder die Völker, die den Mitgliedstaaten der Vereinten Nationen zum Teil unterstellt sind?”
101 See Preuss 1994, 150.
about the permitted means\textsuperscript{102} - the right of groups to statehood or autonomy are more controversial\textsuperscript{103}.

For instance though the \textbf{Charter of the United Nations} recognizes the right to self-determination it stresses as well that the organization is based on the sovereignty and equality of all its members\textsuperscript{104}. However self-determination understood as political autonomy or as right to statehood of a group that is not identical with the population of a state will necessarily infringe on the sovereignty of the state.

Yet the \textbf{Protocol 1 to the Geneva Convention} on victims in international armed conflicts presupposes in some cases an interpretation of the right to self-determination as autonomy or state rights for ethnic groups\textsuperscript{105}. When the right to self-determination is evoked against a colonial or racist regime then internal conflicts are treated as international conflicts. This approach seems to sanction secession.

The \textbf{constituent power of states} often evoke the right to self-determination of peoples, frequently but not always understood as \textit{ethnos} to legitimate state formation\textsuperscript{106}. The \textbf{custom of the United}

\begin{itemize}
\item \textsuperscript{102} See e.g. PERNTHALER 1986, 45-47.
\item \textsuperscript{103} For more details on autonomy rights see below at § 8 I.2.B.c.; § 11 IV.; § 14 III.2.
\item \textsuperscript{104} See Art. 2 [1.] UNO-Charter: The Organization is based on the principle of the sovereign equality of all its Members.
\item \textsuperscript{105} Art. 1 [4.]
The situations referred to in the preceding paragraph [international conflicts] include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (emphasis mine).
\item \textsuperscript{106} So instead of many Belearus:
Preamble of the Constitution of 1994: We, the People of Belearus, …, founding ourselves on our inalienable right to self-determination;…
or Russia 1993 in its preamble of the Constitution of 1993: We, the multinational people of the Russian Federation … proceeding from the commonly recognized principles of equality and self-determination of the peoples …
\end{itemize}
Nations in relation to the right to self-determination is not uniform. Whereas in some instances of new state-formation the right to self-determination of an ethnic group was implicitly recognized in other instances the right of similarly situated groups to their own state or even to autonomy was denied or at least not supported.\footnote{See Fleiner 1996b, 34-36.}

An ethnicity-based understanding of the people in respect to the right of self-determination is in most instances problematic most of all when the right to self-determination is understood as including the right to statehood.\footnote{See e.g. Offe 1994, 181.} In most cases the new state will again include ethnic minorities who could again evoke the right to self-determination. The right to self-determination of one ethnic group can infringe on the right to self-determination of others, of the ethnic majority of the state, or of other minority groups.

3. Ernest Gellner’s Functional Theory of Industrialization

According to Gellner nations come into existence based on necessity and opportunistic considerations during the age of industrialization.\footnote{Cf. Vincent 2001, 590-91: He gives a short account on different theories of nationalism and nation-building and views Gellner in the broader context of modernization theories in the tradition of David Apter, Karl Deutsch, Lucian Pye, and Clifford Geertz.} Economic considerations lead to the creation of homogeneous nations. New differentialist national movements start when the costs to assimilate are higher than the costs to separate.

Ernest Gellner developed a purely functional or utilitarian theory of nation building: According to Gellner industrialization necessitated and is exclusively or at least primarily responsible for nation-building. It unsettled existing social structures, created a higher mobility and at the same time a heightened isolation.\footnote{See Gellner, 1965, 171.} Industrialization necessitated the means for communication, a common language and a higher level
of education of a bigger class of people°. Centralized education became one of the most important means of nation building°. Industrialization created pressure for homogenization. It needed a new identity - the national identity - to create the necessary common basis for communication and action. The creation of a common culture was necessary for the working process in the industrialized state°. Industrialization was however not a process that took place everywhere at the same time but in irregular waves. The industrialization therefore created inequalities between less and more developed areas. When cultural differences between the industrial and the less developed area greatly disadvantaged assimilation into the economic process and bared therefore people coming from the less developed area in taking part in the economic success the pressure of homogenization got substituted for a pressure to differentiate, to pursue an industrialization of the own area, and thereby to create a monopoly of high ranking positions for members of the own culture°.

4. Critique of Gellner’s Theory

Gellner’s theory can be criticized on two levels. One can question his functional approach as such and/or one can criticize the influence he ascribes to industrialization. My critique will be aimed mainly at the essentials he ascribes to industrialization. Most authors who argue against Gellner’s theory base their critique on the argument that a purely economic approach

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111 See Gellner, 1983, 57.
113 See O’Leary 1998, 47.
cannot do justice to the complex phenomenon of nation building\textsuperscript{115}. Assimilation or secession is not purely based on tipping games\textsuperscript{116}.

A functional approach that only relies on economic considerations cannot explain the sociological components of collective identity or the influence of ideology as mobilizing force. Economic motivation however decisively reinforces cultural or political factors\textsuperscript{117}.

Successful industrialization obviously necessitated certain homogeneity for communication, mobility, and organized action. Industrialization necessitated nationalism, however, there are nationalisms where the prime influence of industrialization is not apparent\textsuperscript{118} and there are attempts to industrialize that failed because industrialization did not manage to create nations\textsuperscript{119}. In addition it can as well be argued that nation building is a counter-reaction to industrialization. The nation is inherently related to sovereignty and legitimacy. The theory of nation-building must be able to show this link.

First, Thomas Fleiner’s theory of state building according to which nation building as democratic movement is at least partly a counter-reaction to industrialization will be regarded \textsuperscript{(A)}. Second, England will

\textsuperscript{115} Instead of many O’Leary 1998, 56.

\textsuperscript{116} Cf. Latin 1998, 135-57: David Latin offers one example, which contradicts the absolute influence of economic considerations. Latin regarded the assimilation tendencies of Russians in Estonia, Latvia, Kazakhstan and Ukraine based on their use of the Russian besides the titular language, openness of the society to assimilation, expected economic returns, status returns, intervening sociological variables and options for exit. He found out that assimilation is not only based on opportunism and necessity.

Many newer nationalistic movements seem to be opposed to economic considerations. For instance, the separation of Slovakia from Czechoslovakia as well as the separation of Slovenia from Yugoslavia seemed to be unwise from an economic perspective. (In retrospect, because of the escalation of conflicts in Yugoslavia, the secession of Slovenia was in its economic interest. When the separatist movement started this development was however not clearly foreseeable).

\textsuperscript{117} See Horowitz & Lissak 1989, 30.

\textsuperscript{118} For instance in the post-communist countries, see below at § 5.1.4.C.

\textsuperscript{119} Cf. Connor 1994a, 40: New states in Africa and Asia were often not able to create the necessary common identity for a successful industrialization and the working of the modern state as such.
serve as an example for pre-industrialization nation building (B) and, third, the nationalism in former post-communist countries for post-industrialization nation building (C).

A. Nation Building as Counter-Reaction to Industrialization

GELLNER argues that industrialization necessitated nation building. It can however as well be argued that nation building is at least partly a counter-reaction to industrialization\(^{120}\).

Thomas FLEINER distinguished five stages of state development\(^{121}\). In a first stage families formed village communities or nomadic tribes. The elders or the chief had to organize defense against the outside and had to arbitrate internal conflicts. The size of the communities depended on the availability of food. These communities were still mainly anarchic\(^{122}\).

In the second stage the communities started to work the ground regularly. The first boundaries were set and notions of real estate and property developed. More stable political institutions were created. Due to the necessarily higher stage of the division of labor the social relations gained complexity and dependencies developed. The leader gained the function to protect the subjects\(^{123}\).

In a third stage the territoriality principle ousted the personality principle. Cities developed or were founded for commerce and the defense of boundaries. The city community instead of the extended family became the most important social factor. With it the individual gained more independence from the family but was more dependent on the city community. The city did not only have to provide protection but as well services to the community (e.g. streets, sewage systems, and

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120 Cf. CANOvan 1996, 59-64: She distinguishes between modernization that brought nation-building and nation-building that brought or influenced modernity.
121 See FleiNER-GErster 1995a, 19-30.
hospitals). Common interests and action created a feeling of community.\textsuperscript{124}

Industrialization was the next and fourth step in a process of an increasing division of labor and of a decreasing autonomy of the family. To escape poverty and serfdom the farmers moved into the free cities where they worked in industrialized businesses. The nuclear family could not any longer provide the same social security as the extended families before. The state took over social security.

As a \textit{counterweight} to the dependency on the state and the employer the people demanded freedom rights and democratic participation. The increase of the power and the tasks of the state led to a counter-reaction that aimed at a separation of powers, democratization and socialization. Nation-building was therefore not or not only a necessary preliminary of industrialization but a reaction to it and was linked to the demand for democratic participation and human rights.\textsuperscript{125}

Internationalization or globalization and the decrease of state sovereignty marked the fifth stage.\textsuperscript{126}

\textbf{B. The English Nation as Counter Example}

Liah Greenfeld asserts that the English nation already existed in the 16th century and therewith \textit{before industrialization}.\textsuperscript{127} The high standard of education and the early commercialization can explain the early phenomenon of national ideas in England based on Gellner’s

\begin{itemize}
\item \textsuperscript{124} See Fleiner-Gerster 1995a, 22-25.
\item \textsuperscript{125} See Fleiner-Gerster 1995a, 25-29; cf. Habermas 1994, 22: He underlines the connection between democracy and the nation-state (calling them twins) and argues that a national consciousness will develop when the people is mobilized and isolated at the same time.
\item \textsuperscript{126} See Fleiner-Gerster 1995a, 29-30. Globalization might necessitate a new nation concept. For this aspect, see below at §13 I.2.
\item \textsuperscript{127} See Greenfeld 1993, 29-31; compare however as well Miller 1997, 166 FN 13: Miller does not so much contradict Greenfeld but argues that it would be better to talk of a British nation and this nation was created only between 1707-1837.
\end{itemize}
theory\textsuperscript{128}. Gellner includes the early commercialization of society as a nation-building force\textsuperscript{129}.

Jürgen Habermas, however, sees the reason for the early national movement not only and not primarily in the commercialization but in other reasons. The Reformation in England supported the early emergence of nationalism. The break from Rome sanctioned the development of a separate identity\textsuperscript{130}. According to Habermas religious schisms had a decisive influence on nation building because they gradually eroded the religious legitimation of political authority. National movements could create a new secular legitimacy based on popular sovereignty\textsuperscript{131}.

C. Ethno-Nationalism in Post-Communist Countries

The new ethno-nationalism e.g. in the post-communist countries after industrialization is as well difficult to explain with Gellner’s approach. The decay of communism created the necessary preconditions for manifestations of nationalism\textsuperscript{132}. It is questionable whether the communist countries were really industrialized. Communism prevented the development of a free market economy or a business elite. However, industrialization was not the main driving force for the nationalization of politics.

It can be argued that communism created the basis for the outbreak of fierce nationalisms.\textsuperscript{133} Even though communism and socialism were

\textsuperscript{128} See O’Leary 1998, 55.
\textsuperscript{129} See Gellner 1996, 638.
\textsuperscript{130} See Greenfeld 1993, 51-52.
\textsuperscript{131} See Habermas 1998a, 111; see as well above at § 5 I.2.
\textsuperscript{132} See Brubaker 1998, 286: He stresses that the influence of ongoing nationalization of politics in the communist or socialist countries during the communist or socialist era must not be underevaluated.
\textsuperscript{133} See e.g. Greenfeld 1993, 386-87: She asserts that communism has the same ideological basis as German nationalism. Both were based on the view that the Western, capitalist world is worthless, that it alienated the individual from society, and that only an individual that became one with a community was free and unalienated. Both communists and nationalists yearned for a transformation of society that made the real unalienated man possible even if the transformation
regarded as universal values they were applied within national borders.\textsuperscript{134} Communist politics already laid the foundation for the nationalization of politics after the defeat of communism. Communism was the main unifying force in the communist countries; however, the politics of the communist party relied partly on nationalistic sentiments.\textsuperscript{135}

Constitutions granted the right to national self-determination to nationalities within the countries partly as a substitute for individual rights\textsuperscript{136}. Yugoslavia is the unfortunate example that shows the nationalization of ordinary politics best\textsuperscript{137}.

Yugoslavia was based on veto federalism\textsuperscript{138}. Each ethnic group received a republic as their “homeland”. Only Bosnia Herzegovina was needed a violent revolution. However, communism had a cosmopolitan element. In communism the nation was substituted by the class. Nations were only welcome as long as they provided an arena in which the class consciousness could develop.

\textsuperscript{134} See \textsc{Vincent} 2001, 599-600; cf. \textsc{Avineri} 1981, 38: Moses Hess expressed this fusion of nationalism and communism in his book \textit{Rome and Jerusalem}. In the early years he opted for integration and assimilation of Jews into the universal socialist movement. Later Hess sought for a \textit{national} solution of the Jewish problem, however not at the expense of his socialist beliefs. He was convinced that there could be a \textit{national} and socialist solution for the Jewish dilemma.

Cf. as well \textsc{Connor} 1994a, 37: China can serve as an example, too. The Chinese Communist Party stressed the common descent of the Chinese people and relied on nationalist sentiments.

\textsuperscript{135} See \textsc{Basta} 1999, 520: When the communistic ideology was not sufficient to legitimize politics the party relied additionally on the “ethno-nation” as a legitimating factor.

\textsuperscript{136} See \textsc{Fleiner-Gerster} 1995a, 135: The Brezhnev doctrine accepted a very broad right to national self-determination. According to the doctrine every nation that is capable of creating and preserve a socialist social order has a right to self-determination; \textsc{Fleiner & Basta} \textsc{Fleiner} 2000a, 13-14.

\textsuperscript{137} See \textsc{Connor} 1994b, 156-57. Many politicians stress the century old animosities between Serbians, Croats, or Albanians in Yugoslavia. These animosities alone, however, cannot explain the violent outbreak of nationalism. The Communist regime facilitated some decades of peaceful living together. During this time there was a high percentage of intermarriage, and a growing number of people described themselves as Yugoslavian instead of Croatian, or Serbian. Politicians misused and exploited the history of animosities to strengthen their power through nationalistic sentiments.

\textsuperscript{138} See \textsc{Basta} 1998b, 95.
constituted as multi-ethnic republic. According to the Constitution each of the republics and of the two provinces could veto decisions within Yugoslavia. The republic of Serbia had a special status. The provinces of Kosovo and Vojvodina had a veto power within Serbia. Because of these mechanisms the political influence of Serbians in Serbia and in Yugoslavia was very limited.

There was no primary democratic consensus. Both chambers of the federal parliament were based on the confederal principle. The federal government lacked therefore own democratic legitimacy and identity and could not function as a counterweight to the federal units\textsuperscript{139}. Because of the notions of homelands for different ethnic groups combined with their veto power, and the missing of any form of overarching legitimacy politics became automatically politics between different ethnic groups\textsuperscript{140}. The “Croats” vetoed a decision the “Serbs” wanted or the “Albanians” in Kosovo blocked a decision that was favored by the “Serbs”. Politics became \emph{ethnificated}.

The Yugoslav Constitution was in force during the communist era. However the communist party dictated the political results and prevented the actual implementation of the Constitutional provisions\textsuperscript{141}. Yugoslavia appeared to be federal but the Communist party was a centralized and centralizing power\textsuperscript{142}. Federalism and Constitution existed only on paper. The communist party’s rule had prevented the actual implementation of the disastrous constitutional designs. The written constitutions in the Soviet-type societies were mere fiction\textsuperscript{143}.

The actual implementation of the old Soviet-era Constitution after the defeat of communism proved to be fatal in all ethnically diverse countries. The 1992 Yugoslavian Constitution was adopted in haste to

\textsuperscript{139} See \textsc{Basta} 1998b, 95-96.
\textsuperscript{140} See \textsc{Basta} 1999, 523.
\textsuperscript{141} For the communist countries in general see \textsc{Basta} 1999, 519: the communist party formed a para-state order based on the complete control of the party.
\textsuperscript{142} See \textsc{Basta} 1999, 520; \textsc{Przeworski} 1997, 60: the Communist Party exercised an \textit{ex ante} and an \textit{ex post} control over the decision-making process.
\textsuperscript{143} See \textsc{Arato} 1994, 179.
demonstrate the continuity of the Yugoslav State and continued the fatal lack of overarching legitimacy and legality\textsuperscript{144}.

The constitutional designs, most of all in Yugoslavia and the USSR, favored nationalism. The \textit{legitimacy crisis} that arose after the defeat of communism supported nationalistic sentiments further\textsuperscript{145}. The post-communist countries had to create new legitimacy and solidarity. An appealing common ethnic identity combined with the exploitation of historic conflicts promised to legitimate the post-communist states in the eyes of the population.

5. \textit{Nation-Building - a Broader Functional Approach}

Though industrialization necessitated nation-building industrialization was not the only development that favored nation building. It was a whole set of historical developments and ideas that led to the creation of the nation\textsuperscript{146}.

All nation-building processes have certain \textbf{common traits}. Nationalism is the reaction to an \textit{identity and legitimacy crisis}. Reformation, industrialization, as well as the defeat of communism were drastic events in history. They effected the social and political structures and created a deep-rooted identity crisis.

The modern state apparatus with its warfare, taxation, industrialization and theories of popular sovereignty and democracy \textit{necessitated a certain homogeneity} of the population.

The homogenization however called for an idea that was more appealing than abstract ideas like popular sovereignty and human

\textsuperscript{144} See \textsc{Basta} 1998b, 96.
\textsuperscript{145} See \textsc{Basta} 1999, 523: "A federation without federal loyalty had nothing to offer against ethnicity as the only political content of massive and legitimating political action." Authoritarian leaders were the consequence of the fatal constitutional design.
\textsuperscript{146} See e.g. \textsc{Llobera} 1994, 104; \textsc{Habermas} 1994, 22-23.
rights. This gap was filled by the modern idea of the nation as a legally and politically mediated form of community\textsuperscript{147}.

- Nationalism promised to create a common identity and therewith \textbf{homogeneity}. The common identification with the nation even achieved that the members were ready to risk their life to defend their nation and its nation-state\textsuperscript{148}.

- The combination of theories of popular sovereignty as a right to statehood and nationhood according to which a group is a nation and thus sovereign allows a group to pursue its own interests and to aim at own statehood. In this case the nation is used to \textbf{legitimate the state as such}.

- Combined with theories of popular sovereignty the nation could give new \textbf{legitimacy to the political powers}. The appeal to ‘the nation’ increases when political authorities are being challenged\textsuperscript{149}. Political authorities must find a unifying factor that can legitimize their actions. A shared national identity can provide this common basis.

- Based on theories of popular sovereignty and self-determination the nation could demand \textbf{democratization and the protection of freedom rights} whether given by the state\textsuperscript{150} or understood as preconstitutional rights\textsuperscript{151}.

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\textsuperscript{147} See HABERMAS 1998a, 113; as well SCHNAPPER 1994, 50: “Affirmer le principe de la citoyenneté ne suffirait pas en effet par soi seul à constituer une communauté de citoyens. Souveraineté et citoyenneté sont des fictions. On ne peut les intégrer effectivement qu’au nom d’un certain nombre de réalités concrètes, valeurs et intérêt, qui justifient les inévitables contraintes de la vie collective et leur adhésion à l’action extérieure - qui peut aller jusqu’à leur imposer le sacrifice de leur vie.”

\textsuperscript{148} See SCHNAPPER 1994, 79.

Who would today be willing to die for the European Union?

\textsuperscript{149} See MILLER 1997, 29.

\textsuperscript{150} Continental European concept.

\textsuperscript{151} Common law concept.
For the individual nationalism promised a new identity and political rights. For the state it created a secular bearer of sovereignty and a new source of legitimacy, and it facilitated the working of the modern state apparatus and the economy.

II. Defining the Nation

As argued above national movements started as a response to an identity and legitimacy crisis. For the individual the nation promised a new identity. For the state it facilitated the working of the modern state apparatus and the economy and created a new secular source of legitimacy. The new common identity formed the basis for concerted political action.

This understanding of nation-building suggests two elements in the definition of the nation. On the one hand a nation shares a common identity. On the other hand it is distinguished from other groups by concerted political action that allows the nation to legitimize the state and state decisions.

In a first step the essence of ‘national identity’ will be regarded (1). Afterwards the political aspect will be analyzed (2).

I. National Identity

A. Introduction and Methodology

In the literature on the nation and nationalism one finds two completely different and opposed types of definitions of what kind of a group

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152 See NAIRN 1994, 71.
153 See HABERMAS 1998a, 111; ALTERMATT & BOSSHART-PIFLUGER & TANNER 1998, 11. See as well BASTA 1999, 518: The French and the American Revolution had both the purpose “to positivate natural rights and to lay down the original place of sovereignty on popular governments, i.e. to organise democratic government” (emphasis in original).
154 See NAIRN 1994, 71.
155 See HABERMAS 1998a, 111.
can form a nation or who belongs to a nation. Both types of definitions rely on supposedly objective criteria. According to ethnic definitions a nation is a community based on common descent or culture. According to political or civic definitions a nation is a sovereign people as demos living under common political institutions\textsuperscript{156}. For instance the German nation is generally regarded as an example for a nation based on ethnicity while the American and the French nations are regarded as civic nations\textsuperscript{157}.

Neither a purely civic nor a purely ethnic definition will be adopted for this analysis. Instead a functional approach will be taken. Based on a functional approach I will argue for a definition that is on the one hand broader than the above mentioned purely ethnic or civic definitions so that it can account both for ethnic and civic nations and for those nations that do not seem to fit into either category. On the other hand the definition will be narrower to limit the term nation to those groups that are united by a special feeling of solidarity\textsuperscript{158}.

In a first step ethnic and civic definitions and their limits will be regarded (B). Afterwards a functional definition will be introduced (C).

\textsuperscript{156} For a short discussion on these two concepts see PREUSS 1994, 148-50.
\textsuperscript{157} Germany did not have a unified territory or political structure. Therefore it relied on a prepolitical identity. The common ethnic identity was the only common identity. The German national identity is based mainly on a shared culture and ethnicity. In many cases it was the ethnic, prepolitical identity which was transformed into a national identity. The ethnic identity often proved to be so strong because it provided an already existing social structure, a basis for equality of the members, the belief in the common descent, common history and common culture. See HROCH 1998, 96.

In the United States however there was only a very weak cultural identity. Political participation could therefore emerge as the dominant identifying factor.

\textsuperscript{158} Therewith the analysis follows a postmodern approach. According to WALKER postmodernists criticize the use of objective criteria and use a more subjective approach. See WALKER 2001, 618-19.
B. Ethnic and Civic Definitions

Ethnic and civic definitions define the nation by relying on the basis of national unity. Ethnic definitions demand a common identity based on a shared ethnicity or a shared culture. Civic definitions stress the common political institutions. First ethnic definitions (a) and afterwards civic definitions (b) will be regarded. The critique of both approaches will follow (c).

a. Ethnic Definitions

Even though most scholars agree that there are no mandatory cultural characteristics of the nation as such\textsuperscript{159} there are scholars who argue that the nation still must have a distinct cultural identity on whatever criteria this common culture may be based. They define the nation as \textit{ethnos} or deriving from \textit{ethnos}\textsuperscript{160}.

\textbf{GELLNER, CONNOR, and KEDOURIE}, three highly recognized scholars of nationalism, all demand a distinct cultural identity for nations.

For \textbf{GELLNER} the common culture is the outcome of the necessity of homogeneity for the industrialized process\textsuperscript{161}.

\textbf{CONNOR} bases his argument on the origin of the term ‘nation’ from the Latin \textit{nasci} (to be born). In his view nations have the primary connotation of a community of descent. The American people cannot be a nation, according to \textbf{CONNOR}, because the belief in the common ethnicity is missing\textsuperscript{162}.

\textsuperscript{159} See however \textbf{STALIN} 1994, 20-21: Stalin defined the nation as a “historically constituted, stable community of people, formed on the basis of common language, territory, economic life, and psychological make-up manifested in a common culture” (at 20). Stalin alleges that a nation only exists if all elements are present.

\textsuperscript{160} The statement that nation is equated with \textit{ethnos} need not say that every ethnicity forms a nation or that national identity is identical with ethnic identity. National identity can be viewed as (only) deriving from ethnicity in so far as constitutive features of the ethnicity are reinterpreted into elements of national identity. For the different approaches see \textbf{VINCENT} 2001, 590-91.

\textsuperscript{161} See \textbf{GELLNER} 1983, 55-62.

\textsuperscript{162} See \textbf{CONNOR} 1994a, 38.
KEDOURIE presupposes as well a community united by culture. He distinguishes nationalism from patriotism. While the American people might be patriotic and have a distinct attachment to their state they cannot be nationalistic because they do not have an attachment to a nation based on culture. It is, therefore, loose and inexact to speak, as it is sometimes done, of British and American nationalism when describing the thought of those who recommend loyalty to British or American political institutions. A British or an American nationalist would have to define the British or the American nation in terms of language, race, or religion, to require that all those who do not, should cease so to belong, and to demand that all British and American citizens should merge their will in the will of the community. It is at once clear that political thought of this kind is marginal and insignificant in Britain and America, and that those who speak of British or American nationalism do not usually have such views in mind.

b. Civic Definitions

Other scholars like Abbé SIEYÈS rely on a political or civic notion of the nation. Abbé SIEYÈS defines the nation as a “body of associates living under a common law and represented by a common legislature.” He defines the nation exclusively as demos. According to SIEYÈS’ definition every demos is a nation.

Dominique SCHNAPPER continues the French tradition and defines the nation as demos. She argues that nations developed in different ways. There were nations that started as an ethnic group. However she denies that there are still nations as ethnos. According to her view the nation is born only when it managed to create its own nation-state. The moment the state exists all citizens are members of the nation.

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163 See KEDOURIE 1994, 50.
164 KEDOURIE 1994, 50.
165 SIEYÈS 1989 [1789], 8: French version: “Qu’est-ce qu’une nation? un corps d’Associés vivant sous une loi commune, & représentées par la même législature” (emphasis in original).
166 See SCHNAPPER 1994, especially 117, 178-83. Consequently she is as well opposed to the idea that there can be nations that are not territorially defineable.
c. Ethnic and Civic Definitions Criticized

Purely ethnic and civic definitions are not satisfying in the view of the above-depicted theory of nation-building because they rely on (supposedly) objective criteria instead of a subjective feeling of identity or belonging. If the nation is however supposed to fulfill its integrating function the feeling of belonging is essential.

- The definition of the nation purely as demos is not satisfactory because not every demos has a common identity or a feeling of belonging together, either because there is no common identity at all or because not all members of the demos share the identity.

Some politicians and scholars thought that every population of a territory could and would form a nation under a common government\textsuperscript{167}. This theory partly explains the drawing of boarders e.g. in the African colonies without regard to existing social structures\textsuperscript{168}. However, a feeling of belonging together did often not develop\textsuperscript{169}. It will be difficult for a modern state to exist with a

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\textsuperscript{167} Cf. SCHNAPPER 1994, 79: She presupposes that the nation creates an identification with the co-nationals and the nation-state so that the national is willing to risk his life for it. Relying on Benedict ANDERSON she poses the question who would be willing to die for the Comecon or the European Community. Even though the European Community has today its own institution and a European Union citizenship exists there is not (yet) a European nation that could create this high degree of solidarity. SCHNAPPER’s theory is in this respect inconsistent. Though she perceives the high degree of solidarity as consequence of nation-building she does not explain why this degree of solidarity does not exist in the European Union even though according to her definition there had to be a European nation.

\textsuperscript{168} See FLEINER-GERSTER 1995a, 131.

\textsuperscript{169} The preamble of Bosnia and Herzegovina shows as well that there is no common Bosnian identity. The people as demos of Bosnia is constituted of three distinct people that do not (yet) have a common identity.

\textbf{Constitution of Bosnia and Herzegovina 1995.}

\textbf{Preamble}

Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows...
demos that does not have a common identity to facilitate concerted action and legitimize the political power.

On the other hand there are cases where an ethnic group founded a state as the (nation-) state of and for their ethnic group even though they accepted to accord citizenship to other groups living in the territory. These other groups were accepted as minorities but not as equally constituting the state.

The view that limits the term ‘nation’ to the nation as ethnos does however not take into account that there are people as demos with no common ethnicity that still have a very strong feeling of solidarity.

Americans do not only feel allegiance to the American State and its political institutions but as well to other Americans. For instance most Americans with Italian ethnicity will feel a stronger bond to other Americans than to Italians in Italy. Shared political institutions can create a strong feeling of belonging together.

A definition of the nation as either ethnic or civic creates a further problem. There are as well nations that are difficult to classify. The distinction between ethnic and civic is not as clear as it first appears.

The reader of the Romanian Constitution will notice that the Romanian nation seems to be defined as ethnic and civic. Art. 4 of its Constitution defines Romania as the homeland of all citizens. Art. 7

See as well Bernhard 1998a, 18.

See e.g. Constitution of Croatia 1990.

Preamble

...Proceeding from the above presented historical facts and from the generally accepted principles in the modern world and the inalienable, indivisible, nontransferable and inexpedient of the Croatian nation to self-determination and state sovereignty, including the inviolable right to secession and association, as the basic precondition of peace and stability of the international order, the Republic of Croatia is hereby established as the national state of the Croatian people and Czechs, Slovaks, Italians, Hungarians, Jews and others, who are guaranteed equality with citizens of Croatian nationality and the realization of ethnic rights in accordance with the democratic norms of the United Nations and countries of the free world...
however imposes a duty on the state to support Romanians abroad for the development and expression of their ethnic identity\textsuperscript{171}. Preferential treatment of ethnic Romanians is problematic in a civic nation. This discrepancy can be either a flaw in drafting the Constitution or a sign that still an ethnic perception of the nation prevails.

Switzerland poses an even more difficult case. Switzerland seems to rely on ethnic and civic elements\textsuperscript{172}. The nation integrates given cultural identities\textsuperscript{173}. The cantons as preconstitutional entities formed or joined the Confederation, which later turned into a federation to protect their identities against the threats from the neighboring states. Swiss federalism made integration possible which still preserved the cantonal identities. The will to act together created a strong feeling of belonging together\textsuperscript{174}.

\begin{footnotesize}
\textit{CONSTITUTION OF ROMANIA 1991.}

Art. 4 [Unity, No Discrimination]
(1) The State foundation is laid on the unity of the Romanian people.
(2) Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property, or social origin.

Art. 7 [Romanians Abroad]
The State shall support the strengthening of links with the Romanians living abroad and shall act accordingly for the preservation development and expression of their ethnic, cultural, linguistic, and religious identity under observance of the legislation of the State of which they are citizens.

\textit{CONSTITUTION OF SWITZERLAND 1874 [was revised in 1999].}

Article 1 [Cantons]
Together, the peoples of the 23 sovereign Cantons of Switzerland united by the present alliance, to wit: Zurich, Berne, Lucerne, Uri, Schwyz, Unterwalden (Upper and Lower), Glarus, Zug, Fribourg, Soleure, Basle (City and Rural), Schaffhausen, Appenzell (both Rhodes), St. Gall, Grisons, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchatel, Geneva and Jura, form the Swiss Confederation.

\textit{See below at § 15 for details.}
\end{footnotesize}
C.  **Subjective Functional Approach**

Objective definitions of national identity are not satisfactory whether they are based on a common culture or on common political institutions. National identity must exist in the hearts of the members and it does not matter on what factors the belief of the common identity is based\textsuperscript{175}. A common culture or common political institutions as such are not the deciding factor for the existence of a national identity\textsuperscript{176}. It is the feeling of belonging that is crucial not the reasons for the feeling of belonging.

Many nations today are a mixture of different ethnicities. Switzerland and the United States are only two more obvious examples. Ethnicity can co-exist with a national identity. There can be multi-ethnic nations\textsuperscript{177}. At the same time the members of one ethnicity can form more than one nation. The Austrian and the German nation are today by many viewed as two distinct nations even though their ethnic origin is the same\textsuperscript{178}.

**Language** is not a decisive factor, either. Paul KIRCHHOF asserts that the nation emerges and exists as a community based on language\textsuperscript{179}. The Swiss people however have four national languages and Americans

\textsuperscript{175} Same conclusion in FLEINER-GERSTER 1995a, 131.
\textsuperscript{176} See H. KOHN 1948, 14.
\textsuperscript{177} See MILLER 1997, 21.
\textsuperscript{178} Cf. SCHNAPPER 1994, 30: In addition ethnicity is not an objectively accessible fact. Ethnic groups are not natural communities but rely as well on definition. Many ethnicity are the creation of myths and/or politics, e.g. the different ethnicities in Nigeria were “created” by the British missionaries while Tito created the Muslim nation in Yugoslavia.
\textsuperscript{179} Cf. HOBSBAWM 1990, 110: There were extensive efforts in Austria in the 1920s to create a national identity distinct from the German identity. The National Anthem was taught in schools together with lectures that the remaining parts of Austria form a natural unit and unity to be proud of. A distinct national identity started to exist, however, only after the Second World War.

\textsuperscript{179} See KIRCHHOF 1987, 746; cf. VINCENT 2001, 591-94 for a short account on authors who regards language as the main element of national identity.
and the English might speak the same language without being one nation\textsuperscript{180}.

Even though most nations have distinct \textit{customs and traditions} these traditions often differ more within the nation than from traditions of surrounding nations. In addition customs are becoming standardized all over the world and change with great rapidity\textsuperscript{181}.

\textbf{Religion} was a dividing force for the separation of countries and the creation of nations, e.g. India and Pakistan. However national identity was often as well a means to overcome the dividing forces of different religions\textsuperscript{182}. Both the Swiss and the German nation do not have a common religion. HABERMAS even asserts that religious schisms were one primary reason why national identities had to substitute religious identities\textsuperscript{183}.

The German nation emerged before a \textit{common state or common institutions} existed. Therefore an existing political entity cannot be an essential factor, either. There are as well no natural borders. There is no theory that could explain whether and why the Loire, Seine, Mosel or Elbe should constitute national borders\textsuperscript{184}. It is sufficient that the nation strives at having a common state\textsuperscript{185}.

National identity and consciousness are based on the \textit{transformation} of already existing group-specific identities and values\textsuperscript{186}. These values and identities can be political or cultural. National movements stressed unifying factors to create a new feeling of identity. “Nationalism is not the awakening of nations to self-consciousness: it

\begin{itemize}
\item \textsuperscript{180} See e.g. SCHNAPPER 1994, 43: On the contrary, linguistic unity was often achieved through and with the nationalization of the population.
\item \textsuperscript{181} See H. Kohn 1948, 14. Theories of globalization that argue for the homogenization of culture go however hand in hand with a ‘localization’. Instead of many see LANGE 2000.
\item \textsuperscript{182} See H. Kohn 1948, 15.
\item \textsuperscript{183} See HABERMAS 1998a, 111, similar as well O’LEARY 1998, 42; TAMIR 1993, 62.
\item \textsuperscript{184} See RENAN 1992 [1882], 52-53.
\item \textsuperscript{185} See below at § 5 II. 2.
\item \textsuperscript{186} See GREENFELD 1993, 17.
\end{itemize}
invents nations where they do not exist - but does need some pre-existing marks to work on...”187.

Nationalism transforms existing identities into national identities. Nationalism stresses certain common features while ignoring divisive ones. Nationalistic movements re-wrote histories. These ‘national’ histories changed the perception of communities. They relied on the reinterpretation of historical events to stress a common identity and to create ‘national’ heroes188.

Nations are not natural communities189. They come into existence and they can vanish again when the belief in the common identity falters. Because national identity is based on invention and interpretation the identities are not stable but can be reinterpreted and changed190.

Many nations define themselves however based on one or several characteristics like descent, language, religion, or political institutions. There are only very few examples of nations which rely on solely one characteristic. Northern Ireland for example fights for a Catholic nation191 and the Quebecois opting for secession base their identity on the common French language192.

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188 In general see TAMIR 1993, 67; KEDOURIE 1994, 51, HABERMAS 1999, 140-41: This reinterpretation of history invites the misuse of nationalism by power elites. For the example of the Jewish people see AVINERT 1981, 23; Heinrich Graetz’s eleven volume history of the Jewish people contributed to the emergence of a self-perception and a world view of the Jews as a nation and of Jewish history as national history.
189 Instead of many see TAMIR 1993, 64.
190 See e.g. WALKER 2001, 620-21. The Belgians and the Italians are still regarded as nations. However the Belgians seem to be in the acute danger of disintegrating into two ethnic groups which no longer share the belief in a common identity. The secessionist movement in Italy that wants to found a new state ‘Padania’ might threaten the unity of the Italian nation.
191 For religion and Irish nationalism, see e.g. K. SCHULZE 1999, 217-40.
192 For language and Quebec nationalism, see e.g. BOURQUE 1995, 199-224.
These two examples show the high influence of what nations or ethnic groups define themselves against. Northern Ireland is surrounded by Protestants while the Quebecois are surrounded exclusively by English speaking nations therefore one single element is enough to stress a common and distinct identity.

The mechanism of differentiation and opposition is apparent in most nationalisms. During nation-building the process of inclusion (of the members of the nation) and exclusion goes hand in hand. The definition of who belongs defines at the same time the out-siders. Through nationalism differences between members are minimized however differences between members and non-members become overemphasized.\textsuperscript{193}

The perception of outsiders can be a decisive factor, too. For instance Jews in Germany, Austria-Hungary and Russia were confronted with Romantic exclusive national movements that led to the exclusion of Jews and barred assimilation. Shmuel TAMIR explained how he would explain Jewish nationalism to his son:

\begin{quote}
...look, we Jews tried to convert and they did not absorb us. We tried to assimilate and they did not accept us ... we concluded that we had no alternative but to become a nation like all the nations in the conservative, routine sense that solved the problem of all the nations.\textsuperscript{194}
\end{quote}

Who is Jewish was not only defined by their own self-perception but is as well decisively influenced by the exclusion from other nations because they were perceived as Jews.

\textsuperscript{193} See HABERMAS 1998a, 111; see as well KARST 1989, 23; WALKER 2001, 620-21; J.P. MÜLLER 1999, 43-44; ARMSTRONG 1994, 141-45: Groups more often define themselves by exclusion or comparison with strangers than by relying solely on their own characteristics. The German groups defined themselves as the people ‘between Wend and Welsch’. ‘Wend’ was the denomination for all non-German speakers living northeast of the German groups and ‘Welsch’ included all Southwest of German speaking groups. The characteristics that become distinctive for the nation need not be the most important elements of the material way of life but are nearly always differentiating factors.

\textsuperscript{194} TAMIR cited in LIEBMAN & DON-YEHIA 1983, 140.
Nationalism normally creates a feeling of **superiority**, most of all when the nation defines itself in distinguishing itself from another nation as e.g. the German nation from the French\textsuperscript{195}.

Whereas most nationals can say what they regard as distinctive features of their nation there are no objective features that all nations shared. It depends on the subjective belief in the existence of the nation on whatever reasons this belief is based.

a. **Constituted by Belief**

The nation is constituted by belief. It needs a shared belief in belonging together, to have a common identity, and the wish to continue life together\textsuperscript{196}.

“Nationality is formed by the decision to form a nationality”\textsuperscript{197}. Only if the nation believes in a national identity and wants to form a nation a nation exists. Nations do not exist independently of the beliefs people have about them\textsuperscript{198}.

This complicates the definition of the nation. The “people’s own beliefs about their nationhood enter into the definition”\textsuperscript{199}. There can be legitimate disagreement whether a nation exists because it is a matter

\textsuperscript{195} See SCHNAPPER 1994, 72: There are only very few exceptions. The first representatives of Zionism who did not pursue the creation of Israel out of religious but solely out of national motivation wanted that the Jewish nation became a nation like all other nations. Their aim was normality.

The same is probably true for the transformation in most countries in Eastern Europe. As Claus Offe argued at a Conference on Transition and democratic consolidation in Fribourg/CH, Dec. 2-4, 1999, while in the earlier cases of nation-building nation building was based all on ideas without taking realities into account nation-building in the post communist countries mainly consists out of realities without ideas.

\textsuperscript{196} See e.g. MILLER 1997, 22-23; CABANEL 1997, 11; H. KOHN 1948, 15; CONNOR 1994a, 36, ANDERSON 1991.

\textsuperscript{197} H. KOHN 1948, 15.

\textsuperscript{198} MILLER 1997, 17.

\textsuperscript{199} MILLER 1997, 17.
of interpreting what the people believe about themselves\textsuperscript{200}. Benedict Anderson calls nations therefore “imagined communities”\textsuperscript{201}.

Defining and conceptualizing the nation is ... difficult because the essence of the nation is intangible. This essence is a psychological bond that joins a people and differentiates it, in the subconscious convictions of its members, from all other people in a most vital way. The nature of that bond and its well-spring remain shadowy and elusive...\textsuperscript{202}.

b. Solidarity

Solidarity of the members of the nation is an important sign for the belief of belonging together\textsuperscript{203}. A nation can only exist as long as its members have a feeling of solidarity. When a majority brutally suppresses a minority or vice versa the suppressed part cannot be viewed as belonging to the nation\textsuperscript{204}.

National identity therefore exists when there is a subjective belief in this identity. The nature of the identity whether it is civic or ethnic, based on culture, religion, tradition, territory or political values must not enter the definition. The belief in the national identity must however be strong enough to transform strangers into a community based on solidarity.

\textsuperscript{200} See Miller 1997, 18.
\textsuperscript{201} Anderson 1991.
\textsuperscript{202} Connor 1994a, 36: This political concept based on imagination bears the danger to generate stereotypes, often relying on prepolitical concepts.
See Habermas 1998a, 111: “The positive self-understanding of the nation now became an efficient mechanism for repudiating everything regarded as foreign, for devaluing other nations, and for excluding national, ethnic, and religious minorities, especially the Jews.”
\textsuperscript{203} See Weber 1994 [1948], 21-22; Fleiner-Gerster 1995a, 175; H. Kohn 1948, 16.
\textsuperscript{204} See Fleiner-Gerster 1995a, 175.
2. Political Activity

HOBESBAWM defines nationalism as a political principle according to which political and national units should overlap. The political activity of the nation distinguishes the nation from any other form of community. Max WEBER states: “In so far as there is at all a common object lying behind the obviously ambiguous term ‘nation’, it is apparently located in the fields of politics.” There can be no nationalism without the assertion of nationhood, which becomes a basis for political action.

The substantiation of nations is a behavioral phenomenon. The nation must engage in collective behavior and actions. It is not only an elite but the mass of the people who become active. Nationalism leads to political demands of self-governing.

Ernest RENAN defines the nation therefore as a daily plebiscite. His definition is perhaps the most famous definition of the nation. It combines the notion of popular sovereignty and the necessity of ongoing identification with the nation.

Nations are characterized by their aspiration for statehood. However nationalism does not evaporate when the statehood is acquired but still

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206 WEBER 1994 [1948], 25.
207 See e.g. BEISSINGER 1998, 171-72.
210 See RENAN 1992 [1882], 55: “L’existance d’une nation est (pardonnez-moi cette métaphore) un plébiscite de tous les jours...”
211 See e.g. H. Kohn 1948, 15; SCHNAPPER 1994, 53-54: The nation incarnates itself in the nation-state. Therefore she argues that a nation can only exist within a state. Cf. however JURT 1999, 188: “Si les traits fondateurs different, les nations se ressemblent à travers leur volité de constituer une communauté d’action politique.” JURT’S approach will not be supported here. If any kind of political action would qualify a group of people as a nation it would be impossible to distinguish e.g. a political party from a nation unless one would revise the definition of national identity given above at § 5 II.2., § 5 III.
exists within the state. The preamble of the Swiss Constitution of 1874 shows the function of nationalism within the state:

[Preamble]
In the Name of Almighty God, the Swiss Confederation, with the intent of strengthening the alliance of the Confederates and of maintaining and furthering the unity, strength and honor of the Swiss nation, has adopted the following Federal Constitution.

Within the state nationalism is directed at maintaining and strengthening statehood.

Nationalism is therewith inherently linked with popular sovereignty. The nation aims at being a sovereign people. Nationalism wants to realize sovereign political communities that are free from external or internal domination. The focus on either internal or external sovereignty differs according to the political situation.

In Germany the nation came into existence before a unified state existed. National consciousness and nationalism was anticipatory and political action directed towards the creation of the state. The self-assertion against external enemies became the main function of the new state. Germany wanted therefore first of all collective freedom.

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212 See BRUBAKER 1998, 276; cf. SCHNAPPER 1994, 36: “La nation, comme réalité historique, doit enfin être distinguée du nationalisme. Ce term désigne d’ailleurs soit les revendications des ethnies à être reconnues comme des nations, c’est-à-dire à faire coïncider communauté historico-culturelle (ou ethnie) et organisation politique; soit la volonté de puissance des nations déjà constituées pour s’affirmer aux dépens des autres.”

213 Emphasis mine. The preamble in the newly adopted Swiss Constitution that entered into force on January 1, 2000 is different. However, it stresses that the Constitution wants to renew the federation between the cantons.

214 The people can be understood as ethnos or as demos. Most problems arrive when a people as ethnos claims sovereignty.

215 See ALTERMATT & BOSSHART-PFLUGER & TANNER 1998, 11; VINCENT 2001, 591; CARON & VERNUS 1996, 156: According to CARON & VERNUS self-determination was either directed at liberalization or at liberation.

216 Instead of many see HABERMAS 1998a, 113-14; for a more detailed account see below at § 10.
In France and the United States the nation developed within a given territory or state\textsuperscript{217}. Membership was identical with citizenship. If the nation is primarily perceived as a legally constituted entity that is as a community of citizens public autonomy and internal sovereignty take precedence\textsuperscript{218}. The freedom of the nation is here defined in cosmopolitan terms.

Nations that identify with state institutions or so called political or civic nations normally develop out of democratic movements\textsuperscript{219}. Civic national identities necessitate the identification not only of the elite but of large part of the population with the political institutions. This will easier be the case when the institution allow the participation of the population, in different words, when the institutions are democratic institutions.

For ethnic nations the elevation of culture and ethnicity can be a substitute for democratic rights\textsuperscript{220}. From ethnic national movements democratic movements can develop when democracy is viewed as the ideal way of mobilizing the people for action and of expressing national identity\textsuperscript{221}.

Political activity to gain, maintain or strengthen statehood forms an objective criterion of the nation.

III. Definition of the Term ‘Nation’

A definition should be able to account for the multiple types of nations in the world. The creation of nations is the response to an identity and legitimacy crisis. The nation offered a new common identity for the

\begin{itemize}
\item \textsuperscript{217} Instead of many see HABERMAS 1998a, 105; for a more detailed account see below at § 8, § 9.
\item \textsuperscript{218} Instead of many see HABERMAS 1998a, 114.
\item \textsuperscript{219} See especially France and the United States below at § 8, § 9. A German civic nation might have developed if the democratic movement in 1848 had been successful.
\item \textsuperscript{220} See Germany (§ 10) and especially theories of acclamation instead of democratic participation.
\item \textsuperscript{221} See for Germany below § 10 I. 3. B.
\end{itemize}
individual and through this identity the necessary unity and secular source of legitimacy for the modern state.

A nation can be defined as a community of people united in solidarity who believe in a common identity and who decide or want to decide about their own destiny through concerted political action. The political action is directed at gaining, preserving, or strengthening statehood.
§ 6. The ‘Nation-State’

The American, the French and the German State are nation-states. The nation-state is more deep-rooted in the emotions of the peoples than any previous political organization. The modern state is the nation-state. Almost all states rely on legitimization doctrines of national or popular sovereignty. They claim not only to rule over a nation but as well for a particular nation. Nationalism transformed a group of strangers into a nation. The nation-state’s greatest achievement was that because it incorporated the nation as one of its constitutive elements it gained through the nation a secular source of legitimacy. National identity created loyalty or solidarity between the members of the nation and facilitated concerted state actions.

As already the word ‘nation-state’ suggests the nation and the state become linked in the nation-state. This section will only have a short look at this link between the nation and the state before going on to discuss different nation-state concepts.

I. Link between Nation and State

Relying on the definition of the state based on the three-element theory by Georg Jellinek a state needs a people, a territory, and sovereignty. In the nation-state the people is equated with the

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223 See Pernthaler 1986, 39; Offe 1994, 107: Offe distinguishes four stages of modernization: first, the creation of the nation-state, second, the guarantee of freedom rights, third, political rights, and fourth, the guarantee of certain social rights.
227 See Jellinek 1919, 144-45.
nation\textsuperscript{228}. The nation becomes one of the three constitutive elements of the state.

\textit{I. Descriptive or Prescriptive/Normative Understanding.}

The concept of a nation-state suggests a high congruence between territory, citizenship and national identity. The territory of the state should be identical with the territory settled by the nation\textsuperscript{229}.

Walker CONNOR argues that there are hardly any nation-states in the world because only in very rare cases state territory coincides with the territory of settlement of the nation\textsuperscript{230}. He asserts that only 9.1% of the states can be justifiably defined as nation-states because the population of the state exists nearly exclusively out of members of one nation\textsuperscript{231}.

CONNOR regards ‘nation-state’ as a \textit{descriptive} term that describes the existing high congruence between territory, citizenship, and nationality\textsuperscript{232}. The term nation-state can and should however be regarded as a \textit{prescriptive} term. Used as a prescriptive term all states are nation-states, which are based on the quest that the state should be the state of and for one nation.

“A nation-state is a nation’s state, the state of and for a particular, bounded, sovereign nation...\textsuperscript{233}” For a nation-state the nation is source of legitimacy and \textbf{constituent and constituted power}. It is the task of the nation-state to further the interests of a nation. The legitimacy of

\textsuperscript{228} See e.g. \textsc{Vincent} 2001, 605.
\textsuperscript{229} Cf. \textsc{Stern} 1980, 8-9: Because of this demand of congruence \textsc{Stern} questions whether a multicultural state or a nation that does not manage to achieve common statehood can survive.
\textsuperscript{230} See \textsc{Connor} 1994a, 39.
\textsuperscript{231} \textsc{Connor} 1994a, 39.
\textsuperscript{232} Similar as well \textsc{Horowitz & Lissak} 1989, 4.
\textsuperscript{233} \textsc{Brubaker} 1998, 46.
the state depends on furthering these interests or at least on seemingly doing so\textsuperscript{234}.

Croatia can serve as an example. According to the Preamble of the Croatian Constitution Croatia is established based on the right to ethn-national self-determination of the Croatian people as \textit{ethnos} and as the state of the Croatian people in which however other ethnic and national groups have equal citizenship rights\textsuperscript{235}. Croatia is therefore supposed to be the state of and for the Croatian nation as \textit{ethnos} even though there is a high percentage of non-Croatians.

\textbf{2. Under- and Over-Inclusiveness}

It is exactly the fact that ethnic nations pursue a nation-state as ethnic state even though there are other ethnic groups that nationalism can be so destructive. Lidija BASTA writes:

[The] constitutions which were passed as an act of sovereign, inalienable “pouvoir constituant” of a given ethno-nation, do contain the fundamental “message” of the ethnic concept of nation-state: The state-building, dominant ethno-nation is the “owner” of the state and its territory, and in consequence, accepts “others” as “foreign elements” and expects them to behave like loyal citizens (read: patient minorities). …Within a multi-ethnic society, ethnicity as a base for political mobilisation and homogenisation must follow the logic of ethnic cleavages, which at the same time means that it inherently generates conflict and confrontations\textsuperscript{236}.

Ethnic or national minorities will feel alienated from the state when the state’s main objective is to further the interests of the dominant nation as \textit{ethnos}.

\textsuperscript{234} See BRUBAKER 1992, 28; cf. DAHRENDORF 1994, 17: He states that "nation-states are deliberate constructions for the common good" but stresses at the same time that heterogeneous nation-states are the great achievement.

\textsuperscript{235} CONSTITUTION OF CROATIA, see above at FN 170.

\textsuperscript{236} BASTA 1999, 529; see as well PREUSS 1994, 152-53: he remarks that paradoxically the Americans encouraged this understanding of an ethnic nation-state in Eastern Europe.
The existence of a nation-state does not exclude that the state is over- and under-inclusive in respect to the nation. The German nation-state is under-inclusive in so far as it does not include ethnic Germans in neighboring countries while it is over-inclusive in so far as a part of the population are German citizens but not German nationals in the ethnic sense.

The relevant link between nation and state in the nation-state is that the nation regards the state based on the right to national self-determination as the arena for the nation’s self-rule in its own interest. The nation forms the constituent and constituted power in the nation-state.

II. Nation-State Membership

Citizenship is a legal status. The citizenry of the state is normally so defined as to include roughly the permanent population of the state\textsuperscript{237}. While citizenship and nationality are not inherently linked the understanding of nationality can influence the notion of citizenship and vice versa\textsuperscript{238}.

There are however important deviations from this rule. Temporary or prolonged absence does normally not lead to the loss of citizenship and there can be groups of the population e.g. foreigners who do not receive citizenship status even though they are expected to reside permanently in the territory.

Access to citizenship itself is limited. At the same time citizenship is a means for closure. The state attaches rights and duties to citizenship\textsuperscript{239}.

\textsuperscript{237} See Brubaker 1992, 21.

\textsuperscript{238} See Habermas 1994; cf. however e.g. van Gunsteren 1994; Karst 1989; Lakoff 2001, 103-04: There is a tendency to regard citizenship not only as a legal status but as well as a social status. In this understanding citizenship is questioned by social inequalities and describes as well a feeling of belonging. So as not to blur the distinction between citizenship and nationality the above mentioned approach will not be followed.

\textsuperscript{239} See Brubaker 1992, 21; cf. Habermas 1994, 24-25: He stresses that the right to renounce citizenship and to emigrate complement the right of the state to include and exclude.
For the access to the country or to other privileges citizenship can be made a prerequisite. Citizenship is “thus both an instrument and an object of closure”.  

Citizenship as instrument and object of closure is generally accepted as a legitimate and necessary institution. The state has to define criteria for eligibility or ineligibility to citizenship. In the nation-state the state will define citizenship criteria so as to coincide to the greatest possible extent with nation membership criteria.

The nation-state is not only, or primarily, an ethnodemographic phenomenon, or a set of institutional arrangements. It is also, crucially, a way of thinking about and appraising political and social membership. Because this way of thinking remains widely influential, debates about the citizenship status of immigrants remain in large part debates about nationhood - about what it means, and what it ought to mean, to belong to a nation-state.  

State interests condition definitions of citizenship: “But conceptions of nationhood, to adopt the terms of Weber’s metaphor, have determined the tracks along which the politics of citizenship has been driven by the dynamic of interests”.

The normative principle of national self-determination assigns political authority to the nation. When the state already existed before national movements began the territory of the state normally defined the nation. All former subjects turned into citizens and members of the nation. National self-determination means in this case that the demos shall have the right to self-rule.

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241 Brubaker 1992, 188 (footnote omitted).
242 Brubaker 1992, 17; cf. Haney López 1996: He explains the way the United States of America for a long time used citizenship law to restrict immigration and naturalization of non-whites to create a white society and to protect white privileges.
244 See the chapters on France and the United States, below at § 8, § 9.
When however a national movement started without a unified state, contrary to existing state patterns, then the nation defined itself as *ethnos* and tried to draw the borders according to its territory of settlement. In this case national self-determination is used to justify the **creation of a state of and for the dominant culture**\(^{245}\).

In the first case nationality will correspond with citizenship while in the second case the nation as *ethnos* will often not be identical with the group of the citizens. Ethnic nationalism creates only in very few cases perfect or pure nation-states in so far as the quest for ethnic homogeneity and the correspondence of the territory of the state and the nation are seldom fulfilled.

The state defines to whom it accords citizenship at birth through **ascription** and whom it will permit to acquire citizenship later in life through **naturalization**.

Both ways of obtaining citizenship can be used to create congruence between state and nation membership. Is the nation defined as all people who live under common institutions the *ius soli* according to which everybody born on the territory is accorded citizenship automatically, is the most effective means to create this congruence.

A nation-state whose nation defines itself as a community of descent is more likely to rely on the *ius sanguinis* principle and will accord citizenship to children whose parents are citizens\(^{246}\).

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\(^{245}\) See STEPAN 1998, 226.

This can be very problematic. Macedonia for example proclaims the state as the nation-state of the ethnic Macedonian people and grants full rights to other ethnicities. However, Albanians in Macedonia do not want to be treated solely as a minority but want to be accepted as equally constituent part of Macedonia. They do not want to be foreigners in their own country.


[**Preamble**]

... as well as the historical fact that Macedonia is established as a national state of the Macedonian people, in which full equality as citizens and permanent co-existence with the Macedonian people is provided for Albanians, Turks, Vlachs, Romanics and other nationalities living in the Republic of Macedonia ...\(^{246}\)

\(^{246}\) See e.g. VINCENT 2001, 606-07.
Naturalization can be a **purely discretionary** decision of the state. In this case the candidate has to fulfill certain conditions to be eligible for citizenship but even then the state has the right to refuse citizenship depending on its interests. Citizenship is in this case a privilege bestowed by the state on some especially deserving individuals.\(^{247}\)

Naturalization can however as well be **expected and promoted** by the state. In some countries naturalization is expected of all immigrants. Failure to naturalize is anomalous.\(^{248}\) An ethnic nation-state will pursue a naturalization policy that is very restrictive and will bestow citizenship only to some carefully selected persons while civic nations will tend to promote naturalization of all immigrants.

Citizenship and naturalization laws very often mirror the understanding of the nation.

> The Revolutionary invention of the nation-state and national citizenship thus engendered the modern figure of the foreigner - not only as a legal category but as a political epithet, invested with a psychological charge it formerly lacked, and condensing around itself pure outsiderhood.\(^{250}\)

Because citizenship status usually reflects nation membership citizenship laws are a **state-sanctioned and routine type of nationalism** that can take but need not take extreme forms.\(^{251}\)

In the nation-state through citizenship the nation is not only a sociological and political but as well a legal concept. Stereotypes are reinforced when they are allowed to enter legal categories.\(^{252}\) Societal prejudices or ideologies alone cannot create total oppression. If,

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247 See Brubaker 1992, 33.
248 See Brubaker 1992, 33.
249 In the ethnic nation-state the state is only restrictive in naturalizing non-members of the nation. Is the person to be naturalized a member of the nation the state tends to accord citizenship very easily.
250 Brubaker 1992, 47 (footnote omitted).
252 See e.g. Karst 1989, 24: Law is in these cases not only the instrument but the symbol of domination.
however, such societal prejudices are transformed into legal categories, discrimination becomes much fiercer.

When legal categories are based on fix attributes like skin color or ethnicity, total oppression becomes possible, if not inevitable. According to Karst law must embody the value of tolerance to avoid the suppression by law.

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253 Cf. Handlin & Handlin 1950, 204: Slavery in the Chesapeake Colonies is one example for this development. Before 1660 the term ‘slavery’ described a low form of human servitude. Slavery, however, soon turned into a legal institution which equaled dark skin color with slave status, and slave status with absolute and perpetual human bondage. This complete degradation and transformation of human beings into dehumanized human beings was only possible because the social construct race entered legal categories. The legalization of the social construct ‘race’ reinforced societal prejudices. ‘Race’ became a reality and still is a reality. For the same conclusion see Fair 1997: Color blindness no longer exists.

254 See Karst 1989, 25. Tolerance of others can be viewed as against the interest of the nation. More on the problem of most nation-states with tolerance or the accommodation of diversity, see below at § 14.
PART II
CLASSIC CONCEPTS OF NATION AND STATE


As was already stated before different kinds of nation-building processes created different kinds of nations and therewith different kinds of nation-states. The self-understanding of nations can differ decisively. In the nation-state the different notions of the state as such are interrelated and intertwined with the understanding of the nation. Experience and practice continuously reinforce notions of the nation and state. There are probably as many understandings of the state, of the nation, and finally of the nation-state as there are states, nations, and nations-states.

Because it is not possible to analyze all existing understandings of the nation-state a selection will have to be made. In this part three nation-states will be regarded: The American, the French, and the German nation-state. These three states were selected because they exemplify three different nation-state concepts.

The idea of ‘nation-state concepts’ is based on the assumption that it is possible to conceptualize different understandings of the nation-state. For this conceptualization some features of nation-states must be defined as decisive in order to be able to distinguish different concepts. The conceptualization reduces the specific nation-state building process to a comparable nation-state building process. Comparison necessitates the distinction of similar and differentiating features and therefore has to rely on generalization and abstraction. The specific context of nation-state building does not receive relevance but only

255 See Brubaker 1992, 16.
256 Every categorization includes choices and therewith as well value judgements.
generalizable aspects can be taken into account\textsuperscript{257}. Even though the aspects must be generalizable they still must be expressive and useful in view of the purpose of the analysis.

The purpose of the analysis is to confront the idea of the nation-state with a concept of normative (cultural) diversity. Therefore the stance of different nation-states in regard to cultural diversity or more generally in regard to culture will have to be analyzed. Culture seems therefore the expressive and useful criteria for selecting nation-states for our purpose.

A common national identity is the outcome of nation-building. This common identity can but does not need to be based on culture\textsuperscript{258}. Based on the relationship between nation and culture three nation concepts can be distinguished.

1. **Nation and culture are not linked.** In this case a relationship between nation and culture does not exist.

2. **A nation defines/creates culture.** In this case culture is a creation of the nation. The nation was not defined based on cultural criteria but the nation creates a cultural identity that becomes part of national identity.

3. **Culture defines/creates a nation.** In this case cultural identity is redefined as national identity. Cultural identity turns into national identity. Nation-membership is defined based on pre-existing cultural criteria.

The nation-state was defined as the state of and for the nation\textsuperscript{259}. The concept of the nation directly influences the nation-state concept. Based on the three nation concepts three nation-state concepts can be distinguished:

\textsuperscript{257} For instance one could define the historical era when national movements started (e.g. 18\textsuperscript{th} century vs. 19\textsuperscript{th} century) as criterion for distinction. The decisive year for nation formation (e.g. 1789 for France or 1871 for Germany) would however not be useful for categorization because it was too specific and would therefore provide for too many categories.

\textsuperscript{258} See above at § 5.

\textsuperscript{259} See above at § 6.
In the first case culture is irrelevant for the state because it is irrelevant for the nation.

In the second case culture is relevant for the nation and therewith for the state though it was not relevant for nation-building.

In the third case culture is relevant for the nation and therewith for the state and was already relevant for nation-building.

As an empirical analysis will show the American, the French, and the German nation-states represent (to a high degree) these three different nation-state concepts. In the case of the **United States** national identity is not linked to cultural identity and cultural identity is supposed not to influence national identity. For the state cultural identity is irrelevant.

In the case of **France** the nation was not based on a preexisting culture but a national culture was created. Culture is deemed relevant for the state though it was not relevant for nation-building. In the case of **Germany** nation-membership was defined based on the pre-existing German culture. Culture is relevant for the state and was already relevant for nation-building.

The empirical analysis of the three nation-states can validate the three concepts. Additionally because the empirical analysis can take the broader context of nation-building and state-building into account it can give an explanation for the prevalence of the classic nation-state concepts without disregarding other decisive and distinctive features. Furthermore the empirical approach can show the consequences, the limits, and promises of the concept in a specific context. The empirical approach can confront theory with reality.

The analysis of the American (§ 8), the French (§ 9) and the German (§ 10) nation-concepts will be followed by a look at the consequences for the notions of the state (§ 11). Conclusions will follow (§12).
§ 8. The American Nation

American nationalism developed from English nationalism. In the self-perception of the colonists in the 18th and 19th century the American was the perfect Englishman.

The first settlers perceived themselves as Englishmen belonging to the English nation. The most important characteristics of the English nation were the English Liberties. The English settlers in the colonies wanted to purify the nation by creating high standards of liberty. The purification of the English nation finally led to the creation of the American nation. Paradoxically the preservation of the English liberties was the main argument for a separation from England\textsuperscript{260}.

Political democratic rights became part of the identity. All who lived on the territory of the new independent country became members of the American nation. In the beginning, however, there were important exceptions. Women and African Americans were included much later. Even today the American society is largely divided by race so that some argue that there are two unequal nations in the United States\textsuperscript{261}. Native Americans are still not included in the nation\textsuperscript{262}.

The American nation is generally described as a melting pot nation because it grew out of members of different origins and cultures. Its high inclusiveness is its highest praised feature. The absorption of different ethnicities and cultures was enabled by the colonies’ notion of equality, liberty and individualism. Dividing issues like ethnicity,

\textsuperscript{260} See Greenfeld 1993, 402; Richards 1994, 86.

The ideas of English liberties helped to shape the American nation but there are always multiple factors that work together. The American Revolution and the Declaration of Independence were not only triggered by the love of freedom and liberty but the driving force was to a large extent self-interest of the ruling class. In the colonists’ self-perception of their identity however those ideas and ideals played an important role. The nation is the embodiment of an ideology.

\textsuperscript{261} See e.g. Hacker 1992.

\textsuperscript{262} See e.g. Fleras & Elliott 1992.
culture or religion were barred from the national agenda and left to the private sphere. Arguments based on equality, liberty, and individualism, however, were as well used or misused for excluding parts of the population and to argue against solidarity and group rights.

I will start with a description of the historical settings and the driving forces in the nation-building process. A second part will deal with the characteristics of the American nation and their ambivalence.

I. Nation-Building

1. The Way to Independence

Nation-building always relies on an idealized history. This is as well the case for the United States. In a first step the idealized euro-centric history will be depicted afterwards it will be relativized by regarding the influence of the First Nation Peoples on American ideas and values.

A. God’s First Born Nation

The first European settlers in the colonies were Englishmen. They brought with them their traditions and political heritage and they perceived themselves as members of the English nation. The English nation was the basis for the nascent American nation. Therefore it is necessary to have a short look at the English nation\textsuperscript{263}.

The life of Thomas MORE shows the turning point in British history from a premodern into a modern English society. The change in the self-perception of the English society proved to be fatal for Thomas MORE who still adhered to the premodern notion that identity was defined by religion\textsuperscript{264}. MORE’s perception could not be consolidated.

\textsuperscript{263} For more information on the English and on the British nation, see e.g. GREENFELD 1993, COLLEY 1992, and MILLER 1997, 166-76, 178-80.

\textsuperscript{264} See GREENFELD 1993, 29-30.
with the growing national consciousness of identity, which created a new entity: the English nation\textsuperscript{265}.

Liah GREENFELD calls the English nation God’s First Born because it was the first modern nation and religion was one of the key factors that supported the development of national consciousness:

National identity implied a totally new set of boundaries which separated England from the rest of the world. But at this period the existence of a separate entity such as a nation was not self-evident. It was problematic and needed justification and conceptualization in familiar terms. Thus it was only natural that at the time of the centrality of religion in every sphere of social existence, nascent nationalism was clothed in religious idiom. Furthermore, because of the association between the Reformation and English national identity, Protestantism not only provided the yet voiceless nationalism with a language, but also secured it a sanctuary and protection which it needed in order to mature. In short, though Protestantism cannot be said to have given birth to the English nation, it did play the crucial role of a midwife without whom the child might not have been born\textsuperscript{266}.

For a long time the English monarch was perceived as the personification of the nation and any opposition against the monarch was deemed as anti-national\textsuperscript{267}. During the Glorious Revolution (1688/89) however the idea of the nation was stripped of religious and monarchical connotations and was based mainly on the idea of the right of equal participation in the government\textsuperscript{268}.

English nationality was not defined in ethnic terms but in terms of political values\textsuperscript{269}. Human dignity, individual liberty and political

\textsuperscript{265} See GREENFELD 1993, 30.
\textsuperscript{266} GREENFELD 1993, 62-63.
\textsuperscript{267} See GREENFELD 1993, 74; for this very change see the theory of BODIN, above at § 5.1.2.A.
\textsuperscript{268} See GREENFELD 1993, 74-77; for this shift see the theories of HOBBES and LOCKE, above at § 5.1.2.B.
\textsuperscript{269} See GREENFELD 1993, 65.
equality were the core features of being English\textsuperscript{270}. The English liberties defined the Englishmen.

This first development of a nation equated the nation with sovereign people and therewith with the \textit{demos}. Only later national movements e.g. in Germany relied on ethnicity as unifying basis.

King James’ and King Charles’ policies threatened the English liberties and therewith endangered the English nation itself. The inability to be English in England led to a huge wave of emigration.\textsuperscript{271} From the sixty thousand people to leave the country during this time twenty thousand went to North America\textsuperscript{272}.

\textbf{B. Englishmen become Americans}

The English settlers came with a national identity. Already the names of their settlements show their \textit{allegiance to England}\textsuperscript{273}. The reasons to leave England were diverse. The founders of Virginia were mostly interested in new economic opportunities for their own and for England’s benefit\textsuperscript{274}. The Puritan settlers in the Massachusetts Bay Colony wanted to establish a religious society\textsuperscript{275}. They wanted to purify their religious and political inheritance\textsuperscript{276}.

In the beginning the move to the American continent was no renunciation of their national allegiance. “In America they saw their dreams come true at the same time as it was frustrated on their native island, but they never lost sight of the fact that this was England’s

\begin{itemize}
    \item \textsuperscript{270} See \textsc{Greenfeld} 1993, 86.
    \item \textsuperscript{271} Huge waves of emigration often occur when once granted rights are revoked. One example is the wave of emigration of Jews from Russia in 1881. Czar Alexander loosened restrictions on Jews. The newly granted liberal rights were revoked in 1881 after his assassination.
    \item \textsuperscript{272} See \textsc{Greenfeld} 1993, 71.
    \item \textsuperscript{273} New England, Boston Cambridge, Virginia, and Georgia are only some examples.
    \item \textsuperscript{274} See \textsc{Greenfeld} 1993, 404.
    \item \textsuperscript{275} See \textsc{Konig} 1979, 3.
    \item \textsuperscript{276} See \textsc{Haskins} 1960, 2.
\end{itemize}
dream. The colonists perceived themselves as Englishmen who shared the same inheritance of liberty and equality.

With the time however a feeling of superiority and with it a distinct identity developed. Britain was one of the most egalitarian societies in Europe but it could not equal America in equality. At least concerning the wealthy white males the American society turned English ideals into reality. In their idealized perception liberty and equality became self-evident rights of all Americans.

The generation of the Revolution did not want to create new rights and principles but saw themselves claiming only the old English liberties. However the colonists saw the colonies and England increasingly as two distinct states which were only held together by the monarch.

C. God’s First Born’s Child is Gaining Independence

Benjamin Franklin’s political development is symptomatic for the changing perceptions of a large part of his generation. Benjamin Franklin was a loyal British subject who fought against Independence. Even though he questioned the authority of the British Parliament to legislate for the colonies he did initially not want a break from Britain. However he changed his mind by 1774 and pressed for Independence.

According to Franklin the English liberties were lost in England and a Union with England would endanger these liberties in the colonies,

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277 GREENFELD 1993, 406.
278 See BAILYN 1967, 66: They believed that the English were more able to maintain these liberties than any other country in the world.
279 See GREENFELD 1993, 408-09.
280 See BAILYN 1967, 141: “[America] ere long will build an empire upon the ruins of Great Britain; will adopt its constitution purged of its impurities, and from an experience of its defects will guard against those evils which have wasted its vigor and brought it to an ultimate end.”
282 See DRAPER 1996, 397.
283 See DRAPER 1996, 396.
too\textsuperscript{284}. The colonists agreed that corruption reigned in Britain\textsuperscript{285} and they feared that the British would try to destroy their liberties in the colonies as well. The standing army in the colonies, the Stamp Act, the Writs of Assistance, and the Tea Act were all viewed as a general tyrannical design of Britain to undermine the liberty of the colonists\textsuperscript{286}.

The more intense the colonists’ committed themselves to equality and liberty the more sensitive and intolerant they became about the imperfect realization of these ideals in England. Idealistic patriotism was a stimulus for rebellion\textsuperscript{287}.

They had three choices: They could submit to external authority like the Irish, they could fight for a reformation of the British Parliament or seek independence\textsuperscript{288}. The first choice would have been against their belief in English liberties, the second too difficult to achieve so that only the third possibility was a workable proposition\textsuperscript{289}.

\textit{The fulfillment of their English nationalism was the absolute sovereignty, self-government, or independence of every individual deemed capable of governing}\textsuperscript{290}.

To fulfill their English nationalism they had to part from England and form a new superior democratic nation based on liberty and equality: the American nation.

\textsuperscript{284} See Draper 1996, 401-04.
\textsuperscript{285} See Bailyn 1967, 51.
\textsuperscript{286} See Bailyn 1967, 105-26; Richards 1994, 86-87. Cf. Frenkel 1956, 119: The sons of influential families studied Coke, Sidney and Locke whose ideology had already justified the Glorious Revolution in England and was again used to justify the American Revolution.
\textsuperscript{287} See Greenfeld 1993, 412.
\textsuperscript{288} See Katz 1987, 37.
\textsuperscript{289} It is telling that an important fighting force during the agitations around the Stamp Act, were called the Sons and Daughters of Liberty.
\textsuperscript{290} See Lerner 1987, 67: The founders wanted to create the best political culture that could be created with mortals.
D. Influence of the First Nation Peoples

American history as it was internalized for nation-building and as it is still taught today in most schools within and outside of the United States is Eurocentric\textsuperscript{291}. The influence of the British heritage is stressed and other influences are neglected. The here offered relativization of American history shall only give one example of the reinterpretation of history.

One undeniable inspiration for the creation of an American nation and the constitution of the United States were the First Nation Peoples (Indians or Natives)\textsuperscript{292}.

Benjamin Franklin is one of the most famous representatives of a whole group of politicians who not only had good contacts with members of the First Nation Peoples and knew their traditions and political organization. He repeatedly suggested a political organization for the United States similar to the Iroquois Confederacy. As the political institutions of the United States share common traits with those of Britain, mainly the features of federalism remind of the union of the six Iroquois tribes\textsuperscript{293}.

The First Nation Peoples did not only contribute to state-building but influenced as well the common ideals of the Americans. GRINDE convincingly argues that the Indian example of and respect for democracy, equality, and liberty were decisive for nation-building and that these values were transformed not only from British but as well from Indian to American values\textsuperscript{294}.

Concerning the Native American history as part of American history a reinterpretation of history is visible in order to justify the territorial

\textsuperscript{291} See FRANKLIN 1971, 10-11.
\textsuperscript{293} See GRINDE 1992, 227-70.
\textsuperscript{294} See GRINDE 1992. At 280 he concludes: “The Founding Fathers did not ‘copy’ the British Constitution, the Magna Carta, the governments of the ancients, or the Iroquois Confederacy, but they did examine and use European and American Indian ideas in the creation of our American government.”
conquest of the American nation and the suppression of the First Nation Peoples.295

2. *We the People*

The Constitution constituted the American nation as the people of the United States:

U.S. Const. Preamble 1787

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Prosterity, do ordain and establish this Constitution for the United States of America.

The nation of the United States was defined as “We the People of the United States...” In other words the territory of the United States defined nation-membership.296

Nation-building, however, was not concluded with the independence from Britain or the adoption of the Constitution.297 The Civil War (1861-64) had important influences on the development of the American nation.

- It confirmed the concept of the American nation as individualistic and civic and it affirmed the size of the nation by determining the territorial extension of the United States.
- It created a higher inclusiveness of the nation with the abolition of slavery and the redefinition of equality.

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295 This reinterpretation of history was achieved through four methods. Historians did not treat aspects of American history concerning Indians, Indians were depersonalized, Indians were treated as inferior, and their contribution to American culture was denied. Virgil Vogel according to Grinde 1992, 279.

296 See Fleiner-Gerster 1995b, 53.

297 Cf. Rosenfeld 1994, 7: The meaning or “We, the People” is not clear. It is neither clear who is the we or who is the people nor does it show how the members of the people are connected to each other.
While in the beginning only white wealthy males were included in the nation reinterpretations led to the inclusion of the poor, women, and African Americans. The First Nation Peoples are still excluded. In addition something like an American culture developed and the American nation became more open for the integration of non-Europeans.

The first section will deal with the reaffirmation of the civic nation concept and the determination of the size of the nation by the forceful prevention of the secession of the Southern states (A). A second section will regard the changing national self-perception through the redefinition of the principle of equality (B). Finally, a third section will deal with the emergence of an American way of life (C).

A. Reaffirmation of one American Civic Nation

The Civil War was a decisive event for the young American nation. The Civil War questioned but in the end strengthened the civic individualistic nation concept. In the Civil War the South and the North fought among other things about competing visions of and the territorial extension of the nation\(^{298}\). The still fragile national identity based on citizenship, individualism and equality was at stake\(^{299}\). There was no consensus among the Southern and the Northern states about the concept and the territorial referent of the nation.

The rights pledged in the Declaration of Independence (1776) were no longer those guaranteed by the British Constitution but natural universal rights, which everybody could claim by the virtue of being human\(^{300}\). The implication of this universalism was a pervasive

\(^{298}\) Greenfeld 1993, 473.

\(^{299}\) See Greenfeld 1993, 473; Richards 1994, 96-110.

\(^{300}\) The Declaration of Independence of the United States of America (1776)

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
individualism. **Universal individualism** however could not function as a means to define the territorial expansion of the nation.

Universal self-government meant the self-government - that is, the independence - of each individual (Christian European) man, and this national commitment to the liberty of every individual man presented a formidable obstacle for the creation of a single American nation. It was not at all obvious why there should be only one American nation. In principle, to carry the ideal of self-government to its logical conclusion, every individual constituted a nation in his own right; in practical terms, at the moment of independence one could easily think of thirteen American nations. Thus the very nationality of the American identity, the uncompromising commitment of Americans to the purified principles of civic nationalism, for a long time to come was bound to hinder the formation of a consensus regarding the geo-political referent of American national loyalty, leaving open the question of what was, or whether there was, the American nation\(^{301}\).

The size of the nation and the state were open for discussion. John Jay argued in *Federalist Paper No. 2* that there was one “united people” in the colonies\(^{302}\). According to Rogers M. Smith he deliberately denied the huge regional, religious and cultural diversity as a response to the Antifederalist argument that a Republic was only possible in a homogeneous society\(^{303}\).

The different colonies were still very **distinct**. The independence from Britain had jeopardized the settler’s common basis as Englishmen and stressed the differences between them. There was no common

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\(^{301}\) Greenfeld 1995, 423 (emphasis hers); see as well Vincent 2001, 607.


American culture that could provide a new common identity and individualism could not determine the size of the nation.

The nation as established in the Constitution was in the danger of disintegrating because of the secessionist movements of States that did no longer belief that the Union was to their benefit.

In the Civil War both the South and the North declared that they were defending American ideals\textsuperscript{304}. The arguments of the South for secession were similar to those employed by the colonies while arguing for independence from Britain\textsuperscript{305}. The arguments were based on the one hand on the perceived suppression of the South by the North and on the other on the rights of the Southern states to decide about their own destiny.

The Southern states stressed however state rights at the cost of individual rights\textsuperscript{306}. Group rights were a substitute for individual rights and racism was a variety of collectivism\textsuperscript{307}. The Southern states were on the way to form a new nation different from the American civic nation.

Southern nationalism and secession were both responses to the unbearable inconsistency between American national ideals and slavery. ... The nascent Southern ideology bears unmistakable resemblance to the Romantic ethnic nationalisms such as the German and Russian ones. Since this baby was, literally, murdered in its infancy, its features never got the chance to develop, but there is no doubt that they would have been strongly racist, collectivistic, and authoritarian, that it would have been traditionalist, anti-capitalist, and therefore, less rational, and would have valued honor above wealth\textsuperscript{308}.

\textsuperscript{304} See GREENFELD 1993, 431.

\textsuperscript{305} See GREENFELD 1993, 432; cf. VINCENT 2001, 607-08: He argues that nationalism has a self-fragmenting aspect. The elements that were used to create the nation can as well be used by subnational groups to argue for own nationhood.

\textsuperscript{306} See GREENFELD 1993, 432.

\textsuperscript{307} See RICHARDS, 1994, 129-35; GREENFELD 1993 479.

\textsuperscript{308} GREENFELD 1993, 476.
The defeat of the Southern states confirmed individualism and the territorial notion of the nation and determined by affirming the territorial dimension of the United States the size of the American nation\(^{309}\). The nation remained a body of individuals instead of becoming an organic individuality\(^{310}\).

The nation was not perceived as a unitary entity and membership did not imply the dissolution of the individual in the community\(^{311}\). “In contrast to the European nations, where the primacy of the nation over the individual imposed general uniformity, the unchallenged primacy of the individual allowed - even guaranteed - plurality of tastes, views, attachments, associations, and self-definitions, within the shared national framework\(^{312}\).”

**B. Equality and Inclusion**

The Civil War clarified the extension of the American nation and reaffirmed the nation concept as civic and individualistic.

This however was not the only important influence of the Civil War on the nation-building process. The Civil War ended slavery, which was a decisive step towards a more inclusive nation and symbolizes the changed understanding of the principle of equality.

The American nation is constituted of equal individuals. Most American leaders were confident that at least all Europeans could be integrated into their society\(^{313}\). However the American population before the Civil War was not an egalitarian society in the modern sense. The Americans excluded those who had had the least political influence

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\(^{310}\) See Greenfeld 1993, 482.  
\(^{311}\) See Greenfeld 1993, 424-27.  
\(^{312}\) Greenfeld 1993, 482.  
\(^{313}\) See Smith 1989, 243; Franklin 1971, 9-11; Karst 1989, 82-87.
under English rule\textsuperscript{314}. The changing notion of equality was an important factor for the development of the nation\textsuperscript{315}.

The change from exclusion to inclusion in the American nation will be depicted mainly based on the experience of African Americans. While legal equality was in most instances achieved there are still factual inequalities. Many cases deal with the question how the courts are supposed to deal with factual inequalities. First the change in the notion of equality will be regarded (a), furthermore the discrepancy between legal and factual equality will receive attention (b). Afterwards the special position of the First Nation Peoples will be analysed (c). The First Nation Peoples are confronted with legal and with factual inequalities and are regarded as excluded from the American nation\textsuperscript{316}. The preconditions for the inclusion of the First Nation Peoples in the body politic will be discussed.

a. From Legal Inequality to Legal Equality

The \textit{presumed dependency} on husbands or on the white property holders was enough to disqualify women, poor males, and African Americans from political participation.

Women were perceived as subordinate by nature to their husbands\textsuperscript{317}. The degradation of African Americans was far worth. After 1660 slavery meant absolute and perpetual human bondage and dark skin color became equaled with slave status\textsuperscript{318}.

Because American nation membership is based on equality and the equal participation in the common political institutions an exclusion from political rights becomes an exclusion from the nation. While for instance in Germany the exclusion of women from the political process did not question their membership in the nation because membership

\begin{itemize}
\item \textsuperscript{314} See HOFF 1991, 80.
\item \textsuperscript{315} Instead of many see KARST 1989.
\item \textsuperscript{316} See e.g. KARST 1989, 29.
\item \textsuperscript{317} See MORGAN 1966, 17.
\item \textsuperscript{318} See e.g. HANDLIN & HANDLIN 1950, 204-18; KARST 1989, 43-49.
\end{itemize}
was guaranteed by their German ethnicity unequal rights in the United
States jeopardizes nation membership.

The Declaration of Independence became a statement of national
identity\textsuperscript{319}. The promise of equality was later interpreted as the central
heritage of the document and as a moral standard, which should guide
politics in the United States\textsuperscript{320}. The assertion of equality turned into
prescriptive equality, which could be used in the fight against slavery
and for equal political rights regardless of skin color, gender, or wealth.

The opponents of slavery cited the Declaration of Independence as
authority that slavery was against the principles of the American
society\textsuperscript{321}. Abraham Lincoln interpreted the Declaration as a
guideline for the future. It should be the task for every generation to
make their society as equal as possible\textsuperscript{322}. The text of the Declaration
became “sacred” and the “generation that discovered the holy greatness
was ready to congratulate itself on the achievement\textsuperscript{323}.”

In the view of the framers the assertion of equality had not contradicted
slavery or the unequal treatment of women\textsuperscript{324}. Senator Stephen
Douglas defended the framers of the Declaration. The equality that the
Declaration wanted to allege was only legal equality between the
British subjects in England and the American colonists\textsuperscript{325}.

The Civil War and the abolition of slavery symbolize a change in the
understanding of equality. Equality is an elusive right. It can be
interpreted in different ways. Any law can be attacked on equality

\textsuperscript{319} See \textsc{Maier} 1997, 154.

\textsuperscript{320} See \textsc{Maier} 1997, 197; for the reinterpretation of equality see as well \textsc{Karts} 1989,
32-33; for the reinterpretation of American founding documents see as well \textsc{Richards} 1994, 111.

\textsuperscript{321} See \textsc{Maier} 1997, 197.

\textsuperscript{322} See \textsc{Lincoln} 1995 [1854], 344-347; \textsc{Maier} 1997, 201-06.

\textsuperscript{323} \textsc{Maier} 1997, 190.

\textsuperscript{324} See \textsc{Maier} 1997, 193-99: The original draft included a condemnation of slavery
which was stricken out during the debates. The framers however did not think
that it was necessary to change “all men are created equal” like the Virginia
Convention which adopted a much weaker compromise.

\textsuperscript{325} See \textsc{Maier} 1997, 204.
grounds by asserting either that equals were treated unequal or unequals treated equal.\footnote{326}{See ROSENFELD 1996, 161; KARST 1989, 40-41.}

Michel ROSENFELD distinguishes the logical progression of three different stages of equality. In a first stage difference is correlated to inequality. Those who are characterized as different are legitimately treated as inferior or superior. In the second stage, identity is correlated to equality. Finally, in the third stage, difference is correlated to equality.\footnote{327}{See ROSENFELD 1996, 165-66.}

The framers of the Declaration of Independence had clearly a stage one understanding of equality. They perceived poor males, women, and African-Americans as different because they were not independent. In their view this difference legitimized different treatment.

When the Declaration was invoked to fight for the abolition of slavery or the emancipation of women the employed arguments were second stage arguments. They argued that women or African-Americans were equal and therefore should be treated as equals.\footnote{328}{For further examples of stage two arguments, see SPINNER 1994, 33-59.}

The Civil War finally brought the end of slavery and was the start of a redefinition of who constituted the people of the United States. The changing interpretation of equality made the nation more inclusive. This is the advantage and the disadvantage of a nation, which is based on equality. Membership can be redefined according to the changing notions of equality.\footnote{329}{Third stage equality leads to positive discrimination.}

The inclusion of African Americans, women, and poor males was a necessary step in the development of the American melting-pot nation.

b. From Factual Inequality to Factual Equality?

The inclusion of African American or women however did not yet make them factually equal members of the nation. The principle of

\footnote{326}{See ROSENFELD 1996, 161; KARST 1989, 40-41.}
\footnote{327}{See ROSENFELD 1996, 165-66.}
\footnote{328}{For further examples of stage two arguments, see SPINNER 1994, 33-59.}
\footnote{329}{See WIEBE 1975, 95.}
equality expressed in the equal protection clause still had prominent significance in the development of the nation. Factual inequality based on former discrimination or on other factors question the national identity of a nation that is based on the ideal of equality.

There are many factual inequalities among the people of the United States that remained and sometimes increased until today. Most visible is the inequality between the races but as well between the genders or the poor and the rich.

In 1896 the Supreme Court ruled that “separate but equal” railroad accommodation for ‘white’ and ‘colored’ passengers satisfied the requirement of the Equal Protection Clause (Plessy v. Ferguson\textsuperscript{330}). Plessy, who was classified by the court as colored because he had one-eighth African blood, was arrested when he refused to leave the section of the train that was reserved for ‘whites’. When upholding the Louisiana Law that prescribed separate but equal transportation the court argued:

The object of [the Equal Protection Clause] was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either\textsuperscript{331}.

Plessy remained valid law until 1954 when the “separate but equal” doctrine was at least in the area of public education overruled (Brown v. Board of Education\textsuperscript{332}). In this case the court regarded several demands of African American pupils to attend non-segregated schools. The plaintiffs had been denied access to ‘white’ schools and argued before the court that segregated schools do not assure equal education of both races.

\textsuperscript{330} Plessy v. Ferguson, 163 U.S. 537 (1896), see as well the comments on the case in KARST 1989, 15-27

\textsuperscript{331} Plessy v. Ferguson, 163 U.S. 537 (1896). This decision is inconsistent with liberalism and individualism because it accepts the existence and relevance of different racial groups. Cf. e.g. KARST 1989, 18: The case recognized the importance of ‘belonging’ and exclusion due to group membership.

The Supreme Court stressed the importance of education as basis of “good citizenship” and went on to argue that separate schools created a feeling of inferiority with African American children:

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone333.

Even until today black and white is still **factually separate and unequal**. For instance in New York there are still 80.8% of black students enrolled in quasi-segregated schools334. The unemployment rate of college educated African Americans is twice as high as of whites with the same education and there are about four times more African American families below the poverty line than European Americans335. In proportion to the percentage of African American inhabitants in Nebraska the imprisonment rate is 15.4 times higher than of white Americans336. David SHIPLER calls the United States “A Country of Strangers”337. The solidarity of white Americans towards African Americans seems to be only limited338.

The granting of equal political rights did not guarantee factual equality and could not or not sufficiently undo the consequences of past discrimination. “In a society which sets great store by equality, economic inequality acquires a significance which goes beyond the effects of difference in material well-being339”. Factual inequality and

334 See HACKER 1992, 162-63: The National School Boards Association counted a school as segregated when black and Hispanic students form the majority of the student body. (The percentage of African Americans in the United States is about 11%).
335 See HACKER 1992, 233.
336 See HACKER 1992, 236.
337 SHIPLER 1998.
338 See GILLES 1999, 13: He reviews David COLE. COLE observes that most white Americans accept a certain extend of discriminating inequality in the criminal justice towards racial minorities as long as they are protected.
the exclusion of an important part of the population from the American Dream questions the national identity.\textsuperscript{340}

A nation based on equality has to cope with a paradox when factual inequality persists. The reliance on prescriptive equality demands that inequalities are abolished. However, inequalities might only be alleviated with unequal treatment.\textsuperscript{341} Unequal treatment to alleviate factual equality, however, seems to question the national identity as well. Compromises are hard to bear for an idealistic nation.

Discussions about the alleviation of factual inequality become a “debate among partisans of equality.”\textsuperscript{342} For instance in *Regents of the Univ. of California v. Bakke* the Supreme Court held that an admission program that reserved some slots for minority students who had otherwise unequal chances to be admitted because of unequal conditions was unconstitutional among other reasons because it disfavored whites.\textsuperscript{343} Here again we see the two competing visions of equality colliding.

It is clear that equality of opportunity, which does not provide for the equality of result, would appeal more strongly to those who have the qualifications necessary to realize the opportunities open to them. It is also clear that in the early American society, actually characterized by equality of conditions, equality of opportunity would be generally acceptable without special provisions for the equality of result simply because it would appear that the latter was implied, inherent in the former. But when actual equality of conditions...

\textsuperscript{340} Instead of many see Karst 1989, 9.

\textsuperscript{341} See e.g. Karst 1989, 39: Factual inequality is perpetuated through formal equality.

\textsuperscript{342} Rosenfeld 1991a, 2; cf. Taylor 1994, 39: “For those who had not gone along with this changed definition of equal status, the various redistributive programs and special opportunities offered to certain populations seemed a form of undue favoritism.”

\textsuperscript{343} Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

\textsuperscript{344} See the critique of the case in Karst 1989, 160-61: While the court took African Americans as group it regarded the white student Bakke as individual. Karst argues that to be consistent the court in Bakke would have had to argue: "We have been wronged" instead of "I have been wronged".
no longer obtains, the provisions for equality of opportunity only (the legal equality of rights) must appear unsatisfactory. Unequal conditions created by past discrimination or by socially introduced deprivations are a special and especially sensitive case of factual inequality. The past discrimination of African Americans or women created unequal conditions. **Affirmative action** is one attempt to alleviate the still existing differences between the races and the genders.

Affirmative action tries to punctually correct factual inequality. Affirmative action programs are therefore limited in scope and in time. Affirmative action must be distinguished from positive discrimination. Positive discrimination is based on the idea that minority groups should permanently receive - next to equal rights - some further rights in order to be able to overcome factual inequality but as well to express and maintain cultural differences.

According to Michel ROSENFELD, affirmative action should be possible without questioning liberalism, individualism and the past jurisprudence of the Supreme Court as long as a class of individuals are victims of invidious past discrimination or of socially introduced deprivations. Under these conditions affirmative action can be a means to help victims but not to help the generally disfavored.

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345 GREENFELD 1993, 439.
346 See ROSENFELD 1991a, 328-33; KARST 1989, 158-72.
348 See ROSENFELD 1991a, 328-33: According to Michel ROSENFELD affirmative action is justified in view of the jurisprudence of the Supreme Court and the principles of liberalism and individualism based on formal equality of opportunity or fair equality of opportunity when six criteria are fulfilled. (1) The class of individuals has been deprived of or have not been provided with means awarded to the remaining members of society based on morally irrelevant characteristics shared by all the members of the class. (2) Prevailing disadvantages can still be traced back to the past deprivations. (3) The prospects of competing for the subject matter of the affirmative action program are reduced because of the prevailing disadvantages. (4) The affirmative action program is a reasonably calculated means to undo the prevailing disadvantage and to create a situation as if the deprivation had not occurred. (5) No alternative remedy would bring the equalization of prospects within the same period of time. (6) The
However even in this limited understanding affirmative action presupposes collectivities. Because someone is a member of a certain group that had previously to suffer discrimination this person can demand affirmative action. Affirmative action is unthinkable without a distinction per group. In this way affirmative action will always be in contradiction to the ideal of the American nation as a nation composed of individuals.

Factual inequality provokes demands for a more active distributive government and questions liberalism and pervasive individualism. The government’s welfare legislation tries to mitigate existing inequalities but is attacked by many Americans because it is inconsistent with the American tradition of non-interference and personal self-government.

c. First Nation Peoples as Legally and Factually Unequal Groups

The status of the First Nation Peoples similar to the Puerto Ricans and native Hawaiians is legally and factually different from the status of other Americans. Therefore it shall be regarded here in a special chapter. The inability of the United States to agree with the First Nation Peoples on their position and rights in respect to the American nation is symptomatic for the inability of immigration countries to accept their native population.

decrease of prospect for the innocent non-preferred individual must not be worse as it had been without the deprivation.

See as well ROSENFIELD 1991a, at 28-29: Formal equality of opportunity must only ascertain that there are no legal or quasi legal barriers that disadvantage one over the other. Fair equality of opportunity demands that initial social disadvantages are taken into account and are remedied. Fair equality of opportunity stresses (limited) equal prospects. Unequal prospects based on natural differences are not taken into account.


In some aspects comparable to the situation of the First Nation Peoples are those of Puerto Ricans and native Hawaiians. Here however only the situation of the First Nation Peoples will be regarded.
The First Nation Peoples claimed to be *sovereign independent nations*[^352]. Treaties between the First Nation Peoples and the colonists were based on international law[^353]. The sovereignty of the Indians was generally accepted even though not always respected.

The framers of the Constitution agreed that the internal affairs of the Indian tribes were outside of the reach of the Constitutional Convention[^354]. The Constitution gave Congress only the power to regulate commerce with the First Nation Peoples[^355]. All other legal contacts continued to be based on treaties[^356].

However after the adoption of the Constitution the legal status of First Nation Peoples deteriorated. The Indians were turned into dependent peoples over which the United States had unlimited powers. Civil rights were not or only partly applied to the Indian tribes.

Probably the most telling case on the status of Indian tribes is *Cherokee Nation v. Georgia* (1831)[^357]. With this case the status of the Indians was degraded. The Cherokee Nation claimed to be a foreign nation and therewith to have standing to sue Georgia for treaty violations. The Supreme Court denied the Indians standing. The Court held that the Cherokee Nation was a “*domestic dependent nation*”. The Court created a new legal category that was non-existent in Western jurisprudence.

The Court’s decision was fatal because it created an entity with a colonial-style protectorate status[^358]. This decision stressed the

[^352]: See GATES 1997, 1006.
[^356]: Federalist Paper No. 24 shows how Alexander Hamilton perceived the status of Indian tribes: “The savage tribes on our Western frontier ought to be regarded as our natural enemies, their [Britain’s and Spain’s] natural allies, because they have most to fear from us, and most to hope from them.” The Indians are described as savages, as foreign and hostile nations.
[^358]: See GATES 1997, 1012.
exclusion of all indigenous people from the American nation because they were regarded as a separate nation. Being a separate nation did however not give them the independence to decide about their own destiny because they were viewed as being dependent on the American nation.

The degradation of the Indians was accompanied and justified by the allegation that Indians were an inferior kind of human beings. The Court described them for instance as “savages\(^{359}\)” or as “ignorant…race\(^{360}\)”:

More and more “Indian affairs became part of the internal domestic political agenda of the United States even though Indians themselves were not part of the body politic\(^{361}\).” Congress appropriated powers and enacted criminal and civil law applicable for conflicts between Americans and Indians and sometimes even for conflicts among Indians.

The Supreme Court did not protect the rights of the Indian nations but relied on ‘creative’ arguments to hold in favor of the United States and denied the Indian tribes the protection under the Constitution. In United States v. Kagama (1885)\(^{362}\) an Act of Congress was challenged that regulated seven major crimes not only between Indians and other Americans but as well between Indians. The Supreme Court held that this Act was outside of the scope of the Commerce Clause but that Congress had an extra constitutional power for dealing with the First

\(^{359}\) Johnson v. McIntosh, 8 Wheat 543, at 591-92 (1823).

\(^{360}\) Missouri, Kansas and Texas Railway Co. v. Roberts, 152 U.S. 114 (1894) concerning the right of the railway company to cross Indian lands. There the Supreme Court held in favor of the railway company with the following argument (at 117-18): [Though] the law has stated with reference to the power of the government to determine the right of occupancy of the Indians to their lands has always been recognized, it is to be presumed… that in exercise the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race…” (emphasis mine).

\(^{361}\) DELORIA 1992, 286.

\(^{362}\) United States v. Kagama, 118 U.S. 375 (1885).
Nation People based on the exclusive sovereignty of the United States over the territory of the United States\textsuperscript{363}.

In a case of 1823 (\textit{Johnson v. McIntosh}\textsuperscript{364}) the Supreme Court upheld that Indians can sell their land only with the approval of the United States based on the argument that the opposed decision would question the previous practice of land transfer.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose substance was drawn chiefly from the forest... However this restriction [land-sale only with prior permission] may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of Justice\textsuperscript{365}.

In addition to denying constitutional protections Congress enacted laws to restrict the access to court for Indians. This created in many cases the disparate situation that Indians could be sued for treaty violations but could not sue themselves\textsuperscript{366}.

First Nation Peoples as tribes are outside of the protection of the Constitution. In 1924 the United States however declared all Indians

\textsuperscript{363} First the Court stated that the soil and the people of the United States are under the political control of the American Government. The Court then continues: “But the power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing or and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else”. \textit{United States v. Kagama} 118 U.S. 375, at 380 (1885).

\textsuperscript{364} \textit{Johnson v. McIntosh}, 8 Wheat 543 (1823).

\textsuperscript{365} \textit{Johnson v. McIntosh}, 8 Wheat 543, at 591-92 (1823).

\textsuperscript{366} See \textsc{Deloria} 1992, 288-89 for the influence of the Act of March 3, 1863 (12 Stat. 765, 767) requiring the prior examination of Indian claims by Congress and Act of March 3, 1891 (26 Stat. 851) which established a forum for claims against Indians.
unilaterally citizens of the United States despite of protests from Indian tribes.\textsuperscript{367}

Still Indians have as individuals, unless they completely renounce their Indian affiliation and traditions, only partial protection of the freedom rights other American citizens have.\textsuperscript{368} For instance only in 1978 a resolution declared the protection of Indian religious practices. This resolution was however regarded primarily as an administrative directive.\textsuperscript{369} DELORIA argues:

The protections of the Bill of Rights, available to all other Americans, have not been available for American Indians. Not only have the federal courts studiously avoided considering the application of these protections, but Congress and the executive branch have frequently acted as if there were no limitations whatsoever in their power to deal with Indians, and the courts have deferred to this assertion of naked authority. In 1968, the American Indian Civil Rights Act (82 Stat. 73) was passed, but this act only served to extend some Bill of Rights protections to tribal members in their relationship with Indian governments. Nothing was authorized that would protect American Indian nations or individuals against the arbitrary actions of the federal government, protections that both states and individuals enjoy.\textsuperscript{370}

The discrimination of the first nation peoples is not primarily addressed in terms of equality as in the case of the African Americans.\textsuperscript{371} As a dependent domestic nation the first nation peoples were defined as

\textsuperscript{367} Indian citizenship Act (43 Stat. 253)

That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States.

For instance the Grand Council of the Six Nations Iroquois Confederacy protested against the forced attribution of citizenship that had been adopted without the knowledge and consent of the First Nation Peoples. See HAUPTMAN 1992, 324-25.

See as well below for normative unity in France at § 14 III.


\textsuperscript{370} DELORIA 1992, 309.

\textsuperscript{371} See e.g. KARST 1989, 2: "Among full members of the community, the ideal of equality prevails; as to outsiders, the issue of equality seems irrelevant."
outside of the American nation. Discrimination of African Americans and Native Americans may have been and still may be experienced as similar but there is an important conceptual difference that influences the mechanisms of as well as the possible means to fight discrimination.

Concerning African Americans legal inequalities can be addressed by the courts based on the equality ascribed to all members of the nation. In the case of the first nation peoples there are accepted open legal inequalities. These legal inequalities can incorporate advantages but very often include negative discrimination. Relations between the first nation peoples were mainly regulated by treaties and by separate legislation that can prescribe unequal treatment without violating the equal protection clause.

The first nation peoples are together with the foreigners the only constitutionally accepted minorities in the state. African Americans, Latinos, Asians, women, or the poor are viewed as individuals and as equal members of the nation and constitutive members of the state. Therefore based on the conception of the nation the latter can constitutionally or legally never (again) be accepted and treated as minority-groups by the state. Discussions about their status in the state will be addressed in terms of individual equality.

Groups however who are not member of the nation do not have state-building status in the state. The First Nation Peoples as peoples are not expected to be one day part of the nation. They will either be completely assimilated or they remain outside of the body politic. While members of the nation have an inherent right to equality, equality of the members of the First Nation Peoples will always only be granted and can be revoked by the same mechanisms through which it was accorded.

Integration into the nation could only happen through assimilation. This assimilation was supposed to include the renunciation of Indian culture. Because integration into the nation was supposed to mean at

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372 Puerto Ricans, native Hawaiens are to some extent in a similar situation.

373 Cf. GRINDE 1992, 279: Assimilation is thought to be a one-way street – that American Indians received the benefits of European civilization but that
the same time the dissolution of Indian tribes the assimilatory policies of the United States after World War II were called policy of termination\textsuperscript{374}. Many tribes dissolved but others resisted successfully.

The First Nation People and the American nation face a dilemma. Many First Nation Peoples do not want to integrate into the nation. Equality as group is however as well denied because Indian tribes are classified as dependent peoples. Equality as group could only be achieved if the First Nation People were accepted as equal state-building group. This however would question the American nation-state.

C. American Way of Life and Nation-Building

In the years following Independence something like an American culture developed. This culture was however not so much marked by language, religion, or ethnicity but by a special ‘way of life’. This ‘way of life’ did not contradict other cultural affiliations as long as they were weak and restricted to the private sphere\textsuperscript{375}. When in the following the term ‘assimilation’ will be used than the assimilation to the American ‘way of life’ will be meant and the renunciation of cultural demands in the public sphere.

The West became an important unifying factor. Moving West created a stronger national loyalty. In contrast to the situation in the well-established colonies like Massachusetts or Virginia, in the Western part of the United States competing loyalties did not exist. The West promoted a sense of American uniqueness, which was not linked to an underlying English or colonial identity. The American identity became

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\textsuperscript{374} See for the term and more information HAUPTMAN 1992, 334.

\textsuperscript{375} Instead of many see KARST 1989, 30-31; HABERMAS 1994, 27; SAMUELSON 2001, 47. PETTIGREW therefore shows that there is neither complete assimilation nor pluralism, see PETTIGREW 1971, 22-23.
associated with a pioneering spirit of the independent, self-conscious, common sense individual\textsuperscript{376}.

Similarly immigration supported the development of an American identity. Immigrants became American and identified with the nation as a whole.

The American identity was so attractive to the new immigrants because of “the dignifying effects of liberty and equality, the exhilaration lure of opportunity, and the enjoyment or even the expectation of a greater prosperity\textsuperscript{377}”. Immigrants quickly adopted the American identity\textsuperscript{378}. Citizenship law supported the integration. Citizenship was granted to most immigrants after seven years later even after five years of residence\textsuperscript{379}.

The first non-English immigrants who arrived in the United States did not have a competing national identity. In Europe most nationalist movements started only in the second half of the nineteenth century. Immigrants without a national identity were much easier to assimilate. The emergence of nationalism in the countries of which the immigrants came from, however, made assimilation more difficult.

Nationalism everywhere elevated the status of the indigenous people, and the respect immigrants got in America as individuals, for some of them, did not measure up to the outright adulation they had been growing used to as members of a group. For such immigrants with national identity, assimilation became much more difficult than it was for their countrymen without it. They had to give up comforting notions of this or that national character, on which were based their sense of self-esteem and pride\textsuperscript{380}.

The promise of prosperity and equality however convinced many immigrants to stay in the country. Immigrants and pioneers soon

\textsuperscript{376} See \textsc{Greenfeld} 1993, 433-34.

\textsuperscript{377} \textsc{Greenfeld} 1993, 435.

\textsuperscript{378} See \textsc{Karst} 1989, 83; \textsc{Greenfeld} 1993, 435.

\textsuperscript{379} See \textsc{Greenfeld} 1993, 434.

\textsuperscript{380} \textsc{Greenfeld} 1993, 436, emphasis in original.
developed an attachment to the land on which they settled. The vastness of America and the prosperity, which was promised by it, became one of the most endearing features. **Bigness became American.** The belief in the American Dream became part of the national identity.

Whereas most immigrants were willing to assimilate and to identify with the emerging American way of life and adopted it as their own, **Americans were not always welcoming the new immigrants.** The first settlers in the colonies were Englishmen. The American nation that emerged was composed of White Anglo-Saxon Protestants. Even other Europeans were in the beginning not welcome to join the nation.

Fearful that the new immigrants with their cultural differences might destroy the American way of life and the American political institutions suspicion and rejection was directed first at the Catholic Irish, later at the Italians, Russians, Greeks or other European immigrant groups. The relatively easy and willing assimilation of these early European immigrants shifted the focus on non-European immigrant groups. “Anglo-Saxons ... placed other whites on what may be called “ethnic probation” and excluded from serious consideration the Japanese, Chinese and Negroes.” As soon as important parts of the immigrant group became part of the middle class they normally as well became included in the nation.

**American way of life was viewed as based on European culture** and the protection of this culture was used or misused to argue for the restriction of naturalization and immigration. Only during the Second

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381 See GREENFELD 1993, 436.
382 See FRANKLIN 1971, 10-11.
383 See FRANKLIN 1971, 9-11; KARST 1989, 82-87; SMITH 1989, 240.
384 FRANKLIN 1971, 14.
385 See KARST 1989, 127-46, 168: This shows as well the correlation between poverty and nation membership.
World War did the United States eliminate ethnic or racial restrictions from the naturalization laws.\footnote{See HANEY LÓPEZ 1996, 37-47 for the history of racial restrictions in American citizenship law.}

Even today there are some politicians as for example Patrick Buchanan who solicit voters with demands for a restriction of immigration of certain immigrant groups couched in terms of cultural protection so that the United States should stay a white country.\footnote{For more details and further examples see e.g. HING 1997, 146-59.} By restricting access to immigration the United States indirectly limits as well access to naturalization and therewith to the nation.\footnote{See BRUBAKER 1992, 34.}

Tensions that arose between members of different religions or different cultures could only be soothed by \textit{banning these issues from the national agenda}. The \textit{separation of the private and the public sphere} could hinder differences from destabilizing the political process. For instance the separation between religion and state was introduced to prevent cleavages between different religious groups.\footnote{Amendment I to the U.S.Const. 1787 \[1791\] \textit{Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…}}

The American way of life strengthened the feeling of belonging together. However, it restricted as well the social integration of groups who were perceived as not sharing the American way of life.\footnote{For the trend to expect linguistic assimilation see NEUE ZÜRCHER ZEITUNG. August 25, 1999. \textit{Texanische Stadt schützt illegale Einwanderer: Kontroverse um immigantenfreundliche Verordnungen}, 56; SAMUELSON 2001, 47.}

II. National Identity and Political Activity

The American nation is a civic nation. The belief in individualism, individual liberty and equality of all people in the United States, their right to political participation in a democratic government, and their belief in the American Dream became the unifying basis of the nation.
These beliefs promised a free and equal society and inclusive nation in which every individual has the same rights and liberties.

The principle of equality is however elusive. As it can be used to include it can as well be used to exclude. Additionally formal (or legal) equality need not coincide with factual (or social) equality. Factual inequalities question the American national identity. The notion of prescriptive equality demands the mitigation of existing inequalities. However, the mitigation might demand unequal treatment of disadvantaged groups. The American nation has to live with this paradox.

The American nation managed to create a belief of belonging together without relying on a common ethnicity, religion, tradition, or culture. The separation of the private and the public sphere and the banning of culture from the national agenda to the private sphere was introduced to mitigate tensions between members of different cultures and religions.

The discussions on equality mainly showed problems in the interpretation of nation membership. Two fundamental questions that concern directly the nation concept as such were however left open. Both questions concern the separation of the private and the public sphere or the role of culture. Is the complete separation between the private and the public at all possible and even if it is, is the separation satisfying? These two questions will be treated in the Chapter 'Reconsiderations for the Context of Normative Diversity'.
§ 9. The French Nation

The French nation-state is the outcome of centuries of state-building. The national consciousness developed within the state. The state left important imprints on the national identity: The state or citizenship created and defined nation membership. Nationality coincides therefore with citizenship. The state became identified with the nation and the *demos*\(^{391}\). The French nation-concept is a civic concept that however differs decisively from the British or the American concept\(^{392}\).

French identity is a very old identity. Initially it was limited to an elite circle and only with the French Revolution did it become a national identity\(^{393}\). Liah GREENFELD distinguishes the progression of three distinct and distinctively French identities. The first French identity was a religious-Christian identity. It was followed by a political-royalist self-understanding that got finally supplanted by a national identity\(^{394}\).

The new identities evolved out of the preceding ones. “Each time, the new identity grew under the auspices of the old one and received its importance from association with it, yet, in favorable circumstances, it helped to bring about the neutralization, if not destruction, of the latter”\(^{395}\).

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391 See e.g. SCHNAPPER 1994, 65; BRUBAKER 1992, 3; FLEINER-GERSTER 1995a, 251; CABANEL 1997, 10.
393 See GREENFELD 1993, 91.
394 See GREENFELD 1993, 91.
395 GREENFELD 1993, 91.
I. Nation-Building

I. A State without a Nation

To be French in the Middle Ages meant to be an especially good Christian or as GREENFELD puts it to be “more Catholic than the Pope”396. France was called “la fille aînée de l’église catholique” the firstborn daughter of the Catholic Church397.

The king was deemed to have a direct link to God, and France through the king was considered a Church in its own right398. The legitimization of the state was religious399. French identity was religious identity. Patriotism without the belief in God was impossible. A sacralization of the king took place. Religiosity or loyalty to God included loyalty towards the king400.

A change of identity came in the sixteenth and seventeenth century. Cardinal Richelieu brought the political royalist identity to a conclusion401. The legitimization of the state stayed religious but the subject of loyalty shifted from God to the monarch. The absolute sovereignty of the king still derived from God402; however, loyalty toward the king as such became a religious act. “The royal authority was the source of all value, as it was of all law, and loyalty to the king

396 GREENFELD 1993, 95; see as well SMITH 1991, 57-58.
398 See GREENFELD 1993, 94-95.
399 See SCHNAPPER 1994, 66.
400 See GREENFELD 1993, 95-96, e.g. at 95: The fleur de lys the symbol of the Virgin Mary became the symbol of the French monarchs. “The cult of Mary and the cult of royalty fused in the symbol of the virginal lily, which was at the same time the royal one; both were represented by and thus identified in it”. FLEINER-GERSTER 1995a, 152.
401 See GREENFELD 1993, 113.
402 See SCHNAPPER 1994, 66; GREENFELD 1993, 113: The king was supposed to be the vicar of God on earth, sometimes he was even described as the incarnation of God on earth.
the supreme piety”403. Patriotism was now directly expressed in the loyalty towards the monarch404.

The very mechanisms for creating the political royalist identity led as well to its destruction. For the efficiency of the state, to suppress internal unrest, and to be better able to face conflicts with its neighbors - most of all with Habsburg - the government ruled increasingly through extraordinary measures405. To the distress of the nobility a centralization of authority took place.

The king appointed intendents, later financial officials and judges who served at his pleasure and were accountable only to the king’s council. The absolute power of the king was the outcome. State power became identical with the power of the king: “L’Etat c’est moi” expressed the new reality406.

The nobility became more and more excluded from taking part in politics. To be a good Frenchman meant to be a good and obedient subject who does not get involved in politics407. As outcome of the centralization the nobility felt degraded because they were not any longer significantly more powerful than the ordinary people. The power structure of the social order became unsettled408. The legal and

403 GREENFELD 1993, 114.
404 Cf. for the theoretic approach the section on popular sovereignty above at § 5 I.2.
405 See GREENFELD 1993, 123.
406 As described in a more detailed way in GREENFELD 1993, 123-25; see as well BIRNBAUM 1998, 23-24: The monarchy demanded with the slogan “une foi, une loi, un roi” (one belief, one law, one king) complete loyalty towards the king and the acceptance of catholizism as the only true religion. The discrimination of non-conformist minorities symbolized as well the transformation of a feudal system into an absolute monarchy.
408 GREENFELD 1993, 130: Pierre JURIEU expressed the perceived threat to the social order as follows: “It must be first understood that under the present government, everyone is of one people. We no longer recognize quality, distinction, merit, or birth. From the heights to which the monarch has been raised, all humans are but dust beneath his feet. By grouping all among the people, oppression and misery have been extended even to the noblest and highest elements of the state.” (as cited by GREENFELD).
social status acquired by birth was not any longer paired with political influence.\footnote{See Greenfeld 1993, 134-37; Brubaker 1992, 35-36. The society of the ancien-régime was inegalitarian. Members of this society were not only factually but as well and even primarily legally unequal. The French nobility was not as much a social class as a legal category. Nobility did not guarantee wealth. The wealth of the nobles differed strongly among different groups, e.g. the noblesse d’épée and the noblesse de robe, but as well within the groups.}

The rapid disintegration of the traditional order threw the social system out of balance, and the strata composing the elite which were directly affected by it found themselves in a situation of status-inconsistency. The divisions of the traditional order lost their meaning, yet the outward signs of them were jealously preserved. The hierarchy of prestige no longer corresponded to the hierarchy of wealth, education, and power and bore no relation to the responsibilities of various strata toward each other. This growing inconsistency between old and new elements of the social order made its continued survival intolerable.\footnote{See Greenfeld 1993, 152-53.}

In their discontent the nobility distanced themselves from the king and increasingly identified themselves with the state as such.\footnote{See Greenfeld 1993, 133: “By wresting power away from the hands of nobility, the kings and ministers of seventeenth century France established absolutism de facto. But by letting the nobility be and preserving its privileged social position, they made certain that it would never be accepted willingly. Nobles were growing painfully conscious of the disconcerting imbalance of their situation. Their privileges, no longer connected to any useful function and therefore cut off from the sources of power and influence, seemed to be suspended in thin air. ... It was this affliction of the proudest order of the French kingdom which led many of its members to transfer loyalty from the royal person to the state, and as the reign of the ‘grand monarch’ drew to its close, rendered France ready to embrace the idea of the nation.”}

The development of a national identity started with this disassociation of the king and the state. Nation building was directed at the reform of the existing state.\footnote{See Brubaker 1992, 6.} It did not question the state as
such or its borders but the social order and the legitimization of the state. The nation was to become the new sovereign.

The French Revolution of 1789 was the most crucial event for the formation of a French national identity.

2. The Revolutionary Classes

A. The Nobility as the Main Revolutionary Class

The nobility tried to redefine its identity to reduce inconsistencies and to preserve and justify social superiority.

The nobility had two possibilities to redefine their identity to overcome their for them unbearable degradation that put them on the same standing as the common people. They could either go on to disassociate themselves from the people or redefine and elevate the people so that being part of it would no longer be degrading.

The second possibility succeeded. The state became redefined as the people of France and loyalty shifted from the monarch to the people or the nation.

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413 See Brubaker 1992, 7.
414 See Greenfeld 1993, 154.
415 Birth alone could no longer sufficiently justify superiority. To redefine nobility as a group distinct from the ordinary people the nobels had to find arguments that were not alone based on birth to include themselves and to exclude others.

See Greenfeld 1993, 145-55: The nobels tried to define nobility of birth as a patriotic virtue due to the services they had rendered to the state over centuries. The high education of the nobility was as well used for the attempted redefinition of aristocratic superiority. In addition culture was interpreted as ennobling.

All these attempts to continue the disassociation of the nobility from the rest of society were however only to a small extend successful. While it was not successful to disassociate the whole nobel class from the people the same arguments (merit, service, education) promised to guarantee the self-justifiable high social standing of the nobels within the people that at the same time got elevated through the influx of blue blood.

416 So Greenfeld 1993, 155: “Thus upgraded, the state, alias nation, alias people of France, was finally freed from dependence on the king and became the symbol around which opposition to the Crown could rally and in the name of which the
B. The Bourgeoisie is Taking Over

The Revolution was not a bourgeois revolution in so far as it did not result out of a bourgeois movement but it made the emergence of the bourgeois society possible\textsuperscript{417}. It was primarily the nobility who triggered the Revolution even though they were soon to be one of its first victims\textsuperscript{418}.

At the beginning of the Revolution the nobility saw itself as the governing part of the nation\textsuperscript{419}. The definition of the nation as a unitary body from which sovereignty directly emanated was not consistent with this role of the nobility because political power without direct delegation from the nation was soon viewed as illegitimate\textsuperscript{420}. From there it was an easy step to exclude the nobility from the nation altogether\textsuperscript{421}.

The bourgeoisie was receptive to the nationalization of identity\textsuperscript{422}. It promised the possibility to legitimately pursue and realize bourgeois aspirations, to gain influence in politics and to rise to high social standing that was until now reserved to the nobility\textsuperscript{423}.

The bourgeoisie perceived the king as well as the visible part of the nobility as decadent and corrupt. The Revolution should get rid of all degeneration so that again a healthy and virtuous society could.

\textsuperscript{417} See Brubaker 1992, 39.
\textsuperscript{418} See Tocqueville 1996 [1859], 47; see as well Greenfeld 1993, 152: “[One] should not be surprised that the great Revolution which abolished the nobility was the work of the nobility nevertheless, and that the aristocracy, not the bourgeoisie that remained bourgeois, was the truly revolutionary class.”
\textsuperscript{419} See Greenfeld 1993, 168.
\textsuperscript{420} This principle found e.g. expression in the Déclaration des droits de l’homme et du citoyen du 26 août 1789 in its Art. 3: Le principe de toute souveraineté réside essentiellement dans la Nation. Nul corps, nul individu ne peut exercer d’autorité qui n’en émane expressément.
\textsuperscript{421} Explained in Greenfeld 1993, 171.
\textsuperscript{422} See for the principle Habermas 1999, 134.
\textsuperscript{423} See Greenfeld 1993, 184.
emerge. The new society should not have any longer any traits of the degenerated nobility. The Revolution should create the “homme nouveau”, the new purified man.

In 1789 for the first time in 175 years Louis XVI assembled the parliament consisting of the three estates: the nobility, the clerus, and the ordinary people. The ordinary people received as many representatives as the nobility and the clerus together. With the support of some liberal members of the other two estates the third estate had a majority.

After disputes about the political representation of the nation Sieyès declared the third estate who represented 96% of the population as the nation. The other two estates were ordered by the monarch to join the third estate in order to retain part of their political influence.

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424 See Birnbaum 1998, 63-64.
425 Birnbaum 1998, 65; see as well Arendt 1996, 33. In a very different context Hannah Arendt describes the ressentiment resulting from a high social standing that is no longer paired with power: “Nur Reichtum ohne Macht und Hochmut ohne politischen Willen werden als parasitär, überflüssig und herausfordernd empfunden; sie fordern das Ressentiment heraus, weil sie Bedingungen herstellen unter welchen es eigentlich Beziehungen zwischen Menschen nicht mehr geben kann. Reichtum, der nicht ausbeutet, kennt noch nicht einmal die Verbindungheit von Mensch zu Mensch, die den Ausbeuter mit den Ausgebeuteten verbindet, und Hochmut ohne Machtwillen zeigt deutlichst, dass man für den anderen noch nicht einmal das Interesse hat, dass der Unterdrücker dem Unterdrückten notwendiger Weise bezeugen muss.”
427 See Sieyès 1989 [1789], 2-9, see e.g. at 9: “N’est-il pas trop certain que l’Ordre Noble a des privilèges, des dispenses, même des droits déparés des droits du grands corps des Citoyens? Il sort par-là de l’ordre commun, de la loi commune. Ainsi, ses droits civils en font déjà un Peuple à part dans la grande Nation. C’est véritablement imperium in imperio” (emphasis in original).
428 See Godechot & Godechot 1995, 22.
One of the first acts of the new national assembly was the enactment of the Declaration of Human Rights. In it the new completely secular legitimization of the state was proclaimed for the first time. After nearly one thousand years of monarchy that relied on religious legitimization the nation became the new source of legitimacy and claimed the right to decide about the concepts of the state and society as well as about the form of government.

3. The Revolution Creates the Modern French Citizen

Revolutionaries wanted to create a totally new society based on rationalism and the equality of all citizens. The subject was freed of old dependencies and was uplifted and ‘reborn’ as equal citizen. The Revolution turned privileged and unprivileged into citizens. The conception of citizenship as “unmediated, undifferentiated, individual membership of the state” did emerge. The French Revolution created a new equality between the members of the state and changed their relationship to the state as expressed by SIEYÈS:

I picture the law as being in the centre of a huge globe; all citizens, without exception, stand equidistant from it on the surface and occupy equal positions there; all are equally dependent on the law, all present it with their liberty and their property to be protected, and this is what I call the common

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429 In 1971 the Constitutional Council decided that the Declaration of Human Rights is incorporated in the preamble of the French Constitution and through it still valid and binding law. With it the Constitutional Council became a more active constitutional court and France received probably the only existing normative preamble. Cf. FLEINER-GERSTER 1995a, 250.

430 See text in footnote above and SCHNAPPER 1994, 66.

431 See FLEINER-GERSTER 1995a, 251.


433 See FLEINER-GERSTER 1995b, 51.


435 BRUBAKER 1992, 39; for more information on the French Revolution and citizenship, see e.g. RETAT 1993, 3-15; FITZSIMMONS 1993, 29-41.
The rights [droits communs] of citizens, the rights in respect of which they are all alike\textsuperscript{436}.

With this new understanding of law and citizenship the French Revolution laid the legal basis for the equality of all citizens that is civic equality.

The Revolution, however, did not only create civic equality but it was as well crucial in adding a new component to citizenship. Political rights were now viewed as deriving from the status of citizenship\textsuperscript{437}. Civic equality and political rights are distinctive and essential if not constitutive features of modern citizenship\textsuperscript{438}. In this sense the Revolution was as well a democratic revolution\textsuperscript{439}. Political participation rights became generalized\textsuperscript{440}.

4. The Revolution Creates the Nation of Citizens

Finally the Revolution created national citizenship. National identity is based on citizenship or put differently on the legal and political equality of each citizen\textsuperscript{441}.

\textsuperscript{436} Cited in Brubaker 1992, 39-40.
\textsuperscript{437} See Brubaker 1992, 40; Sieyes 1989 [1789].
\textsuperscript{438} See e.g. Rousseau 1964 [1762], 112: He adopted a participatory definition of citizenship. He defines citizens as participants at the sovereign power “participants à l’autorité souveraine”. See as well Brubaker 1992, 40-43.
\textsuperscript{439} See Tocqueville 1996 [1859], 47-48.
\textsuperscript{440} See Brubaker 1992, 49; but see as well Birnbaum 1998 and Feiner-Gerster 1995a, 250-53: Democracy was however difficult to introduce. Since the French Revolution a struggle to create the right institutions and the appropriate political system influenced the French history decisively. French national identity contains ambiguous elements that can easily trigger fierce fights about the appropriate expression of being French.
\textsuperscript{441} See Schnapper 1994, 68: “Plus que dans d’autres pays, le modèle d’intégration ‘à la française’ est fondé sur l’idée et la valeur de la citoyenneté individuelle, sur l’égalité formelle, juridique et politique, de l’individu-citoyen. Ce modèle était idéologiquement fondé sur une conception selon laquelle tous les hommes, s’ils
The French Revolution as a national revolution transformed French reality in two ways. First, it created the *nation une et indivisible*\(^{442}\), constituted of equal citizens. Second, nationalism supplanted the indifference of the old regime to nationality and citizenship and led to the consolidation of the difference between the self and the other\(^ {443}\). In different words and more precisely, the Revolution created a nation that understands itself as the sole source of sovereignty and legitimacy and demands absolute and undivided loyalty of its members who compose the nation as equal citizens. Additionally the creation of the nation necessitated the definition of nation membership through the mechanisms of inclusion and exclusion.

In a first paragraph the quality of the nation as *nation une et indivisible* will be regarded (A), afterwards membership in the nation will be defined (B). These two issues though distinct are interrelated. The selection of the composing parts will influence the whole while the aimed-at quality of the whole influences the selection.

### A. Nation une et indivisible

The centuries long French *state-building tradition* assured that the *state stayed the frame of reference* and this tradition is responsible for the statist quality of the nation.

- The state defined the nation\(^ {444}\). All citizens became members of the nation\(^ {445}\). The nation substituted the king as the king had replaced God. Through it the nation became sacralized\(^ {446}\).

\(^{442}\) Cf. e.g. the *Acte Constitutionnel* of 1793 in Art. 1: La République française est une et indivisible.

\(^{443}\) See Brubaker 1992, 43.

\(^{444}\) See Fleiner-Gerster 1993, 21; Brubaker 1992, 4; Greenfeld 1993, 156-58: The English example of nation-building influenced the acceptance of the nation - as defined by the state - as the object of reference

\(^{445}\) See Fleiner-Gerster 1993, 21; Brubaker 1992, 7; see e.g. as well Art 2 of the *French Constitution* of 1795: L’universalité des citoyens français est le souverain.
The nation continued the centralization of the state. This centralization of the state is mirrored in the centralization of loyalty. The nation became the only object of loyalty, source of absolute undivided and undivisible sovereignty, and the expression of the common good.

The French nation is composed of individuals. Unmediated, direct, and individual citizenship as underlying criteria for nation-membership predestines the individual as direct and unmediated addressee of duties and rights and is opposed to conceptions of minorities or group rights.

While the nation was composed of individuals it was still perceived as an organic being or a collectivity. The individualistic approach in France is different from the American or British understanding of individualism. The nation was perceived as having own individuality.

The nation in France was constituted out of legally equal individuals like in England or the United States but national interests or the

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446 See the text of LA MARSEILLAISE: "amour sacré" sacred love.
447 See SCHNAPPER 1994, 13-14: “La nation, qui s’autoproclamait en 1789 nouvel acteur historique, héritait de tout le travail de centralisation politique et d’élaboration de l’État central que la monarchie avait mené pendant des siècles. Mais la Révolution, en fondant désormais la légitimité politique sur la volonté des peuples, consacrât symboliquement en Europe une rupture fondamentale, sur laquelle nous vivons encore.”
449 See GREENFELD 1993, 165.
450 See e.g. BIRNBAUM 1998, 77-98; GREENFELD 1993, 177.

There are however authors who view one major difference between the French and the German nation in their understanding that the German nation is organicist, the French however not. See e.g. JURT 1999, 184, who relies on CABANEL 1997, 10. They dispute however not the collectivist perception of the nation but base their argument on the voluntaristic aspect of national identity in France according to which the French nation is not a natural community but being a member needs the voluntary acceptance of the duties and rights of French citizen. One can therefore say that the French nation is organicist in so far as it acquires a life on its own but that membership in the nation is not based on so-called natural or seemingly objective criteria. The whole dispute seems to be more a different use of terminology than a substantial difference in understanding.
common good were viewed as higher than individual interests⁴⁵¹. For instance SIEYÈS demands for the exclusion of the nobility were partly based on the argument that the nobility defended their particular interests and not the common good⁴⁵². In comparison to England the nation was not only constituted of rational individuals but was viewed as a rational being itself⁴⁵³.

The idea of the common good is most famously expressed by ROUSSEAU: The individual is not always able to perceive his own interests. Only the general will can realize the national interest and can guarantee real liberty of the individual. “Whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing else than that he will be forced to be free”⁴⁵⁴.

The possible use of the doctrine of the common good or the general will for the justification of authoritarian regimes and the inability to mediate between different conceptions of the good inherent in the French system created the basis for conflicts between groups with opposed ideas about what the common good should constitute⁴⁵⁵.

⁴⁵¹ See GREENFELD 1993, 165.
⁴⁵² See FLEINER-GERSTER 1995a, 440-41.
⁴⁵³ See SIEYÈS 1989 [1789], 9: “[Elle] est étrangère à la Nation par son principe, puisque sa mission ne vient pas du Peuple, & par son objet, puis-qu’il consiste à défendre, non l’intérêt général, mais l’intérêt particulier.”
⁴⁵⁴ See GREENFELD 1993, 167-68: “In England, it was the liberty of the individuals who composed it that made the nation free. In France, it was the liberty of the nation that constituted freedom of the individuals. In England the source of authority was the individual, a thinking human being; individuals delegated their authority to representatives, and thus empowered the nation. In France, it was the nation from which authority emanated, and it empowered individuals.”
⁴⁵⁵ However, one would not do justice to ROUSSEAU if one only stressed the authoritarian potentials of his theory. ROUSSEAU wanted that the general will is the true expression of what is best for all. For ROUSSEAU the task of the state is to safeguard the interests of all its citizens. ROUSSEAU’s theory is therefore as well a social theory that necessitates a high degree of solidarity. See LAKOFF 2001, 105.
⁴⁵⁶ See BIRNBAUM’s closely argued thesis in BIRNBAUM 1998, 39-62. He takes his understanding of the importance of hatred for the French national identity from TOCQUEVILLE. BIRNBAUM writes for example at 48: “Tocqueville dans son ensemble, on constate avec stupéfaction à quel point ce sentiment revient sous sa
B. The Self and the Other.

Nation building leads to the **differentiation** between those who become members of the nation and the others who are not eligible as co-nationals.

The Revolution created a legal frontier and a “moral frontier” between members of different nation-states. Abolishing legal and moral boundaries within the nation-state, it crystallized legal and moral boundaries and divisions between nation-states. Thus it engendered both the modern nation-state and modern nationalism\(^{456}\).

a. Inclusion

The nation developed within the already existing state and did not or only minimally question the state borders\(^{457}\). It however made the state borders more important\(^{458}\). Formerly state borders had been open and were often easier to cross than to enter most cities\(^{459}\).

Immigration could now become a political issue. The world population was from now on divided into co-nationals and foreigners and somewhere in between there was a category of those who belonged or had belonged to the French colonies\(^{460}\).

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\(^{456}\) BRUBAKER 1992, 48.

\(^{457}\) E.g. in respect to the Alsace. Later however the national consciousness led to a missionary enthusiasm with which colonialism and the Napoleonic Wars were legitimized.

\(^{458}\) Cf. LIMOUSIN 1988, 10: “le roi maître en son domaine ... il n’est pas maître en son royaume ...” Only with the construction of nation-states received the sovereignty over the territory new importance.

\(^{459}\) See LIMOUSIN 1988, 9-10.

\(^{460}\) See LIMOUSIN 1988, 9.

This aspect of French nationalism is not treated in all detail in this analysis. For some remarks, see however below § 8 I.4.B.d.
The French nation defined the largest part of the French population as members of the nation. It excluded the aristocracy and the clergy but was relatively open to accept immigrants as soon-to-be nationals. The French nation is inclusivistic and very willing to turn all members of the population into French citizens and therewith as well into French nationals. At least second-generation immigrants automatically received French citizenship. This measure was adopted not primarily to enlarge the army - there was only a limited military interest - but based on political interests.

Since second generation immigrants were viewed as prétendus étrangers “foreigners by pretense” their exclusion from citizenship and military service were viewed by many French as unjust and unequal treatment. Foreigners who did not naturalize were regarded with suspicion because they were perceived as French who did not want to fulfill their national and civic duties.

With the French openness to all individuals who were willing to become French France could become the refuge and safe haven for many persecuted persons who had to flee from other countries. France could even influence other countries in their treatment of minority groups. For instance the Swiss emancipation of Jews took place partly because the French made it a precondition for the signing of a trade agreement.

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461 See BRUBAKER 1992, 36-37: Already before the Revolution the legal differences between foreigners and the French were mostly limited to issues of inheritance. The parliament increasingly abolished differences between the bulk of the French and the foreigners. The construction of the “qualité de français” became more and more inclusive.


463 See BRUBAKER 1992, 14.

464 See LIMOUSIN 1988, 16-17; cf. the CONSTITUTION OF 1946 in its Preamble: “...Tout homme persécuté en raison de son action en faveur de la liberté a droit d’asile sur les territoires de la République...”
b. Assimilation

The history of France is much more influenced by fights between Frenchmen than by the question of inclusion or exclusion of foreigners. According to Tallien’s remark in 1795 “the only foreigners in France are the bad citizens”\textsuperscript{465}. The definition of who is a good citizen gained major importance. A good citizen had to fulfill out of his own free will his duties deriving from the citizenship status\textsuperscript{466}.

The French nation is highly inclusivistic but as well assimilationist\textsuperscript{467}. The French always had an important confidence in their ability to transform all members of the population into Frenchmen or in different words to assimilate them to French culture and values. The foreigners and Frenchmen were mostly very willing to accept the French values that included the values of rationalism and that granted liberty and human rights to all individuals without regard to ethnicity and religion even though it demanded of them a high degree of assimilation\textsuperscript{468}.

In its openness French rationalism did not mean tolerance or multiculturalism. Every individual was accepted as a rational being but not as member of his group. Nationality was supposed to overshadow and finally to dissolve all other identities\textsuperscript{469}. As citizens everyone had

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\textsuperscript{465} Cited in Brubaker 1992, 7.
\textsuperscript{466} See for more detailed explanation below at § 9 I.4.B.c.
\textsuperscript{467} See Brubaker 1992, 8.
\textsuperscript{468} See Fleiner 1999, 417-18; Fleiner 1998a, 75: The nation is united through the universal values of the Déclaration des droits de l’homme et du citoyen.

\textbf{Preamble}

The French people hereby solemnly proclaim their dedication to the Rights of Man and the principle of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the 1946 Constitution. By virtue of these principles and that of the free determination of peoples, the Republic offers to the Overseas Territories expressly desiring this to adhere to them new institutions based on the common ideal of liberty, equality, and fraternity and conceived with a view to their democratic evolution.

\textsuperscript{469} See Fleiner-Gerster 1995b, 51.
the same rights, as individuals with distinct identities they had none\textsuperscript{470}. Rationality much more included the idea that there was one determinable common good that every citizen had to accept and to pursue\textsuperscript{471}.

While the American nation is as well inclusivistic its members belong to various cultures and ethnicities. The aim of American integration into the nation is not necessarily complete cultural assimilation but culture becomes excluded from the public sphere\textsuperscript{472}. In France assimilation is expected and the French state actively promotes French values.

c. Cultural Homogenization

The common culture of the French people does not rely on common prepolitical values\textsuperscript{473}. On the contrary, the culture is the creation of the state. The state actively pursued the creation and the promotion of the ‘French’ culture. School and the army created shared cultural values and with it instituted French national identity\textsuperscript{474}.

The French population should be a \textbf{homogeneous} people. The picture of a clock was often used to explain the necessity of homogeneity. The proper working of the state needs similar to a clock internal coherence that determines very precisely the acts of men without tolerating any

\textsuperscript{470} The expression of this idea by \textsc{Comte de Clermont-Tonnerre} nearly acquired a proverbial quality: “Il faut refuser tout aux juifs comme nation et tout leur accorder comme citoyen.”

\textsuperscript{471} When \textsc{Napoleon} proposed to the Jewish community equal citizenship status he posed them twelve questions to make sure that their primary loyalty would be directed towards the French state. Questions included for instance the relationship and solidarity between Jews and non-Jews including the position towards intermarriage. See the twelve questions in \textsc{Aldeeb Abu-Salieh} 1999, 87.

See as well \textsc{Fleiner} 1999, 417-18.

\textsuperscript{472} In the \textsc{French Constitution} of 1793 Art. 1 states: Le but de la société est le bonheur commun...

\textsuperscript{473} See above the chapter on the American case at § 8 I.2.C.

\textsuperscript{474} This is probably together with the voluntaristic aspect of nation membership the most important difference between the French and the German nation concept.

\textsuperscript{474} See \textsc{Schinapper} 1994, 66-67.
deviation in equality or any diversity of values. Every kind of diversity appeared as dysfunctional.\(^{475}\)

The common *French language* is the most prominent example of cultural homogenization. Initially the French language, deriving from *francien*, a dialect spoken in the territory between the Somme and the Loire, was spoken only in Paris. It was not the language of France. France was divided into at least five linguistic groups, the French language gained however importance as the language of the upper class. Its importance was though not undisputed. Even in Paris it had to compete with Latin.\(^{476}\)

Linguistic unification was deemed as necessary for the unification of the nation.\(^{477}\) The common language should ensure that obstacles to communication vanish and that therewith the active participation of all citizens in the polity becomes possible.\(^{478}\) France started an active promotion of the French language and is perhaps the only nation with a public academy (*l’Académie Française*) to safeguard the purity of the language. A claim of cultural superiority began to develop. Both the language and the belief in a superior culture remain part of the national identity today.\(^{479}\)

The pressure for unification and assimilation was not based on ethnocultural but on political considerations. Linguistic unity was perceived as indispensable for Republican citizenship.\(^{480}\) “It is one thing to want to make all citizens of Utopia speak Utopian, and quite another to make all Utopiphones citizens of Utopia.”\(^{481}\)

The common French language did not constitute the nation but was a consequence of the political convictions of the Republic and soon the

\(^{475}\) See Birnbaum 1998, 71, 91.


\(^{477}\) See Brubaker 1992, 7; Jurt 1999, 186: Finally the linguistic unification was proposed and then pursued in a organized manner by abbé Grégoire in 1794.

\(^{478}\) See Jurt 1999, 186; Birnbaum 1998, 68; Schoch 1999.

\(^{479}\) See Greenwood 1993, 99-100; Jurt 1999, 186.

\(^{480}\) See Brubaker 1992, 7.

\(^{481}\) Brubaker 1992, 8.
willingness to learn and speak French became part of the French way of life\textsuperscript{482}. Membership to the French nation had a \textit{voluntaristic aspect}\textsuperscript{483}. Those who want to belong to the French nation, take upon themselves the duties and rights of citizens including the willingness to endorse the French culture\textsuperscript{484}.

d. \textbf{The Exception: The Peoples of the Overseas Territories}

The Constitution distinguishes between the French people or nation and the peoples of the overseas territories. Together they form a community.

F Const. 1958: \textbf{Art. 1 [Institution of Community]}

(1) The Republic and the peoples of the Overseas Territories who, by free determination, adopt the present Constitution thereby institute a Community.

(2) The Community shall be based on the equality and solidarity of the peoples composing it.

The Constitution recognizes the existence of peoples of the Overseas Territories. Because they are recognized as \textit{next to and therefore excluded from the French people} they can have their own institutions

\textsuperscript{482} See JURT 1999, 186; LIMOUSIN 1988, 11: “Contrairement à la conception germanique, ce n’est pas le fait de parler français et encore moins l’appartenance à une prétendue race française qui détermine la citoyenneté française mais l’adhésion à un projet politique et social et la participation à une communauté de destin. L’usage de la langue française, l’assimilation aux moeurs et à la culture dominantes, à un certain art de vivre français, ne sont que les conséquences de ce choix, en aucun cas les conditions préalables à l’acquisition de cette citoyenneté.”

\textsuperscript{483} See for the principle of voluntaristic citizenship and assimilation FLEINER-GERSTER 1993, 21; cf. as well CABANEL 1997, 10: “l’horizon de cette nation est la communauté démocratique à construire dans l’avenir: membre dans la nation, celui qui accepte ou désire se lier librement, par droits et devoirs mutuels, aux autres contractants.”

\textsuperscript{484} See e.g. BRUBAKER 1992, 151-55: Between 1983 and 1986 citizenship laws were criticized in France because they had lost the voluntaristic element. Most of all Algerians who just achieved independence had an unwelcome surprise when they realized that their children who were born in France automatically received the French citizenship and had to serve in the army. These children were counted as second generation immigrants because their parents had been born on formerly French territory. The automatic distribution of French citizenship was viewed as a re-colonialization. For more information on France and Northern Africa, see GEISSER 1997.
and they can be governed by separate legislation\textsuperscript{485}. The \textit{nation une et indivisible} is limited to the French citizens within the French Republic. The population of the Overseas Territories are accepted as French citizens when they recognize the ideals of liberty, equality, and fraternity\textsuperscript{486} but still there is no complete assimilation or cultural homogenization expected\textsuperscript{487}. France is much more flexible with accommodating the interests of the overseas territories than for instance of Corsica\textsuperscript{488}. The situation of Corsica will be treated more into detail below.

\textsuperscript{485}See F Const. 1958: Art. 72-87 esp. 73 and 74

F Const. 1958: Art. 73

Measures of adjustment required by the \textit{particular circumstances} of the overseas departments may be taken with regard to their legislative system and administrative organization.

F Const. 1958: Art. 74

(1) The overseas territories of the Republic shall have a special organization taking account of their \textit{specific interests} within the general interests of the Republic.

(2) The status of the Overseas Territories shall be determined by constitutional enactments defining, in particular, the powers of their own institutions; changes to their status can be made in the same form, after consultation of the territorial assembly concerned.

(3) The other aspects of their particular structure are defined and modified by Act of Parliament, after consultation of the territorial assembly concerned.

(Emphasis mine).

\textsuperscript{486}F Const. 1958: Preamble

... By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories that express the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived with a view to their democratic development.

\textsuperscript{487}For more information on France and the Maghreb, see \textsc{Geisser} 1997.

\textsuperscript{488}For the difference in treatment between for instance the Corse population who are not defined as peoples of overseas territories and peoples of overseas territories cf. Decision 82-138 (February 25, 1982) of the Constitutional Council esp.: “2. Considérant que, pour contester la conformité à cette disposition de la loi portant statut particulier de la région de Corse, les auteurs des saisines font valoir que la seconde phrase du texte précité devrait être entendue comme permettant la création de nouvelles catégories de collectivités territoriales et non la création d'une collectivité territoriale particulière et dérogatoire au droit commun ; qu'ils ajoutent, à l'appui de cette affirmation, que les articles 73 et 74 de la Constitution,
5. Counter-Movements

To analyze the different features of French national identity the prominent and most contested features of national identity will be juxtaposed to the attempts to redefine these very features.

As in the development of every nation there were counter-movements who aimed at a redefinition of national identity. The history of France is especially rich in attempts to redefine national identity. The resurgent argument for the redefinitions of the nation concept was based on the gap between the political ideas or ideology and the perceived reality. Revolutionary ideals were utopic. We can distinguish two categories.

A. Two Categories - Three Attempts to Redefine National Identity

a. First category. The first struggle about the true meaning of being French took place within the frame of reference of national identity. It did not question the stativeness of the nation; in other words, it did neither question the inclusiveness of the nation nor the importance of the state. It questioned the value system and wanted to define Christianity instead of rationality as a “universal” value.

b. Second category. The second struggle questioned not only the value system but questioned as well the frame of reference. Here two sub-groups can be distinguished:

- One movement wanted to introduce multiculturalism and liberalism as achieved in England or the United States and with it questioned the collectivist quality of the nation while still relying on citizenship as criterion for nation membership.

- The other movement argued for the transformation of the national identity so as to resemble ethnic identity comparable to the German

[Note: The text continues with further discussion and examples, but it is not fully transcribed in this snippet.]
national identity. It did not question the organity of the nation but
the importance of the state in defining nation membership.

**B. Reason or Religion**

The counter-movement that emerged for the first time immediately after
the Revolution was based on a value conflict. The relationship
between the church and the state and the importance of religion for the
French identity were severely disputed and attempts to redefine the
French national identity so as to include religion as one of its features
were frequent. “Raison ou Religion” was the debate. The Basilica of
Sacré-Coeur became the symbol of Catholic France while the Eiffel
tower symbolized French rationality. The attempted redefinition of the nation as a Catholic nation did not
question the statist nation concept as such. The Catholic majority
understood the Catholic religion as a universal value. BIRNBAUM calls
France “le pays de l’universalisme catholique et révolutionnaire.”
These earliest struggles about the meaning of being French were in fact
a dispute about the meaning of universality.

The Catholic Church and the Republic viewed their sets of values as
exclusive and universal. If values are defined as universal that is that
they must be recognized as true by every thinking or believing human
being then these values are not open to discussion. Everybody who
questions these values proves at the same time his or her irrationality or

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490 See BIRNBAUM 1998, 100.
491 See BIRNBAUM 1998, 149-58. Sacré-Coeur was inaugurated in 1891 and
symbolises a crucial moment in the cultural war between rationality and
catholicism in the midst of the affair Dreyfus. According to the weekly Le
Sacré-Coeur the Basilica is the symbol of the Catholic fight against “la
République opportuniste et radicale”. The cross on top of the basilica should
dominate Paris and should make the tower Eiffel disappear. The fight was
implicitly and explicitly as well directed against the Jews who were perceived to
be the enemies of the Catholique church. Jeanne d’Arc became the
personification of a Catholic Aryan virgin.

492 See BIRNBAUM 1998, 32.
493 See e.g. for the Republic: ROUSSEAU 1964 [1762], 289.
hersesy. However, to be able to argue with universal values the universe must be defined first. People who do not accept the universality of the values will experience the French system or any system similar to the French as authoritarian.

The Enlightenment had an important influence on the thinking of the revolutionary classes. The actors of the Revolution believed in a rational nation\textsuperscript{494}. France should be ruled by reason. According to Rousseau the members of the population founded with a social contract a state and became through this act a more cultivated enlightened people\textsuperscript{495}. The high importance accorded to human rights is one of the outcomes of this rationality.

The rationalists understood French values to be universal values that could be recognized and accepted as superior and universal at the same time. Superior because they were nowhere as well realized as in France, universal because every reasonable person was supposed to be able to accept them as their own. The republicans believed the French nation to be the ideal personification of enlightened universal rationality and human rights\textsuperscript{496}.

Based on this understanding of the French nation as an ideal political and moral community universalism easily turned into missionary

\textsuperscript{494} See Cabanel 1997, 10-11; Limousin 1988, 13.
\textsuperscript{495} See Fleiner-Gerster 1993, 21; Cabanel 1997, 10; cf. Habermas 1994, 24: Rousseau did however not take the social contract as a fact but he saw his theory as a model to explain realities. Popular sovereignty was viewed as opposed to royal sovereignty.

See as well the even Kant’ian influence expressed in the Déclaration des droits et des devoirs de l’homme et du citoyen and there especially Art. 2 in the chapter on the duties (devoirs): Tous les devoirs de l’homme et du citoyen dérivent de ces deux principes, gravés par la nature dans tous les coeurs: - Ne faites pas à autrui ce que vous ne voudriez pas qu’on vous fît. - Faites constamment aux autres les bien que vous voudriez en recevoir.

enthusiasm\textsuperscript{497}. What was supposed to be good for the state was also presumed to be good for every individual in France and elsewhere. The missionary enthusiasm gained from time to time authoritarian features\textsuperscript{498} and was used to justify the Napoleonic Wars as well as colonialism\textsuperscript{499}.

The Revolution was not able to supplant religion completely with rationality as a new unifying basis\textsuperscript{500}. The ideal of the nation of citizens based on rationality stood in \textbf{contradiction to the reality} of a majority of the population who felt united by the common Catholic religion.

Catholics called the three famous French principles liberty, equality and fraternity “\textit{trois idées suisse}” three Swiss ideas that were against the Catholic tradition\textsuperscript{501}. Cultural appearance was opposed to political ideals as it is according to Pierre Birnbaum until today\textsuperscript{502}.

In the beginning the counter-revolution \textbf{tried to re-institute the old religious identity}. The struggle whether the monarch should be legitimized by the nation or could still rely on religious legitimacy\textsuperscript{503} still questioned the nation-state and the nation as source of legitimacy as such. On the long run the counter-revolution did not succeed in

\begin{itemize}
\item See Schnapper 1994, 129; Brubaker 1992, 10-11: He speaks of a “\textit{mission libératrice and civilisatrice.”}
\item See e.g. Birnbaum 1998, 21-23. The massacre of Saint-Barthélemy (1685), the terror of the Revolution and the Counter-Revolution are examples for the authoritative nature of French national and partly as well pre-national identity. For the good of homogeneous France and the preservation of French values rivaling identities had to be destroyed to purge the nation from all impurities.
\item See Jürt 1999, 187; as well Cabanel 1997, 11: he stresses in a bit sarcastic words mainly the adverse effect it had on the neighbor states: “Le malheur est que les voisins de la Grande Nation virent dans les soldats non des messagers de l’avenir libérateur, mais des troupes d’occupation souvent brutales, et que des nationalismes du ressentiment surgirent un peu partout.”
\item See Birnbaum 1998, 26.
\item See Birnbaum 1998, 174: These ideas were called Swiss because they were viewed as being influenced by Protestant reasoning and all Protestant influences were understood as infiltrations from Switzerland.
\item See Birnbaum 1998, 37.
\item See Fleiner-Gerster 1995a, 251-52.
\end{itemize}
turning the wheel back so as to make the nation disappear again\textsuperscript{504}. French identity remained national identity. However for many the French identity even though now a \textbf{national identity had religious meaning}. \textit{La fille aînée de l’Eglise} should become the Catholic nation \textit{par excellence}\textsuperscript{505}.

De Maistre who was the most important fighter for a Catholic French nation used the same vocabulary and relied on the same logic as the main actors of the Revolution. He accepted and supported the statist quality of the nation. He wanted the regeneration of the French people and asked for the assimilation if possible of all members of the population to Catholic values. To purge the nation completely he wanted to make Protestantism and every other form of diversity disappear even if it might need force\textsuperscript{506}. He also understood sovereignty as necessarily undivided and absolute\textsuperscript{507}. According to him only Catholizism could have ended the Revolution\textsuperscript{508}.

This counter-movement shows one of the dangers of the French nation concept. As long as the vast majority of the members of the population perceives the values as universal voluntaristic assimilation will succeed. If however the value system is not generally accepted and when discussions about the right set of exclusive values arise the French conception of the nation can easily lead to destruction and civil war.

The Catholic movement stayed strong for many decades. However there was a clear \textbf{trend of approximation} between the republican and

\textsuperscript{504} This was not clear early after the revolution. It needed several years until it was evident that there was no way back to religious identity.

\textsuperscript{505} See BIRNBAUM 1998, 19.

\textsuperscript{506} See for a very comprehensive argumentation BIRNBAUM 1998, 100-36, esp. 112-16.

When accepting force as one means of unification the nation loses its voluntaristic trait and with losing trust in the willing assimilation of all non-Catholics to Catholic belief and the quest for the expulsion or suppression of all non-Catholics the movement turned into an ethnic counter-movement. For ethnic counter movements see below at § 9 I.5.D.

\textsuperscript{507} See BIRNBAUM 1998, 125.

\textsuperscript{508} See BIRNBAUM 1998, 127.
the Catholic movement. Both movements alone were not strong enough to sustain complete dominance over longer periods, therefore members of both movements had to seek compromises\textsuperscript{509}.

With the approximation of the Church and the Republic and their willingness to seek compromises the quality of the debate changed in an important way. The new debate on the relationship of church and state was focused on debates on multiculturalism and liberalism. This new dispute will be treated in the following subsection.

C. Monoculturalism or Multiculturalism

The schools and army turned foreigners into French citizens and nationals as these institutions had turned peasants into Frenchmen\textsuperscript{510}. Integration meant however as well assimilation or in different words the belief in monoculturalism. It was expected of all citizens that they adopt the French culture, which is a creation of the state and accept the French way of life. France tried to create a homogeneous people that owed exclusive loyalty to the French State and accepted the undivisible nation as the only source of sovereignty.

The assimilationist tendencies are today often viewed as a negative feature of French nationalism\textsuperscript{511}. With the time demands started that it should be possible to be French but to keep a feeling of belonging to another culture.

The multicultural or liberalistic counter-movement is based on the idea that France should stop its homogenizing activities. Cultural

\textsuperscript{509} See Birnbaum 1998, 188-89: “Le rêve d’une République absolue qui triompherait aisément de ses adversaires en s’appuyant sur les seules Lumières mises en œuvre par la puissance étatique s’efface chaque jour un peu plus. Du tournant du siècle à l’entre-deux-guerres, les mobilisations nationalistes s’enflent sans cesse jusqu’au paroxysme du 6 février 1934, ébranlant de l’extérieur l’État républicain. Pourtant, les règles de l’affrontement se sont quelque peu modifiées, les catholiques se ralliant peu à peu à la République et les républicains délaissant toujours plus l’anticléricalisme, en dépit d’un bref renouveau en 1924 durant le Cartel des gauches.”

\textsuperscript{510} See Brubaker 1992, 15.

\textsuperscript{511} See Schnapper 1994, 17.
diversity or alternative group identities should no longer be perceived
as threatening the national French identity as long as the expression of
culture was restricted to the private sphere.\textsuperscript{512}
This counter-movement will be explained based on one example: the
relationship between state and religion. Later on as well France’s
difficulty with regional identities will be regarded.
The Vth Republic with Charles de Gaulle is still the reconfirmation of
the centrality of the state for the French nation. France and the French
nation only exist because of the state: “il n’y a de France que grâce à
l’État.”\textsuperscript{513}
At the same time though politicians like de Gaulle who opted for the
state-centered quality of the nation did not hide their Catholic
convictions. It became possible to be Catholic and to pursue the statist
quality of the nation.\textsuperscript{514} One did not any longer have to decide whether
to be Catholic or republican but could openly be a Christian republican
or a republican Christian. The antagonism between the Catholic
Church and the French State diminished. Birnbaum even argued that
a republican-Catholic identity emerged\textsuperscript{515}.
The fusion of a republican and a Catholic identity only became possible
because the doctrines of the republicans and of the Catholic Church
changed. The republicans accepted that someone could be a good
citizen even though he or she openly articulates his or her religious
believes\textsuperscript{516}.

The church did not any longer demand of its members exclusive
loyalty. Within the Catholic Church in France but as well elsewhere a
new discussion started whether the church should stay integrationist
and assimilationist or turn towards the acceptance of the limited partial

\textsuperscript{512} See Birnbaum 1998, 182-83.
\textsuperscript{513} See Birnbaum 1998, 222.
\textsuperscript{514} See Birnbaum 1998, 223.
\textsuperscript{515} See Birnbaum 1998, 277.
\textsuperscript{516} For the principle of toleration and the accepted relativity of the own beliefs, see
Denninger 1998, 139.
truth of all religions and the respect for multiculturalism necessarily inherent in it\textsuperscript{517}. Today the official church stresses tolerance towards other religions, opts to a certain degree for multiculturalism, accepts human rights as Catholic values and even accepts the separation of church and state\textsuperscript{518}.

The Republicans had opted for the complete separation of state and religion\textsuperscript{519}. Even though the Catholic Church later accepted the separation the church argued for a separation as practiced in the United States instead of the aggressive neutrality or militant non-religiosity pursued by the republicans\textsuperscript{520}.

The dispute turned around two different understandings of religious neutrality of the state. In the American perception the state stayed neutral by accepting all kinds of religious manifestations in the private sphere\textsuperscript{521}. Neutrality of the state in France originally meant the complete invisibility of religion\textsuperscript{522}. Neutrality was openly anticlerical\textsuperscript{523}. GREENFELD goes so far as to say that “Above all

\textsuperscript{518} See Leiner-Gerster 1995a, 394; Birnbaum 1998, 278-79.
\textsuperscript{519} See Birnbaum 1998, 160.
\textsuperscript{520} See Birnbaum 1998, 293-304.
\textsuperscript{521} See e.g. Monsma 1993: He calls the American understanding of neutrality positive neutrality.

In the public sphere American neutrality demands however as well relative invisibility of religion. This is expressed in AMENDMENT I (1791) to the AMERICAN CONSTITUTION (1789): Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...

The Constitution only postulates that the state should not privilege one religion and that it should not allow religions to organize in the form of public institutions. The Constitution forbids therefore any action of the state that could favor one religion. In the private sphere however everybody is free to express his or her beliefs. Religious neutrality in the USA is therefore not anticlerical but shall protect the religious groups against state action.

See as well Kålin 2000, 36-37, 40.
\textsuperscript{522} Birnbaum 1998, 311; see as well Leiner-Gerster 1995a, 388: The separation between the state and religion derived from the anticlericalism of the French Revolution.
\textsuperscript{523} See Kålin 2000, 36.
patriotism implied complete renunciation of self, the effacement of the private in front of the public.\(^{524}\)

The dispute about the relationship between the state and religion gained heightened attention over the **scarf case**. Some Muslim girls insisted in wearing scarves in school. The school administration ordered them to take the scarves off. In this case all religions joined sides against school officials.

Non-Catholic religious communities formerly supported the strict separation of religion and the state because it held the Catholic Church in check. The scarf case heightened their perception that the aggressive or militant non-religiosity as pursued by the state in the case of the Muslim girls combined with the accepted visibility of the Catholic Church threatened their religious freedom and was opposed to equal treatment. The Catholic Church on the other hand had to fear that one day the scarf case might be taken as a precedent to again limit Catholic visibility. The representatives of religious communities accused the state officials of being intolerant\(^{525}\).

Adversaries of neutrality in the American sense warned that toleration would hinder integration and therewith questioned the distinct French achievements in nation building\(^{526}\).

The **Conseil d’Etat** finally decided that students were allowed to show their religion as long as they did not demonstrate it in an aggressive way that could disturb the peace at school\(^{527}\). With this still rather

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\(^{524}\) Greenfeld 1993, 176.

\(^{525}\) See Birnbaum 1998, 296-300.


\(^{527}\) See Expert Opinion (November 27, 1989) of the Conseil d’Etat. School teachers as civil servants however are not allowed to wear the chador in school. According to the opinion and the following decisions the school has to decide whether the wearing of scarves of the students disturbs the public order. However the school is not allowed to define the wearing of scarves as such as disturbing. See the later decisions that continue the line of argument: Decision (November 2, 1992) of the Conseil d’Etat, Decision (March 14, 1994) of the Conseil d’Etat, Decision (March 10, 1995) of the Conseil d’Etat, and Decision (October 9, 1996) of the Conseil d’Etat. For comments on these cases see Kälin 2000, 154-56.
restrictive decision the Conseil d’État accepted at least partly the American perception of religious neutrality.

France moved away bit by bit from the concept of an organic nation and adopted new aspects of liberalism. The newspapers claimed that now the French Revolution was finally over\textsuperscript{528}. Others however argued that most of all the institutions and the legal system still mirror the confrontational typically French identity\textsuperscript{529}.

The original fight between the Catholic Church about the value system turned into disagreement about the collectivist quality of the nation concept. The dispute about the relation of church and state is only one example for the new demand to adopt liberalism similar to the American example. New discussions about the acceptance of regional identities or decentralization show as well that the mono-cultural quality of the French nation concept has to face opposition.

According to a new multiculturalist view the state should be as minimalist as possible and all cultural issues should remain private business\textsuperscript{530}. The individual should not any longer be forced to give up his cultural identity for the sake of integration. The role these liberals envisage for culture is still a limited one. The expression of culture is restricted to the private sphere.

\textit{D. Ethnicity or Civism}

The legal status of citizenship defines nation-membership in France\textsuperscript{531}. Connected to citizenship all citizens can evoke rights and must fulfill duties. At least the good citizens who are willing to fulfill their tasks as citizens are members of the French nation and the Republicans took it

\textsuperscript{528} See Birnbaum 1998, 34-35; cf. Higuchi 2000, 131: Higuchi noticed a movement towards pluralism - as he says even - in integrationist France.

\textsuperscript{529} Birnbaum 1998, 36-38; e.g. at 37 (footnote omitted): “De manière plus structurelle encore, le système politico-administrative à la française produit des chocs frontaux successifs, du heurt toujours non résolu entre appartenance culturelle et utopie politique, préserve, en dépit de toutes les avancées de ‘l’américanisation’, nombre de ses traits essentiels.”

\textsuperscript{530} Birnbaum 1998, 301-03.

\textsuperscript{531} See above at § 9 I.3., § 9 I.4.
for granted that all citizens would be willing to fulfill their tasks. There
was always the presumption that every individual could and would
accept the universal French values as his or her own.

Because of the conviction in the integration of all individuals
citizenship laws relied to a great extend on the ius soli principle532. All
persons living for a certain time on French territory could be assumed
to be French and to be willing to be French citizens. The time
foreigners were required to live on French soil before they could
become citizens differed during different times but was normally short.

In the first French Constitution after the Revolution for instance the
only condition to receive citizenship next to the requested number of
years on French territory was the solemn affirmation to be loyal to the
nation, the state and the Constitution533. Second generation immigrants
often received French citizenship automatically534.

While in Germany535 every inclusion of a foreigner into the nation
needed a justification, in France the exclusion of a foreigner who lived
on French territory needed an explanation.

The ethnic counter-movement wanted to move away from the
automatic naturalization of foreigners and wanted to restrict the ius soli
principle. The members of this counter-movement were vehemently
opposed to movements towards pluralism or American liberalism.
They argued for a homogeneous nation. In this respect they agreed
with the republicans. On the other hand they denied the legitimacy of
assimilation and integration because of the supposedly unassimilability

\[\text{\footnotesize 532 There was however always as well a ius sanguinis component. Children of French parents receive French citizenship.} \]
\[\text{\footnotesize 533 See the French Constitution of 1791 in Titel I, Art. 5: Je jure d’être fidèle à la Nation, à la loi et au roi et de maintenir de tout mon pouvoir la Constitution du Royaume, décrite par l’Assemblée nationale constituante aux années 1789, 1790 et 1791. (Emphasis in original).} \]
\[\text{\footnotesize 534 See e.g. the first French Constitution (1791) after the Revolution in Title II, Art. 1-5.} \]
\[\text{\footnotesize 535 See below at § 10.} \]
of people with non-Christian beliefs or of people who belong to different races and ethnicities\textsuperscript{536}.

Even the most prominent representative of the civic nation concept, SIEYÈS did not hesitate to use some ethnic arguments to strengthen his claim that the third estate without the nobility forms the nation. He relied on an argument used by the nobility themselves. The nobility had claimed that they had a different ethnic origin than the common French people. While the nobility had used this argument to justify their superiority and their privileged position SIEYÈS now used it as one reason to justify the exclusion of the nobility from the nation\textsuperscript{537}.

Similarly citizenship laws rarely relied on pure \textit{ius soli} principles\textsuperscript{538} but complemented the \textit{ius soli} approach with features of \textit{ius sanguinis}\textsuperscript{539}. Children of French parents normally received automatically or at least easier French citizenship.

In France the ethno-cultural movements wanted to transform the criteria for nation membership so that the nation would closer resemble an ethnic nation. These movements could find support periodically. In times when France felt threatened from within and from the outside, ("\textit{patrie en danger}") French nationalism did gain xenophobic elements\textsuperscript{540}.

\begin{flushleft}
\textsuperscript{536} See e.g. BIRNBAUM 1998, 319; KRULIC 1988, 32.
\textsuperscript{537} SIEYÈS 1989 [1789], 11.
\textsuperscript{538} One example for the \textit{ius soli} principle can be found in the \textsc{Constitution} of 1799, First Title, Art. 2: Tout homme né et résidant en France qui, âgé de vingt et un ans accomplis, s’est fait inscrire sur le registre civique de son arrondissement communal, et qui a demeuré depuis pendant un an sur le territoire de la République, est citoyen français.
\textsuperscript{539} See e.g. \textsc{French Constitution} of 1791, Title II, Art. 2.
\textsuperscript{540} See for this phenomenon BRUBAKER 1992, 8-14; LIMOUSIN 1988, 17; HOCHET 1988, 23-30; KRULIC 1988, 31-43; See BIRNBAUM 1998, 270-71. Politicians like Jean-Marie Le Pen today represent the ethno-cultural counter-movement to the state centered assimilationist nation concept. Le Pen uses the same phrases as the revolutionaries. Out of the corrupt and decadent Vth Republic a new VIth Republic shall emerge with a purified nation that would embody national populist values, honesty, and responsibility.
\end{flushleft}
The counter-movement became apparent in the discussions about the naturalization law. **Naturalization should no longer be accorded automatically but should be merited**\(^{541}\). The critique of the attribution of citizenship garbed itself as far as possible in accepted terms and principles. The nationalists underlined that their main concern was that French citizenship and nationality regained the voluntaristic element that was until now presupposed by the state.

However, the ethno-nationalists did not so much aim at leaving foreigners the free choice whether to receive citizenship but wanted that foreigners had to prove their complete assimilation before they could be accorded citizenship. They had to prove that they are *français de coeur* “French at heart”\(^{542}\). Automatically citizenship should only be accorded to children of French parents that means according to the principles of *ius sanguinis*.

The nationalists were equally opposed to dual citizenship and the general trend, which they viewed as a desacralization and devaluation of citizenship\(^{543}\). They feared that because dual citizenship is opposed to absolute and undivided loyalty to the state French citizenship would be accepted out of mere practicality considerations\(^{544}\). If these foreigners received dual citizenship this would devaluate French citizenship and be opposed to all ideals and principles of the French nation.

Finally they alleged with a three-pronged argument that certain groups were inassimilable to French culture because, first, they did not any longer want to assimilate. Second, the traditional institutions of assimilation were not as effective as in earlier times, and, third, that today’s immigrants were coming from cultures, which are too different

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\(^{541}\) See **BRUBAKER 1992**, 142-43.


\(^{543}\) See **BRUBAKER 1992**, 144.

from the French culture and therefore cannot be assimilated to French culture.545

The first argument was directed at the multiculturalist movements described above, the second one was as well supported by many who were generally not in favor of the ethno-nationalist movement546, the third argument is the typical ethno-national argument. With the - according to the ethno-nationalists - unbridgeable difference e.g. between the members of the Islamic faith and members belonging to Christian and even Jewish faith, the nationalists argued in favor of a categorical exclusion of foreigners. They wanted to provoke a change in argumentation. Like in Germany inclusion should become the exception that must be justified547.

Since the Second World War ethno-cultural movements did fortunately not succeed. What worked well as arguments for the opposition could not find majorities when approached by the government. The French were not ready to accept the move away from the inclusiveness of the nation. They had however open ears for the part of the demands that were in accordance with the French national identity.548

They accepted a strengthening of the voluntaristic aspect of national identity but only in so far as they introduced that second-generation foreigners were not any longer accorded citizenship automatically but were granted citizenship unconditionally when they demanded it549. This change of the naturalization laws could only be successful when

545 See Brubaker 1992, 148.
546 The decentralization of the school system had an important influence on its capacity to integrate, see below at § 11 IV. for the ENA.
549 With this change they had as well acted according to the wishes of many proponents of the multiculturalist counter-movement who viewed the automatic ascription of citizenship to second generation immigrants - most of all in the context of Algeria- as a coercion.
the proponents retreated from using exclusivistic wording in favor of rhetoric of inclusion\textsuperscript{550}.

E. Relationship of the Three Movements towards Each Other

The three depicted movements are very close to and \textbf{linked to each other}. Often one movement moved from one category to the next, sometimes a movement used the phraseology of one category but acted according to other principles.

The discussion about the \textit{meaning of universality easily turned into an ethnic counter-movement} as the example of the philosophy of de Maistre can show. From the moment on, when willing assimilation turns into forced assimilation the forced identity loses the voluntaristic aspect of French national identity. Identity will turn into a “natural” ethnic identity at the point when the movement loses the belief in the assimilability of foreigners.

The arguments of French ethno-nationalists who precisely allege that people of Muslim faith cannot be assimilated to French culture are one example for a counter-movement very similar to the one labeled above the universalist counter-movement.

To the extent that the Vichy-regime was willing to collaborate with the Nazis and to support them with the deportation of Jews this regime was definitely a regime relying on ethno-nationalism. Pétain tried to pursue ethno-nationalist politics of exclusion while however using as often as possible universal rhetorics like de Maistre before\textsuperscript{551}.

\textsuperscript{550} See Brubaker 1992, 155-59.

\textsuperscript{551} See Fleiner-Gerster 1995a, 389; Birnbaum 1998, 131, 196-208: Vichy France took over the ideology fought for by de Maistre. The Catholic Church did not only accept the Vichy regime, according to some there was even an osmosis between church and Vichy. Pétain opted for a renewed importance of the Catholic Church and Catholic values in the state on the expense of the values of Enlightenment. During and after the Vichy regime most civil servants even high ones remained in office. Only one example is Maurice Papon who made the news lately because of his flight to Switzerland and arrest in Gstaad. He was an active member of the student-body at schools influenced by republican ideas. Afterwards he became General Secretary de la préfecture de la Gironde during the Vichy regime and organized the deportation of Jews in his district. The
The difference between ethnic and here-called universalist counter-movements is not so much a quantitative but a qualitative difference. The difference can be described with the terms inclusiveness vs. exclusiveness as well as universalism vs. particularism.

The ethnic counter-movement is not only a counter-movement to the republican French values but as well a counter-reaction to trends towards multiculturalism. The multicultural counter-movement attacks the homogenizing activity of the state. The movement was as well partly an opposition movement to the slow and subtle move away from rationalism as only accepted values in the state, which made assimilation more difficult to accept.

In the discussion above the multicultural movement was regarded in the terms of protest against the absolute loyalty demanded of French nationals. More and more this development is coached as well in universalist language. Multiculturalism, pluralism, or diversity become universal values and turn from descriptive to prescriptive or normative terms. With this changing understanding of multiculturalism the debate could change from a liberalistic debate into a new discussion about the term of universality. Coached in inclusivistic universal language this movement might have more chances of success in France than in terms of anti-assimilation or particularism and liberalism.

6. Political Institutions for the Nation

French identity is ambiguous. France relied on political utopia and the different features of the identity are not easily to be reconciled. Individualism and political democratic participation are difficult to realize with the understanding of the nation as collectivity and the belief in one distinguishable common good. Centralized sovereignty,
the demand for complete and undivided loyalty to the nation and the state and the belief in universal values and in the general will barred the mediation between competing conceptions of the good.

Linked with the debate what the common good constitutes is the question who can and how can they establish the common good. Put differently: should the government, the head of state or the parliament based on representation, or the whole nation through referendum determine the general will by decree, with majority, unanimity, or consensus driven decisions?

The nation had a long struggle to find the political institutions to fit the nation-state. The political system of France was object to many changes. The joke that the French Constitution can be found in the library in the section for periodicals, expresses the frequent constitutional and political changes.

Partly because of the competing conceptions of French identity and the long time exclusive understanding of the meaning of being French French history is marked by a permanent search for institutions that could express the will of the nation. Additionally because of the gap between political Utopia and political reality a governmental system that promised to incorporate the ideals was not necessarily apt to deal with the political reality and a Constitution that accepted the political reality seemed to be a betrayal of the ideals.

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553 See Fleiner-Gerster 1995a, 252-53.

554 Art. 4 of the Constitution of 1793 (the leftist Montagnard Constitution) states for example: La loi est l’expression libre et solennelle de la volonté générale... Art. 6 of the French Constitution of 1795 is similar but includes majoritarianism: La loi est la volonté générale, exprimée par la majorité ou des citoyens ou de leurs représentants. The proposed but never ratified Constitution of Marechal Pétain of 1940 in Art. 10 however states: Le chef de l’Etat ... personnifie la Nation et a la charge de ses destinées. The Constitution of 1958 states in Art. 20: Le gouvernement détermine et conduit la politique de la Nation. See as well Fleiner-Gerster 1995a, 319-21: While Sieyès thought that the common good could be only reached through a political system favoring parties and interest groups, Rousseau believed that the general will can only be found in systems of direct democracy through majority vote.

555 See Fleiner-Gerster 1995a, 252.
Since the third estate proclaimed itself for the first time to represent the nation France lived through 15 political regimes, four revolutions, two violent uprisings, and three foreign interventions. Political change became the inalienable right of the nation.

II. National Identity and Political Activity

As all national identities French national identity has changed and is going to change in the future. French history is especially rich in attempts to redefine the national identity and state institutions but exactly these attempts make it easier to see the most crucial and distinctive elements in French national identity and its political expression.

French identity developed *within the state* and is marked by the century old tradition of French state-building. The state always stayed the frame of reference. Within this frame of reference the nation became the object of undivided and absolute loyalty. Citizenship defines nationality. At least all good citizens are members of the nation.

The willingness to turn French and foreigners into citizens and nationals was based on the belief that everybody *could* and *wanted* to adopt French values and French culture and would *willingly assimilate*. The three counter-movements, which are depicted above, show a three-folded disillusionment because of a disparity between reality and ideals.

The *French nation concept differs from the American concept* in a decisive way. Both concepts are civic nation concepts because in both cases citizenship is the most important prerequisite for nation membership. However, the *notion of citizenship* is different. In the American understanding the citizen is the Supreme Being and the individual interest is the prime interest in the state. In the French concept nation membership elevates the citizen and the national interest is supposed to supersede individual interests.

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556 See Fleiner-Gerster 1995a, 250.
The American State aimed at enabling individual self-determination whereas the French State aimed at changing society for the good of all. Changing society included creating a national culture and citizenship, included the acceptance of this culture whereas in the American concept culture was supposed to be irrelevant for the state and for the citizen though not necessarily for the individual.557

In the section on 'Reconsiderations for the Context of Normative Diversity' two connected issues will be further regarded that concern the presupposed assimilation. The principle of presupposed assimilation creates a normative unity that does not necessarily coincide with factual unity. In a first step the gap between norms and facts will be shown. Afterwards the consequence of the inherent non-recognition of diversity for factual minorities will be regarded.

§ 10. The German Nation

The development of the German nation was completely different from the development of the American or French nation. The American and the French nation developed within a given territory while the German nation developed against and in conflict with existing state patterns.

The German national identity is based on the belief in a common ethnicity. Political action was directed at establishing a nation-state that can further national interests.

After the Second World War a reinterpretation and transformation of the national identity started. Human Rights and democracy became fundamental values.

I. Nation-Building

1. Ethnic Nation without a Nation-State

German nationalism and national self-consciousness had developed before a unified German state existed. Until 1871 there was no German nation-state. The idea of the nation could not be linked to the idea of citizenship because the common political framework was missing.

Citizenship laws were first developed in Prussia. German citizenship law developed without reference to the ethnic concept of the German nation. German nationality and citizenship in Prussia or in the other subnational units were distinct.

558 See e.g. SCHNAPPER 1994, 159 or CARON & VERNUS 1996, 169-84.
559 Before 1871 the German Empire was divided into a multiplicity of bigger and smaller principalities and kingdoms. The dominant powers were Prussia and Austria.

The Constitution of the Kingdom Bavaria was the first to introduce the notion of citizenship in Germany. This first regulation was however rudimentary. Only in Prussia citizenship law gained importance. See RENNER 1998, 5-7
The nation was perceived as a prepolitical community in search of a state\textsuperscript{561}. “This prepolitical German nation, this nation in the search of a state, was conceived not as the bearer of universal political values, but as an organic cultural, linguistic or racial community - as an irreducibly particular \textit{Volksgemeinschaft}\textsuperscript{562}.”

In Germany the nation and the institutional reality of the state were distinct unlike in the United States and in France where statehood and nationhood became fused. Consequently nationhood in Germany was an ethnocultural fact whereas in the United States and in France it was a political fact\textsuperscript{563}.

The German national consciousness developed within the Holy Roman Empire of the German Nation. The German nation coincided neither with the population of the Empire nor with the subnational reach of effective political authority\textsuperscript{564}. The Prussian State for example was on the one hand subnational, on the other - after the partition of Poland - supranational. The Prussian population was over- and underinclusive.

The distinct terms of \textit{Staatsangehörigkeit} (formal state membership), \textit{Staatsbürgerschaft} (participatory citizenship), and \textit{Nationalität} or \textit{Volkszugehörigkeit} (ethnocultural nation-membership) as well as the different meanings of \textit{Staatsvolk (demos)} and \textit{Volk (ethnos)} reflect the independent and sometimes even antagonistic course of state-building,

\begin{footnotes}
\item[561] In this respect it is a very interesting question why not instead of a German national identity as an ethnic identity a Prussian or Austrian identity or as well a German identity as \textbf{civic identity} developed.

A civic identity could perhaps have developed if the National Convention in the Church of St. Paul in 1848 had been successful. The Convention as \textbf{democratic movement} drafted a Constitution and wanted to invest Friedrich Wilhelm IV as emperor of the people. Friedrich Wilhelm IV refused to accept the crown. The Austrians had left the Convention already before. After the discouragement of the democratic movement, the disillusionment about the political institutions and the renewed uncertainty about the extension of the state national identity as cultural and ethnic identity promised elevation and a criteria for defining state borders. For the 1848 movement see \textsc{schulze} 1997.

\item[562] \textsc{brubaker} 1992, 1.

\item[563] \textsc{h. kohn} 1945, 18-20.

\item[564] See \textsc{brubaker} 1992, 5.
\end{footnotes}
nation-building, and democracy. Nation-building occurred in protest against and in conflict with existing state pattern\textsuperscript{565}.

\textbf{A. The Middle-Class and Enlightenment}

In Germany nationalism was mainly a \textit{middle-class phenomenon}. Its leaders came mostly from the bourgeoisie rather than from the aristocracy. Nationalism was the answer to a strong feeling of \textit{inferiority} based on individual and group experiences. Most of all the German middle class was confronted with the insurmountable clash between their high ideals and dreams for themselves and for their society and the very different reality. The better fulfillment of the ideals of the Enlightenment in the neighboring states, most of all in France and England, further increased the perception of their own inferiority. The middle class responded to the perceived inferiority with a transformation and reinterpretation of values. Out of an intense feeling of inferiority a strong feeling of superiority developed.

The \textbf{Enlightenment} celebrated the importance of rationality and \textit{education}\textsuperscript{566}. The large majority of the educated came from the middle class: A \textit{Bildungsbürgertum} evolved. The middle class became exposed to new ideas and sentiments. The high importance that the Enlightenment accorded to the reason elevated those who thought to possess it.

\textbf{Education} was the avenue for upward social mobility \textsuperscript{567}. The availability of education created however a surplus of intellectuals. Education promised a higher social standing but did not bring the acceptance of the aristocracy and could often not provide for a living. Partial fulfillment of hopes proved once again to be more disturbing

\textsuperscript{565} See e.g. H. Kohn 1945, 329-31.

\textsuperscript{566} See Greenfeld 1993, 293-94; Caron & Vernus 1996, 151-52: The Enlightenment was at the same time an anti-Catholic movement. Already in the Enlightenment as well as later the Protestants were most influential in the definition of German identity. Only Bismarck was able to unite Catholics and Protestants.

\textsuperscript{567} See Greenfeld 1993, 294-96. Education was as well used to spread national thoughts. For this aspect see Fichte 1978 [1808], 20-24, 27-58.
than no promise at all. The Bildungsbürgertum became increasingly dissatisfied with their position in society.\textsuperscript{568}

The Bildungsbürger were not only dissatisfied with their personal position in society but also with the society as such.\textsuperscript{569} The ideas of Enlightenment of liberty and equality were not fulfilled in the Empire. The Enlightenment movement looked towards France and England as positive examples of enlightened states. The feeling of inferiority created by the realization of German deficiency provoked the first expressions of Ressentiment against the West.\textsuperscript{570}

The Enlightenment was however still characterized by its cosmopolitanism. To be a good Englishmen or Frenchmen meant as well to be a good world citizen. Having little to be proud of in Germany German intellectuals could still perceive themselves as good world citizens.\textsuperscript{571}

\textbf{B. Turn to Nationalism}

Nationalism became increasingly appealing to the Bildungsbürgertum because it promised what the Enlightenment did not accomplish for them in the Holy Roman Empire: the equal human worth of all members of their society and therewith the \textit{automatic elevation of all members of the national community}. Nationalism started as the dream of scholars and poets in the beginning unsupported by the public opinion, and found its expression in education and propaganda rather than in government policies.\textsuperscript{572}

\begin{itemize}
  \item \textsuperscript{568} See Greenfeld 1993, 312.
  \item \textsuperscript{569} The Bildungsbürgertum stayed one of the driving forces. In the Parliament of 1848 three-fourth of the representatives were members of the Bildungsbürgertum. See Caron & Vernus 1996, 172.
  \item \textsuperscript{570} See Greenfeld 1993, 313: “The evident superiority of the model nations, England and France, in particular, left a sour taste in the mouths of those who, despite themselves, sang their praise in Germany.” Similar Caron & Vernus 1996, 152.
  \item \textsuperscript{571} See Greenfeld 1993, 313-14.
  \item \textsuperscript{572} See H. Kohn 1945, 329-31. Johann Gottlieb von Fichte (1762-1814) is in this respect a prominent example. Whereas he first was an ardent supporter of the
\end{itemize}
Nationalism with its emphasis on equality did not automatically contradict the ideas of enlightenment. Identity however was reinterpreted to make it comprehensible and consistent with traditions and experiences\(^{573}\).

The reinterpretation of identity into national identity promised the elevation out of inferiority. The elevation of the self-perception was however only possible by turning away from the unfulfilled ideals of the Enlightenment\(^{574}\). The modern, rationalist, western world was now depicted as worthless and evil in which man was alienated from the true nature of man. Only the fusion into a new collectivity could undo the alienation and lead to true freedom.

**Pietism** was one of the traditions that influenced the national identity. Pietism was different from Puritanism in England. In so far as Puritanism was the expression of a self-conscious upwardly mobile confident group Pietism (in Germany mainly Lutheran Pietism) was the religious ideology of a much more disillusioned fatalistic and pessimistic society\(^{575}\).

**Emotionalism** was characteristic of Pietism and was opposed to the rationalism of Enlightenment. Passion took the place of scriptural learning. Scriptural learning did no longer promise the certainty of salvation\(^{576}\).

Religion was viewed as a personal unity with God, all forms of worship became acceptable as long as they were viewed as natural and sincere. German replaced Latin as the language of worship. The language received a new mythical meaning\(^{577}\). It became the means through which Enlightenment he later turned to nationalism. See *Encyclopedia of Nationalism*. 2000. Vol. 2, 161-62.

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\(^{573}\) See GREENFELD 1993, 314.

\(^{574}\) See e.g. VINCENT 2001, 593; CARON & VERNUS 1996, 151: Nationalism was therewith a counter-reaction to the Enlightenment.

\(^{575}\) See GREENFELD 1993, 315.

\(^{576}\) See GREENFELD 1993, 316-18.

\(^{577}\) See FICHTE 1978 [1808], 61-74.
which God manifested himself to a people. Ethnic communities became unique expressions of God’s love.\textsuperscript{578}

The centrality of emotions and passions created the sentiment that blood and suffering as signs of repentance and true feelings added value to everything associated with it whether it was war, the profession of a soldier or death.\textsuperscript{579} Out of Pietism ethnic differentialist nationalism could develop. It provided the ideology to justify war and the special role of ethnic communities.

In the beginning Pietism was as well a dividing force. The divisions between Catholics and Protestants threatened the formation of the nation.\textsuperscript{580} It needed the secularization of pietist thought in order to from a national unity that could include Protestants and Catholics. Romanticism brought this secularization. Romanticism had the biggest influence on the German national consciousness. Thoughts, which became later associated with Romanticism, were already expressed in the literature of the Sturm und Drang.\textsuperscript{581}

Romanticism secularized pietist thought. “For Herder ... each culture had a religious meaning; it was an irreplaceable brick in the Providential construction. But on the whole Romantics dispensed with God: they dissolved the Deity in nature and made individuality and totality primary values.”\textsuperscript{582} Emotions were glorified and unreflected emotions became the expression of Wesenswille. The intensity of emotion was important not the nature of it.

\textsuperscript{578} See Greenfeld 1993, 319.
\textsuperscript{579} See Greenfeld 1993, 321.
\textsuperscript{580} See Caron & Vernus 1996, 150-51.
\textsuperscript{581} See Greenfeld 1993, 322-23; Caron & Vernus 1996, 151.
\textsuperscript{582} Greenfeld 1993, 331.
C. Counternationalism

The dissatisfaction with the own society and the transformation of the national consciousness was increased through the confrontation with the French society.\textsuperscript{583} The French Revolution and its aftermath, most of all the Napoleonic wars influenced decisively the German understanding of the nation.\textsuperscript{584} This influence was however not a direct importation of the new French understanding and theoretical elaboration of the nation as a political community but on the contrary the conscious negation and differentiation from the French concept. German ethnic nationalism was counternationalism.

The Bildungsbürger’s initial general admiration for the French Revolution whose philosophy was familiar to them from the Enlightenment movement as well as the admiration for Napoleon soon turned into resentment when the French army approached victoriously.\textsuperscript{585} The Napoleonic invasion created for the first time a community of interest between the middle class, bureaucracy, and nobility. The German national cause became an anti-French cause.\textsuperscript{586}

National consciousness arose out of an on-going battle between realized inferiority and megalomania.\textsuperscript{587} The feelings of superiority were expressed in a strong Ressentiment towards the West. The West and most of all France were perceived as the incarnation of evil. “[The] moment Germans turned to national identity and acquired national pride, this pride was wounded, and not by Napoleonic conquest alone, but rather by the miserable and laughable state of their society, rendered conspicuous by the proximity of the West.”\textsuperscript{588}

\textsuperscript{583} See CARON & VERNUS 1996, 149.
\textsuperscript{584} See CARON & VERNUS 1996, 152-57; JURT 1999, 183; CABANEL 1997, 11.
\textsuperscript{585} See GREENFELD 1993, 357-58.
\textsuperscript{586} See VINCENT 2001, 593; GREENFELD 1993, 359; GRIMM 1999, 44.
\textsuperscript{587} See H. KOHN 1945, 329-31.
\textsuperscript{588} GREENFELD 1993, 373.
This perception of inferiority triggered the definition of the West as the anti-model of everything good. Nationalism created a new bond between the Germans but was accompanied by hate for all fellow man who did not belong to the nation\(^{589}\).

The Romantic Weltanschauung turned into the German Weltanschauung. Pieto-Romantic ideals were ‘nationalized’. The German nation was now seen as the object of supreme loyalty. The German nation was not only perceived as a nation among many but as the only true and ideal nation\(^{590}\). The middle class’ feeling of inferiority turned into sheer megalomania\(^{591}\).

The German language was perceived as the original language and as the reflection of the unique spirit of the people\(^{592}\). Even more the common descent was stressed. The failure to assimilate national minorities was now interpreted as a virtue, France’s ability to assimilate minorities became a vice. It was argued that German blood was undiluted. The national identity became based on race and the German race was viewed as the purest one\(^{593}\).

Jews became the symbol of the West\(^{594}\). German nationalists defined the Jews like the German nation as a race. While they however changed their own identity, which had been hateful to them, into a new idealized one they created a hateful identity for the Jews. German intellectuals compared the German nation to the ideal anti-Enlightenment and anti-West community; the Jewish race on the other

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589 See H. KOHN 1945, 18-20.
591 See Wilhelm VON HUMBOLDT cited in GREENFELD 1993, 364-65: “There is perhaps no country that deserves to be free and independent as Germany, because none is so disposed to devote its freedom so single-mindedly to the welfare of all. The German genius is among all nations the one which is least destructive, which always nourishes itself, and when freedom is secured Germany will certainly attain an outstanding place in every form of culture and thought...”
592 See VINCENT 2001, 591-94; see FICHTE 1978 [1808], 61-74, for the importance of language in general as well KIRCHOF 1987.
593 See GREENFELD 1993, 368-69.
hand became the embodiment of everything evil\textsuperscript{595}. Religion was no longer the main dividing factor but denunciations of the Jews were based on the imagined \textit{Rassenseele}\textsuperscript{596}.

In a society, which glorified emotions, arguments in favor of Jewish emancipation based on reason were no longer convincing. “The traditional definition of the Jew as an evil and impure outsider, as wicked as he was defenseless, made him an exceptionally convenient peg on which to hang the blame for the innumerable frustrations which could not otherwise be soothed\textsuperscript{597}.” Resentment and with it anti-Semitism became part of the German national identity. Combined with the Romanticist glorification of violence and death racial anti-Semitism paved the way to the holocaust\textsuperscript{598}.

\subsection*{D. Collectivism}

The French understanding of nationhood has been state-centered and assimilationist whereas the German understanding is Volk-centered and differentialist\textsuperscript{599}. The writings of the \textit{Bildungsbürgertum} during this time show a more and more non state-based perception of the nation as a \textbf{prepolitical and ethnocultural community}, as a \textit{Kultur nation}\textsuperscript{600}, which however strived for its own state.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{595}] See \textsc{Greenfeld} 1993, 382.
\item[\textsuperscript{596}] Anti-Semitism did not only reign in Germany. Still in Germany anti-Semitism took an unprecedented dimension with the Holocaust. Emotionalism was probably one reason but alone cannot explain (as nothing will ever be able to explain) the systematic persecution and the genocide. Other reasons can be the need of a scapegoat within Germany after the First World War (\textit{Dolchstoss Legende}). Already before the First World War the Jews were depicted as anti-Christ (even though a majority of German Jews were secularized) and therewith as the common enemy of Catholics and Protestants. According to Hannah \textsc{Arendt} the discrepancy between wealth and power had a major influence, too. In her view, wealth that is not paired with power will create enmity. See \textsc{Arendt} 1996, 33.
\item[\textsuperscript{597}] \textsc{Greenfeld} 1993, 380.
\item[\textsuperscript{598}] See \textsc{Greenfeld} 1993, 384.
\item[\textsuperscript{599}] See \textsc{Brubaker} 1992, 1.
\item[\textsuperscript{600}] See \textsc{Brubaker} 1992, 6.
\end{itemize}
\end{footnotesize}
German Romanticism perceived the nation as an *organically developed individual*, united by a distinct *Volksgeist*. According to Romanticism the perfect expression of the *Volksgeist* was only possible in its own state. The *Volksgeist* constituted the nation whereas the state was expressive of nationhood\(^{601}\). The ethnocultural community needed therefore a state to express itself. This ethnic nation-state was perceived as the ultimate goal, the ultimate expression of the *Volksgeist*.

France exemplified to the German Romanticists or nationalists the instrumentalist approach which according to them showed man’s alienation from himself and the nation in a rational society\(^{602}\). “The state is not a mere factory, a farm, an insurance, institution or mercantile society, it is the ultimate association of all physical and spiritual wealth, of the total internal and external life of a nation into the great, energetic, infinitely active and living whole\(^{603}\).”

True freedom could only result from the unconditional subjection of the individual to collective authority\(^{604}\). Only within the community could the individual express his true self. Individuality was the expression of the human nature.

The Romantic understanding of individuality was therefore completely opposed to the American idea of individualism\(^{605}\). “To be free, it appeared, man had to renounce all independence; to be happy, he had to reconcile himself to the place assigned to him in the larger scheme of things...\(^{606}\)."

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\(^{601}\) See H. KOHN 1945, 18-20; VINCENT 2001, 593.


\(^{603}\) A. MÜLLER 1955, 150.

\(^{604}\) See GREENFELD 1993, 349.

\(^{605}\) Interestingly this notion of collectivity did hardly differ from the French perception of the nation as collectivist.

\(^{606}\) GREENFELD 1993, 350.
Romantics often described themselves as champions of democracy however democracy meant here the submersion of the individual into the nation and the state\textsuperscript{607}.

\textbf{E. Parallel Political Concept}

At the same time, however, a parallel political concept of a \textbf{Prussian nation} developed which resembled the French assimilationist nation.

After the Prussian defeat by the French the Prussian Chancellor Hardenberg suggested in 1807 to create a Prussian nation to strengthen the Prussian state\textsuperscript{608}. Their wish to artificially and deliberately create a \textit{political nation} as a mobilized and unified \textit{demos} stood in sharp contrast to the Romantic understanding of the nation as an ethnocultural organic and natural community\textsuperscript{609}. This dualism between ethnocultural and state-political concepts of the nation strongly influenced German politics ever since\textsuperscript{610}. Political and cultural ideologies of nationhood served as the basis for competing conceptions of nationhood.

In France cultural nationhood was perceived as ingredient but not as competitor of political nationhood. In Germany however political and ethnocultural understandings were \textit{two opposed exclusive competing concepts}. Neither concept managed to succeed completely but the ethnocultural conception of the nation won dominance in the early nineteenth century and has remained available for political exploitation\textsuperscript{611}.

\textsuperscript{607} See GREENFELD 1993, 369.
\textsuperscript{608} Cf. however as well SCHNAPPER 1994, 12: He doubts that the existence of nations was responsible for victories and the increase in human losses but the development of weapons.

Both the German and French politicians however perceived the fact that the enemy (France respectively England) was nationalized as one reason for their defeat and tried to construct a nation of their own to increase their power.

\textsuperscript{609} The Prussian concept took over the values of the Enlightenment and was influenced by Adam Smith and realized the Emancipation of the Jews. See CARON & VERNUS 1996, 156-57.

\textsuperscript{610} See BRUBAKER 1992, 10.
\textsuperscript{611} See BRUBAKER 1992, 10.
2. The Long Pursuit of an Ethnic Nation-State

A. Forcing the Nation-State

The intermixture between Germans and other ethnicities made it impossible to create a “perfect” ethnic nation-state whose frontiers corresponded exactly with the territory of settlement of ethnoculturally Germans. Both the Prussian kleindeutsche or the Austrian grossdeutsche solution could not create an inclusive ethnically homogeneous German nation-state. The chosen kleindeutsche solution excluded millions of Austrian Germans and included linguistic and self-conscious national minorities612.

The dualism and tension between the two competing nation concepts remained. However, assimilation of the large self-conscious population of ethnic Poles failed during the Wilhelmine era. The German State did not manage to assimilate indigenous Poles to German language and culture and was unable to secure their political loyalty to the German State613. Germans in enclaves in the Slavic east as well preserved their language, culture, and national identity.

This failure to assimilate reinforced the ethnocultural and differentiating self-definition of the German nation at the expense of a political understanding and was used as a justification to discriminate against ethnic minorities in an effort to strengthen “Deutschtum.”

B. Purifying the Nation-State

In 1871 Germany became a nation-state and its citizenship national614. The war against France had created a common (Catholic and

612 See BRUBAKER 1992, 13. The decision for the kleindeutsche solution assured at the same time the predominance of Protestant values. See CARON & VERNUS 1996, 173.

613 See BRUBAKER 1992, 15.

Protestant) interest in German unity and could work as catalyst for national unity.\textsuperscript{615}

German politics however stayed ambivalent. While Germany relied on the ethnocultural principle of citizenship to justify an incorporation of the German speaking Alsace they did not apply this principle to the Poles at the eastern border\textsuperscript{616}. Bismarck adopted a policy of forced assimilation to suppress Polish nationalism. However “inequality can be perpetrated through promotion of a forced identity as much as it can through the exploitation of difference\textsuperscript{617}”. This policy of forceful assimilation led to a strong Polish counternationalism. After the mid-1880s except for a break under chancellor Caprivi the politics concerning the Polish minority became more and more differentialist.

After attempts to Germanize the people failed Germany tried to Germanize the soil by displacing Poles for Germans in the eastern frontier districts\textsuperscript{618}. The introduction of Expropriation Laws, which permitted the expropriation of land from indigenous Poles to strengthen Deutschtum, marked the culmination of discrimination against Polish co-citizens in 1908.

Parallel to the discrimination of co-citizens who were not of German ethnicity German citizenship laws became more inclusive towards ethnic Germans and highly exclusive towards non-Germans. In 1899 Bismarck introduced a special approval procedure for the naturalization of clergy, Poles and Moravians, and Jews. Immigration most of all of Jews and Poles was no longer welcome\textsuperscript{619}.

Citizenship law however had remained internally inconsistent. Concerning acquisition citizenship was defined based on descent.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{615} Caron & Vernus 1996, 176-83.
  \item \textsuperscript{616} See Brubaker 1992, 127.
  \item \textsuperscript{617} Rosenfeld 1994, 9.
  \item \textsuperscript{618} See Brubaker 1992, 131.
  \item \textsuperscript{619} See Brubaker 1992, 134-35.
\end{itemize}
\end{footnotesize}
Prolonged absence from the territory however led to the loss of citizenship\textsuperscript{620}.

In 1913 a \textit{pure ius sanguinis} system was introduced\textsuperscript{621}. The German citizenry and the German nation were therewith defined as a community of descent. German citizens living abroad were now able to preserve their citizenship, the naturalization of ethnic Germans was facilitated, whereas the naturalization of non-Germans was restricted to promote an ethnic homogenization of the Empire\textsuperscript{622}.

A further decisive step towards nationalization of citizenship took place in 1935. The \textit{Reichsbürgergesetz} of the Nuremberg Laws \textbf{excluded Jews from full citizenship (Reichsbürgerrecht)} but not yet from state membership (\textit{Staatsangehörigkeit}). Officially Jews were as \textit{Staatsangehörige} still entitled to protection by the state.

In 1938 the Interior Ministry proposed to make \textit{Staatsangehörigkeit} congruent with \textit{Volkszugehörigkeit}. In 1940 \textbf{Jews were stripped of their Staatsangehörigkeit} by making the loss of the \textit{Staatsangehörigkeit} the automatic consequence of “taking up residence abroad”. “Taking up residence abroad” was defined very broadly so that it included the forced deportation to most concentration camps\textsuperscript{623}.

3. \textit{Post War Realities}

The total defeat and capitulation of the German Reich after the Second World War supported by the pressure of the Allies, necessitated a \textbf{redefinition of the national identity}. The respect for human rights and democracy became part of the national self-consciousness\textsuperscript{624}.

\begin{itemize}
\item \textsuperscript{620} See RENNER 1998, 9.
\item \textsuperscript{621} This law is valid until today.
\item \textsuperscript{622} See BRUBAKER 1992, 114-17; RENNER 1998, 13-17: Naturalization was now within the discretion of authorities. Additionally the possibility to revoke certain naturalizations that had taken place between 1918 and 1933 was introduced. Collective naturalizations were used to ascribe citizenship to groups of ethnic German origin e.g. in Austria or Poland.
\item \textsuperscript{623} See BRUBAKER 1992, 167.
\item \textsuperscript{624} See HABERMAS 1990, 209 (incl. endnote 4).
\end{itemize}
There was however no or no complete redefinition of the nation as an ethnic community\textsuperscript{625}. Citizenship laws are still very inclusive towards ethnic Germans and exclusive towards all others. German nationalism is today again torn by inconsistencies. Reunification intensified the debate on German national identity\textsuperscript{626}.

\subsection{Ethnicity}

The \textit{GERMAN BASIC LAW} (GG) distinguishes between German citizens and Germans. Art. 116 of the \textit{GERMAN BASIC LAW} defines a German as a person who possesses German citizenship or “who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German origin or as the spouse or descendant of such a person”\textsuperscript{627}.

Somebody of German origin who does not have German citizenship has more rights in Germany than other foreigners. Some rights are limited to Germans irrespective of citizenship\textsuperscript{628}.

Citizenship laws are supposed to favor nationals. This can partly be explained by plain necessity. By 1950 about twelve million ethnic Germans had been expelled or had fled from Eastern Europe. Two thirds of them resettled in Germany. Forty percent of these ethnic Germans had formally not been German citizens. The ethnic definition

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\textsuperscript{625} See e.g. \textsc{Greiffenhagen 1997}, 81-99; \textsc{Limbach 1999}, 13.


\textsuperscript{627} Emphasis mine.

\textsuperscript{628} See \textsc{BRD GG 1949: Art. 8 [Freedom of assembly] (1) \textit{All Germans} have the right, without prior notification or permission, to assemble peacefully and unarmed… (emphasis mine). ‘All Germans’ is interpreted in accordance with Art. 116 GG which defines Germans not only as persons having German citizenship.}
of citizenship was the easiest way to clarify the legal status of these newly arrived persons\textsuperscript{629}.

However the ethnic definition of citizenship is not only the outcome of necessity. The ethnic perception of the nation is still deeply engraved in the national self-consciousness. The German Basic Law was not called Constitution because it should only be valid until a unified German people could adopt a Constitution\textsuperscript{630}.

The Federal Republic of Germany always assumed that there existed only one German citizenship and that the citizens of the German Democratic Republic were citizens of the FRG. This vision of the unification of the German people in a unified Germany created necessarily suspicions among countries with German minorities\textsuperscript{631}.

The procedure of German reunification strengthened these suspicions. The unification was done by adhesion of the German Democratic Republic to the Federal Republic of Germany in accordance with the procedure of old Art. 23 GG\textsuperscript{632} instead of according to the procedure of Art. 146, which had had necessitated the adoption of a new constitution.

The procedure of Art. 23 GG is reserved for the adhesion of the so-called “other parts of Germany”. The crucial question is, what has to be

\textsuperscript{629} See Brubaker 1992, 168-69; Renner 1998, 20: For instance in the British occupation zone these new arrivals were viewed as citizens of Germany whereas in the French occupation zone they were treated as stateless persons.

\textsuperscript{630} Article 146 [Duration of validity of the Basic Law]

This Basic Law, which is valid for the entire German people following the achievement of the unity and freedom of Germany, ceases to be in force on the day on which a constitution adopted by a free decision of the German people comes into force.

\textsuperscript{631} See Offe 1994, 38.

The Moscow and the Warsaw Treaties (both of 1970) did not help to calm these suspicions because the Federal Constitutional Court stressed that these contracts did not affect the definition of who is German (BverfGE 40, 141).

\textsuperscript{632} Art. 23 GG Validity of the Basic Law

This Basic Law is in the beginning in force for the territory of the Länder… In other parts of Germany it will enter into force after their adhesion. (Repealed, transl. mine).
understood by “the other parts of Germany”? Could this as well be the territory settled by ethnic Germans e.g. in Romania or Poland? Even though German politicians opted for Art. 23 GG mainly because it promised a speedy procedure it suggests that the reunification of all Germans was (is?) still not achieved.

The aim and perceived necessity of cultural homogeneity was as well expressed by the German Constitutional Court in the Maastricht decision. In this decision the Court stated that a certain degree of economic, social and cultural homogeneity is a prerequisite for the functioning of the state. According to the court common political institutions alone are not sufficient to create a European people.

German citizenship law is still primarily based on the ius sanguinis principle. It is very open to immigrants with a German ethnicity but is exclusive to other immigrants. This difference in treatment has become very obvious since 1988. Between 1988 and 1991 over a million ethnic Germans arrived in Germany from post-communist countries and many more followed since. Based on Art. 116 these immigrants received the German citizenship. Naturalization of other non-German immigrants however remains very difficult.

Attempts to facilitate the naturalization of second or third generation immigrants or to allow dual citizenship evoked heated discussions. The German Chancellor Gerhard Schröder recently had to withdraw a

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633 See HABERMAS 1990, 216-17.
634 See Maastricht Case, 89 BverfGE 155 (1993); see as well DENNINGER 1994, 18; comments on this case in J.P. MÜLLER 1999, 40; FLEINER 1999, 418-19.
635 The most important legal text in respect to citizenship is still the REICHS- UND STAATSANGEhörIGKEITSGESETZ of July 22, 1913. This statute was often amended but never repealed and serves as the basis for German citizenship law.
637 Cf. as well Foreign Voters I Case, 83 BverfGE 37 (1990), where the court declared that foreigners cannot be part of the body politic and cannot legitimize the German state.
638 A German citizen is only allowed to have dual citizenship when he or she receives both citizenships automatically, e.g. because he or she is born of German parents in the United States or because he or she receives a second citizenship automatically through marriage.
proposal to permit dual citizenship because the outrage was too overwhelming.  

The resistance to grant dual citizenship still shows the perception that membership in the German nation or the state means complete loyalty to and fusion with the nation and the state. In order to become German the foreigners would have to renounce all other affiliations and direct their exclusive loyalty to the German nation and the state. There is no room for multiple identities. “State-membership is too closely tied to nation-membership. To take on German citizenship ... requires that one becomes German in some thicker, richer sense than merely acquiring a new passport.”

However, a new citizenship law was adopted on May 21, 1999 that partly breaks with the ius sanguinis principle. Any child born on German territory of whom at least one parent has been in Germany for eight years or more will be granted German citizenship automatically even if the child has a second citizenship through its parents. The child can keep the dual citizenship till the age of 23 than he or she must decide which passport to keep.

At least in Western Germany the reliance on the common culture or ethnicity as basis of unity is decreasing. Democracy and human rights and also the welfare state are today at least as important as ethnicity for the definition of German identity. The Reunification poses in this respect a new challenge. According to surveys persons of German nationality in Eastern Germany identify themselves still stronger by relying on German culture and have a different perception

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639 NEW YORK TIMES. March 1, 1999. Schröder’s Popular, but Is His Grip a Little Uncertain, A6. Gerhard Schröder faced a petition against dual citizenship with over one million signatures. For the intellectual debate, see e.g. KLEGER 1998, 139-64.


641 NEW YORK TIMES. May 22, 1999. Germany Makes Citizenship Easier for Foreigners to Get, A3. For a more thorough discussion see below at § 14 IV.3.

642 See GREIFFENHAGEN 1997, 71: In a survey in 1959 the German culture was still the prime object of pride. In 1978 the German culture was the main object of identification only for 25% of the interviewed Germans.
of German history than Germans in Western Germany\textsuperscript{643}. The future will show whether German identity will develop differently in East and West or whether a reconciliation will take place.

\subsection*{B. Universal Human Rights and Democracy}

The ethnic component of German nationalism is today however only one side of the national consciousness. The Second World War created a lasting impression on the Germans. Everything reminding of the notion of German cultural superiority, enmity against foreigners, disrespect of human dignity or human rights, or forceful conflict resolution became suspect and repulsing\textsuperscript{644}.

Over the years identification with the constitutional design and especially with democracy and human rights grew steadily\textsuperscript{645}. The Federal Constitutional Court was important for the internalization of the values of human rights and democracy. Because of the rulings of the Court, supported by the growing economy and by the positive effects of the welfare state the people gained trust in constitutional democracy.

**Human dignity, human rights and democracy became prime values of the German constitutional system.** Art 79 of the German Grundgesetz establishes that the protection of human dignity (Art. 1 GG) and the principle of militant democracy (Art. 20 GG) must not be amended.

\textsuperscript{643} See e.g. GREIFFENHAGEN 1997, 59, 83; LIMBACH 1999, 24-28; WESTLE 1998, 93-115.

\textsuperscript{644} The suspicion of everything associated with nationalism led as well at least until the Reunification to the evasion of an identity discussion: see SCHRÖDER 1998, 39-42. He argues that in Western Germany the evasion was voluntary while in Eastern Germany there was an open policy to suppress a common German identity. In the opinion of some authors this avoidance was partly responsible for the reemergence (as counterreaction) of fierce ethnno-nationalism in Germany. For this argument, see LUDWIG 1994, 103-17; NEUE ZÜRCHER ZEITUNG. August 5, 1999. Rechtsextreme Jugendgewalt in Osteuropa: Nach langem Schweigen Gegenreaktionen in Brandenburg, 7.

\textsuperscript{645} See GREIFFENHAGEN 1997, 71: In a survey in 1959 only 7 percent answered to be proud of the German political system, in 1978 already 31 percent, and in 1988 it was the prime object of pride. Same result in LIMBACH 1999, 12.
First, the importance of Human Rights (a), second, of democracy (b) for German national identity will be regarded.

a. Human Rights

The Federal Constitutional Court (Bundesverfassungsgericht) as guarantor of human rights is very respected. The value system established in the Constitution is today so internalized that the respect for human rights and democracy are part of the national consciousness. The Court stresses frequently the special respect for human rights in Germany. Thus the Court argues e.g. in the Abortion I Case:

Unlike the case in the Weimar Constitution, the categorical inclusion of the inherently self-evident right to life in the Basic Law may be explained principally as a reaction to the ‘destruction of life unworthy to live,’ the ‘final solution,’ and the ‘liquidations’ that the National Socialist regime carried out as governmental measures. Article 2 (2) [1] of the Basic Law implies, as does the repeal of the death penalty be Article 102 of the Basic Law, ‘an affirmation of the fundamental value of human life and of a state concept which emphatically opposes the views of a political regime for which the individual life had little significance and which therefore practices unlimited abuse in the name of arrogated right over life and death of the citizen.’

The Court argued based on the condemnation of the disrespect for human life during the Nazi Era that Germany cannot liberalize abortion as other democratic countries because liberalization would be opposed to the German value system.

The adoption of human rights as values of the nation and the imposition of a state duty to protect these values is in accordance with the German nation concept. Today the German State has next to the

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646 See GRIMM 1999, 75-77.
648 Eighteen years later the Court held in the Abortion II Case, 88 BVerfGE 203 (1993) that the state fulfills its duty to protect life when it legalizes abortion during the first weeks of pregnancy but demands mandatory counseling.
duty to further German culture the duty to protect and further human
dignity and human rights.

b. Democracy

The introduction of militant democracy as a value of the nation is
however not so easy to harmonize with the German nation concept.
Democracy does not necessarily correspond with the objective of
nationalism to further German values.

Democracy can be translated as rule by the people for the people. The
group of the governed shall be identical with the group of those who
govern. The nation-state is based on the quest that the state is of and
for the nation. In the nation-state democracy is supposed to be rule
by the nation for the nation.

Democracy is not inherently opposed to nationalism. Democracy relies
according to DAHL on at least two assumptions or preconditions. First,
the individual or the people have a right to self-determination. Second,
all persons are equal.

Nationalism relies partly on similar notions as democracy. As
democracy nationalism is based on a right or on the quest for the right
to self-determination: The nation should have the right to govern itself
independent from external influences. Nationalism is like

649 The German Constitutional Court had as well an important role for the
concretization and internalization of democracy. Militant democracy was
supposed to protect the constitutional order. For instance the Basic Law in Art.
21 (2) foresees that parties “which, by reason of their aims or the behavior of
their adherents, seek to impair or abolish the free democratic basic order or
endanger the existence of the Federal Republic of Germany, shall be
unconstitutional.” For the meaning of militant democracy see 2 BVerfGE 1
(1952) for the prohibition of the Socialist Reich Party and 5 BVerfGE 85 (1956)
for the prohibition of the Communist Party. For short comments on the case, see
LIMBACH 1999, 17-19; for a critical account see DENNINGER 1998, 139-41.

650 See DAHL 1989, 107-08.

651 See LAKOFF 2001, 102-04.

American nationalism accorded to every individual member the right to govern
him- or herself and granted the right to active participation in the governing
process. German nationalism is based on a very different notion of popular
democracy based on the belief in the equality of its members. While American nationalism was based on the universal equality of every human being, German and French nationalism elevated all Germans respectively Frenchmen to equal members of the nation.

The quest for being a democratic country can enhance the legitimacy of its existence and of its government in the view of its own population and of other countries.

According to Max Weber there are three possibilities why state decisions are viewed as legitimate and binding. They can be viewed as legitimate based on traditional legitimacy, where the rulers find their authority in the “eternal yesterday” “sanctified through the unimaginably ancient recognition and habitual orientation.” Legitimacy can be based on the extraordinary quality of the leader. This is according to Weber charismatic legitimacy. The third possibility to create legitimate decisions is “by virtue of ‘legality,’ by virtue of the belief in the validity of legal statute and functional sovereignty. German nationalism justified the sovereignty of the nation as a whole.

Nationalism without inherent equality of the members of the nation is difficult to imagine. The subordination of one group normally impairs the solidarity and loyalty so that this group will not be regarded or will not regard itself as part of the nation. Nationalism seems to demand the acceptance of the equal worth of all members. Theoretically however there might be nations where some groups are unequal without losing solidarity or the belief in belonging together.

Equality, however, need not be formal equality but could as well be equality in rights as distributive differentiating equality.

See e.g. Vincent 2001, 591 who argues in favor of the link between nationalism and democracy but mentions that there are some national movements (he calls them conservative) that do not follow this logic because they emphasis a hierarchy and are therefore as well sceptical of democracy.

Today we see a tendency that countries try to establish a democratic government partly because of external pressure. This is true for Germany and will be true for the former Communist countries that try or tried to be accepted into the European Council and the European Union but as well for Spain and South Africa.

See Weber 1958, 78-79.
competence’ based on rationally created rules. Democracy can create this rational legitimacy.

There are however very different types of democracy. OFFE distinguishes two models of democracy: procedural and result-oriented democracy. Result oriented democracy takes democracy as a means to achieve social progress. Democracy itself has no value. If in a specific case the democratic process does not lead to the result which is perceived as the good result the process can be changed or procedural rules breached so as to reach the wanted result. In a result oriented democracy ideological goals can override the authority of democratic rules of the game. Because the rules of the game can be changed and overridden this model of democracy cannot provide rational legitimacy according to Max WEBER’s definition.

In a process-oriented democracy on the other hand decisions are only legitimated by their source not by their content. Democracy here is perceived as a procedure. The procedure legitimizes the result. Nobody is allowed to violate the established procedure in the name of

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656 WEBER 1958, 79.
658 See e.g. LIPPHART 1984.
659 See OFFE 1994, 82; cf. similar distinction in ROSENFELD 1998a, 122: He distinguishes primary proceduralism and derivative proceduralism: “Under primary proceduralism, deployment of the relevant procedure is both indispensible to and determinative of any outcome that may count as legitimate. Under derivative proceduralism, on the other hand, outcomes are ultimately determined by and legitimated by something more fundamental than, or logically antecedent to, the relevant procedure, and the latter is relegated to an auxiliary or essentially rhetorical role.”
660 See OFFE 1994, 82-83; cf. PEZWORSKI 1997, 60-61: He regards this idea of democracy in relation to communist states.
661 See HOROWITZ & LISSAK 1989, 253. For instance the communist countries relied on output oriented democracy, see BASTA 1999, 517-28.
662 See HOLMES & SUNSTEIN 1995, 278.
663 See OFFE 1994, 83; as well BASTA 1999, 518: Justice is realized through “the procedural principles of equality, certainty and universalisable character of law” (emphasis in original).
progress or substantive justice. This model of democracy can create legitimacy according to Max WEBER’s definition.

Robert DAHL’s view of an ideal democracy is an example for process oriented democracy. Robert DAHL distinguishes four process-based criteria for the ideal democracy. His four criteria shall guarantee that the people have a decisive and equal influence in all important stages of governing. They must be able to take part in the opinion building process, to control the political agenda, to gather the necessary information about which solution would be in their interest, and to actually decide the issues on the political agenda based on equal voting power of each individual.

According to Churchill democracy is the worst form of government with exception of all others. Democracy is a response to tyranny. Max WEBER’s traditional and charismatic domination led too often to tyranny and oppression. Even if the momentary charismatic or traditional leader is accepted and respected, there is no guarantee that future leaders will be as well. Procedural democracy promises the peaceful change of power. Rules of the game limit the power of the government and can create stability and foreseeability. Democracy

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665 See DAHL 1989, 109-29: In an ideal democracy all citizens should have the adequate and equal opportunity to participate in the opinion building process, that is to ask questions and to express and argue their preferences as to the final outcome. In addition every citizen shall have equal voting rights based on the ‘one man one vote principle’. The final decision shall be solely based on the outcome of the vote. According to DAHL’s third criteria every citizen shall have the opportunity for discovering and validating the choice on the matter to be decided that would best serve the citizen’s interests. Fourth, every citizen shall have the opportunity to participate in choosing which issues are to be decided through the democratic process. His fifth condition is that the demos must be very inclusive. The demos must include all adult members except transients and persons proved to be mentally defective. The fifth criterion is of a different nature than the preceding four. The fifth criterion concerns the question who shall govern in a democracy while the four other criteria concern the question how to govern.

666 See LIPSET 1967 [1959], 122-23.
relies on the notion that at least the majority will agree with a decision reached in the democratic process.\textsuperscript{667} Procedure oriented democracy developed out of the American Revolution and corresponds with the objective of the American State and the nation.\textsuperscript{668} Individual self-government based on the inherent equality of all persons with the acceptance of competing conceptions of the good can be realized in a process-oriented democracy.

It is however far more difficult to realize and justify democracy as procedure in Germany. German nationalism is mission oriented. According to German nationalism the objective of the nation-state is to further German culture and German values. This quest is based on the presumption that there is one right solution: the solution that benefits the organic nation best. When however there is one known and “right” solution it does not need a democratic process that might even lead to the adoption of the “wrong” solution\textsuperscript{669}.

Strongly community based nationalisms - like German nationalism at least until the Second World War but as well like French nationalism - can lead to the rejection of the democratic process in so far as the democratic result clashes with the aims and values of the community.\textsuperscript{670} Result-oriented democracy would much more easily correspond with German nationalism.

\textsuperscript{667} Dahl 1989, 107-08: However already this notion relies at least on two assumptions which are not that obvious: first, that each person is the better judge of his own interest than anyone else, and second, that the differences in intensity of being in favor or opposed must be minimal. Democracy should however not be equated with majoritarianism.

\textsuperscript{668} See Offe 1994, 83.

\textsuperscript{669} See Vincent 2001, 597; Horowitz & Lissak 1989, 148; for the similar debate concerning Quebec and Canada Taylor 1994, 60; same conclusion in Preuss 1994, 153-55: He stresses “that in the framework of an ethnic conception of the nation the constituent power of the nation does not necessarily coincide with the principle of democratic sovereignty (just as national self-determination is not the same as democratic freedom).”

The experience of the Second World War with Hitler as a charismatic Führer showed the necessity for unamendable human rights, limited government, and a rational legitimization of state actions to prevent future oppression and aggression by the nation in the name of national interest. Germany now has to struggle with the paradox of being a collectivistic ethnic nation that relies on a democratic process to legitimize the decisions of the nation.

Sometimes result oriented arguments remerge. Procedural democracy was partly accepted because it proved to be a modern and economically efficient form of government. In different words, procedural democracy seemed to guarantee the just result. Some feared that Germany could abandon democracy as procedure one day as easily as it was implemented.

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671 See Limbach 1999, 16-17, 21: The history necessitated the continuous reflexion on values and on identity. This reflexion could create a new identity based on human rights and democracy. The prospering economy strengthened the belief in the political system.

672 Germany is not the only country that is confronted with this paradox. Israel is one example among many. Israel is defined as a Jewish state but relies at the same time on universal humanistic values:


THE STATE OF ISRAEL will... be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations. ... (emphasis in italics mine, others in original).

673 See Limbach 1999, 18-19, cf. 5 BverfGE 85 (1956): In this case the court argued that militant democracy could provide the rights decisions. Cf. Herzog 1999, 31: Based on this understanding of democracy high unemployment can question the value of democracy.
had adopted it before because of this result-oriented view of procedural democracy.\textsuperscript{674}

The debate on the \textbf{procedure for Reunification} showed the dilemma that arises when procedural democracy seems to be opposed to the just result. Democracy as procedure would have necessitated the democratic that is the free and non-prejudged decision of the concerned populations\textsuperscript{675}. The government of the Federal Republic of Germany however influenced the procedure and the choice of procedure in favor of the value of cultural unity\textsuperscript{676}. The slogan “We are the people” turned into “We are one people”\textsuperscript{677}.

As safeguard against tyranny Germany oriented itself at the paradigms of the French Revolution\textsuperscript{678}. Equality and fraternity (both limited to co-nationals) were compatible with the German nation concept. However, liberalism and its understanding of human rights as individual rights, which have the function to protect from the State, as well as a liberalistic understanding of democracy as procedure were introduced even though in contradiction to the earlier understanding of the state.

\begin{itemize}
\item \textsuperscript{674} See Greiffenhagen 1997, 61-63: The debate was mainly based on the argument that democracy was not anchored in German history (Herkunftsschwäche).
\item \textsuperscript{675} See Przeworski 1997, 62: He distinguishes the ‘uncertainty of outcomes’ as the distinctive element of democracy.
\item \textsuperscript{676} See Habermas 1990, 205-23: Germany did not use the opportunity to strengthen the democratic legitimacy of the constitution but used politics of accomplished facts (Politik der vollendeten Tatsachen) with conditioned financial support and the adoption of the procedure of Art. 23 GG. Germany stressed once more culture instead of political institutions and democracy as main value of the nation. See as well Habermas 1994, 21; Greiffenhagen 1997: 35-37, 101: According to Greiffenhagen’s interpretation of Hennis Western Germany tried to limit the influence of the new parts of Germany (reduction of the voting power in the Bundesrat and showed therefore that Western Germany viewed itself as superior and was not ready to accept Eastern Germany on an equal footing.
\item \textsuperscript{677} These two slogans were used in the German Democratic Republic. The slogan “We are the people (“Wir sind das Volk”) called for a revolution. Later on the state-issue “We are one people” (“Wir sind ein Volk”) gained more prominence. For this development see Schröder 1998, 39-47.
\item \textsuperscript{678} See Denninger 1994, 13-24.
\end{itemize}
In most cases the ethnic consensus was transformed in or developed into a democratic consensus. The Germans became more and more convinced that procedural democracy could serve its ends and could guarantee stability, economic development, and just decisions. The Federal Constitutional Court created trust into the political system and was to a great extent responsible for the internalization of the value of democracy and human rights.679

C. Constitutional Patriotism

HABERMAS argues for constitutional patriotism as substitute for nationalism680. According to him Germany is probably the country that realized constitutional patriotism best because of its special respect for human rights as well as its far-developed welfare state681. He wants to disassociate prepolitical criteria and base unity only on political criteria682. The actual constitution shall incorporate the specific interpretation of republican values in accordance with the common history.

The political culture of a country crystallizes around its constitution. Each national culture develops a distinct interpretation of those constitutional principles that are equally embodied in other republican constitutions – such as popular sovereignty and human rights – in light of its own national history. A ‘constitutional patriotism’ based on these interpretations can take the place originally occupied by nationalism683.

By relying on history HABERMAS limits the openness of constitutional patriotism. Due to Germany’s history the German State accords special value to human rights684. The adoption of the ius sanguinis principle

679 See LIMBACH 1999, 23.
680 See HABERMAS 1999, 143-45 (Verfassungspartiotismus). The term was first introduced by Steinberger.
681 See HABERMAS 1999, 144.
682 See HABERMAS 1999, 142.
683 HABERMAS 1998a, 118 = HABERMAS 1999, 143 (emphasis mine).
684 See above at § 10 I.3.B.
for citizenship was however as well argued based on historical reasons. Because of the high influx of ethnic Germans after the Second World War the *ius sanguinis* principle was the easiest way to resolve the status of the immigrants.\(^\text{685}\)

When the interpretation ‘true to history’ receives too large importance constitutional patriotism is difficult to distinguish from ethnic or civic nationalism in all those cases when the nation adopts a republican form of government.\(^\text{686}\) Through historical interpretations prepolitical criteria can receive constitutional relevance. When the common history shall influence the constitution this will be at least in the beginning necessarily preconstitutional history. Even for his example of Germany’s respect for human rights he relies on preconstitutional history, as there is the Second World War.

When preconstitutional common history receives relevance than immediately the question ‘whose history?’ must be answered. HABERMAS’ theory does not give an answer how the constituent power must be understood. Many nations try to justify their nation-state based on historical arguments. Based on history they opt for the right to self-determination of their nation as ethnic nation even though they might accept citizenship rights of other groups.

II. National Identity and Political Activity

Ethnicity was and is the central element of the German national identity. The creation of a national consciousness without the existence

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\(^{685}\) See above at § 10 I.3.A.; cf. GRIMM 1999, 77: He criticizes the idea of constitutional patriotism. GRIMM understands ‘true to history’ as true to a specific tradition of constitutionalism. In different words, he limits history to political history. GRIMM’s approach is in accordance with the aim of constitutional patriotism as alternative to prepolitical identities. GRIMM argues further that in Germany a tradition of constitutionalism does not exist and that therefore constitutional patriotism will not be successful as uniting concept.

of a unified state necessitated the reliance on prepolitical characteristics as basis for a common identity.

German nationalism was to large extents French counter-nationalism. French nationalism was state-based, German nationalism Volks-based. French nationalism stressed rationalism, German Romanticism and Pietism glorified unguarded emotionalism. French nationalism was assimilationist; German nationalism became more and more differentialist. The German nation-membership was based on German culture and ethnicity, French nation-membership was not beased on a propolitical culture but demanded the adoption of a state-created culture.

The German nation was viewed as an organic collectivity. It demands a “unity of heart” and an identification with the nation that goes far beyond the allegiance the American state expects from its citizens. The “unity of heart” did not depend on the voluntary association like in the case of France but it was assumed that only the common culture and ethnicity could create the necessary identity.

The political activity of the nation was directed towards the creation and purification of a homogeneous ethnic nation-state. At the same time there existed always a concept of a political nation which however could never win dominance.

The redefinition of the German nation after the Second World War was not used to change the community of descent into a political community. However, the respect for human rights and democracy has become part of the national identity. While the incorporation of human rights was unproblematic democracy in the modern sense is not completely compatible with the nation concept. The German nation lives with the paradox to be an ethnic nation and to rely on universal values.

In the section on 'Reconsiderations for the Context of Normative Diversity' three issues shall be further regarded concerning the homogenization of the nation through exclusion. The first issue

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687 Shapira 1992, 6-7.
concerns the optimal borders of the ethnic state. The second issue deals with the position of minorities on the constituent or state-building level, the third with their role in the constituted state or on the level of constitutional design.
§ 11. Consequences for the Notion of the State

I. Introduction

The tasks assigned to the nation-state differ according to the nation concept. The notion of the state is directly influenced by the notion of the nation. The nation-state is supposed to guarantee that the members of the nation can express the national identity. The nation incarnates itself in the institutions of the nation-state.\footnote{688}{See Schnappe 1994, 52.}

Based on the American understanding that the individual should have the right to self-rule the American state has only the limited task to assure the necessary preconditions for self-rule. Based on the German and French collectivistic understanding of the nation the German and the French states have to further the common good of the German resp. French nation. This necessitates state action. Due to the different nation concepts the German and French states have a different state concept than the American.\footnote{689}{See Damaska 1986, 71-74.}

II. Acting vs. Reacting State.

According to DAMASKA the Continental-European state is an acting state whereas the Anglo-Saxon or Anglo-American state reacts.\footnote{690}{See Damaska 1986, 80.} The reacting state tries to function as a neutral mediator between parties. All tasks that are assigned to the state can be reduced to this conflict-solving function of the state. The state reacts to existing conflicts.

The Continental-European state on the other hand takes a more active role. “All spheres of social life, even matters that take place in...
pianissimo, can at least potentially be evaluated in terms of state policy and shaped to its demands.”

III. Civil Society and the State.

The difference in the concept of the state becomes as well apparent by regarding the relationship between the civil society and the state.

HEGEL’s theory of the civil society (Bürgerliche Gesellschaft) in his Philosophie des Rechts is one of his most important achievements.

HEGEL defines ‘civil society’ as

an association of members as self-subsistent individuals in a universality which, because of their self-subsistence, is only abstract. Their association is brought about by their needs, by the legal system - the means to security of person and property - and by an external organization for attaining their particular and common interests.

Civil society is the intermediate sphere between the family and the state. Civil society is viewed as a social order devoted largely to the leveling of hierarchical and status based relationships. The different spheres or stages however are not clearly separated.

The civil society is self-constituting and self-mobilizing. There is no strict separation between civil society and the state but a mediation between the two. The character and direction of the interaction between the state and civil society shows the different notions of the state. Either the civil society is based on a system, which enjoys normative superiority over the state, or the system of the state enjoys normative superiority over the system of civil society.

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691 DAMASKA 1986, 80.
692 HEGEL 1942 [1821], §157.
693 See ROSEN Feld 1991b, 244.
694 See COHEN & ARATO 1992, ix.
695 See COHEN & ARATO 1992, xi.
The basis of civil society is the system of needs mediated through labor\textsuperscript{697}. Unlike for example Adam Smith Hegel did not believe in the self-regulating power of the market. He was convinced that the market will experience periodic crises and will not produce the common good\textsuperscript{698}. Not the malfunctioning of civil society but precisely the smooth functioning of the market causes poverty and overproduction. According to Hegel poverty grows in the proportionate ratio to the growth of wealth\textsuperscript{699}.

The state must resolve the contradictions that result from the actions of the civil society. The clash of interests cannot be overcome through the ‘invisible hand’ but only through conscious direction and supervision\textsuperscript{700}. In Hegel’s view it is therefore necessary that the state is active and intervenes\textsuperscript{701}. The action of the state however must not go so far as to take over the economy. Even though the state is superior the civil society must not be crushed by the state\textsuperscript{702}.

For Hegel, the state is the highest normative institution, providing a political framework for promoting the public good. The order of ethical life finds its expression in the state, and it is there that it flourishes. Indeed, in the state ethical life reaches its highest form of development. This is characterized by the intentional identification of the citizen with the welfare of the nationwide community\textsuperscript{703}.

Hegel’s civil society is founded on a common understanding about the good life. This however is not only based on a universal belief in the good of free societies but requires the belief in a particular common enterprise and a special bond that unites the society\textsuperscript{704}. Particular

\textsuperscript{697} See Avineri 1995, 143.
\textsuperscript{698} See Rosenfeld 1991b, 232.
\textsuperscript{699} See Avineri 1995, 148-49.
\textsuperscript{700} See Avineri 1995, 151.
\textsuperscript{701} See Rosenfeld 1991b, 234.
\textsuperscript{702} See Avineri 1995, 152.
\textsuperscript{703} Rau 1991, 7.
\textsuperscript{704} See Taylor 1991, 70; Fleiner 1999, 417-18: This idea of a common good and that the state is the source of law and justice necessitates a closer feeling of belonging.
interests shall be taken into account but at the same time members of civil society must embrace the common good\textsuperscript{705}.

As will be shown the French and the German nation-states took over HEGEL’s perception of the state and society.

The great alternative view is the theory of the so called ‘invisible-hand mechanism’. Adam SMITH e.g. believed in the self-regulatory power of the market. He wanted a passive or negative state that only guaranteed the conditions necessary for the proper functioning of the market. All other issues were excluded from the proper sphere of the state.

There should be a separation between the private and the public sphere. The civil society should enjoy normative superiority over the state. The state must e.g. not interfere in cultural matters. The invisible hand mechanism is not only a free market theory. It is based on the belief that the constitution channels energy towards the maintenance of stability and freedom whatever the personal motivation of the citizens may be\textsuperscript{706}.

So we have these two conceptions of what can make a free society possible; one which makes common meanings and shared good absolutely central to the preservation of the society and the other which says that the motivation issue is unimportant. The latter says we need structure which, in invisible-hand fashion, behind the backs of the subjects and independent of the forms of motivation, will lead their actions towards certain patterns that preserve freedom\textsuperscript{707}.

As will be shown the United States is the example for Adam SMITH’s view of the state.

\textsuperscript{705} See DALLMAYR 1991, 328.
\textsuperscript{706} See TAYLOR 1991, 69.
\textsuperscript{707} TAYLOR 1991, 70.
IV. Examples

The influence of these different perceptions of the state can be shown by a comparison of France and the United States. Both countries’ nations are civic nations. **However France can be characterized as an acting state, the United States is primarily reacting.** In France the state enjoys normative superiority over the civil society. What is held to be good for France is also considered as good for the French. Values of the state become values of the nation. The French nation is constituted by political unity however it is centrally expressed in the striving for cultural unity\(^\text{708}\).

The transformation of state values into values of the nation makes the nation necessarily authoritarian in so far as the national conception of the good is supposed to take precedent over other competing conceptions\(^\text{709}\). Political inclusion meant cultural assimilation for cultural minorities as for immigrants\(^\text{710}\).

The United States as a reacting state is necessarily libertarian. Libertarianism stresses “above all individual autonomy, very broad property rights, and a ‘minimal state’ limited essentially to the following two functions: affording police protection to the lives and property rights of its citizens and enforcing contracts”\(^\text{711}\). The imposition of state values as values of the society is opposed to the concept of the state.

Similar to France Germany is an active state. A comparison of the oaths of the American and the German president already shows the difference in the understanding what the proper functions of the state and its officials are.

\(^{708}\) See BRUBAKER 1992, 1; for more details see above at § 9 I.4.

\(^{709}\) See ROSENFELD 1998a, 220-21: According to Rousseau the national good is expressed in the general will. For the sake of the individual he or she has to be forced to accept the general will because only through the general will can he or she be free.

\(^{710}\) See BRUBAKER 1992, 1.

\(^{711}\) ROSENFELD 1991a, 52.
The American president pledges:

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States\textsuperscript{712}."

The German president swears:

"I swear that I will dedicate my efforts to the well-being of the German people, enhance their benefits, avert harm from them, uphold and defend the Constitution and the statutes of the Federation, fulfill my duties conscientiously, and do justice to all. So help me God\textsuperscript{713}."

While the American president swears only to uphold the Constitution the oath of the German president goes much further. The German president pledges to further the well-being of the German people. The duty to further the common good of the German people must rely on the presupposition that there exists one right perception of what the common good is.

The German Basic Law is based on a value system and every decision should be based on a balancing of competing values. The German state has the task to enhance the benefits and avert harm from the community in compliance with the value-system which is anchored in the Basic Law. The United States on the other hand is not supposed to make value decisions\textsuperscript{714}. The government and the courts have only to assure that the government does not overstep the boundaries set by the constitution.

The actual outcome of decisions are however more similar than one might assume based on the different notions of the state. The cases about \textbf{abortion} in the United States and in Germany are interesting because they reach similar results but the way of arguing in favor of the admissibility of abortion is different.

\textsuperscript{712} U.S.Const. 1787: Art. II § 1 cl. 8.
\textsuperscript{713} BRD GG 1949: Art. 56.
\textsuperscript{714} It is however impossible to bar value arguments from influencing decisions.
In *Roe v. Wade*\textsuperscript{715} the American Supreme Court argued that the right to privacy limits the legislature’s power to regulate abortion. The American Court followed a subjective rights approach while the German Court interpreted the fundamental rights as objective principles\textsuperscript{716}. The German Constitutional Court adopted a balancing approach. The Court expressed the importance to protect human life: The duty to protect the unborn is a duty the state owes to each individual. This duty includes to create family friendly living conditions. Based on the value of human life abortion must be considered as fundamentally wrong and unlawful. However to determine the scope of the duty to protect the unborn life the importance and need for protection must be weighed against competing interests which as well deserve legal protection. Here the court took the rights of the mother into account\textsuperscript{717}.

The German Constitutional Court argued based on the value-system of the Grundgesetz. Fundamental rights are not only subjective rights of the citizens against the state but as well society’s most important values\textsuperscript{718}. The German Court demanded an active role of the state in protecting the rights of mother and child\textsuperscript{719}. The American Supreme Court on the other hand demanded non-action\textsuperscript{720} by the state. The notion of the state influences the political agenda. Issues which are not


\textsuperscript{716} See SCHLINK 1994, 199- 222.

\textsuperscript{717} *Abortion II Case*, 88 BVerfGE 203 (1993).

\textsuperscript{718} See SCHLINK 1994, 204; LIMBACH 1999, 19;

\textsuperscript{719} See the principle GRIMM 1999, 75-76: “In ihrer objektiven Bedeutung werden die Grundrechte zum einen aus der einseitigen Abwehrhaltung gegen den Staat gelöst und können diesen auch zum Handeln, nicht nur zum Unterlassen verpflichten. Zum anderen werden sie aus der einseitigen Ausrichtung auf den Staat gelöst und gewähren ihren Freiheitsanspruch rundum, gleichfällig, ob die Gefahr vom Staat oder von privater Seite ausgeht” (emphasis mine).

\textsuperscript{720} See DAHL 1989, 89-91: It is a necessary feature of a democratic system that the citizens have the exclusive opportunity to decide how matters are to be placed on the democratic agenda.
assigned to the state are outside of the legitimate ordinary political and democratic process\textsuperscript{721}.

After \textit{Roe v. Wade} the issue ‘abortion’ was removed from the legitimate political agenda. The decision of the German Constitutional Court was in this respect not as far reaching. Through the balancing of values the issue of ‘abortion’ was not completely removed from the political agenda. The Court decided only that through a system of mandatory counseling for women who want an abortion within the first weeks of the pregnancy the state fulfills its duty to protect the life of the fetus.

The differences in \textit{territorial organization} in the United States, France and Germany are telling, too. Germany and the United States are organized as federations. The interpretation of German \textit{federalism} as three-tier and of American federalism as two-tier however shows different functions of the federal states\textsuperscript{722}. In the United States the states and the federal government have distinct powers and interests. These interests can clash and must be mediated. In Germany a national unity which overarches the federal government and the Länder is assumed. The national interest has precedent over possible state and federal interests\textsuperscript{723}.

In France the centralized sovereignty even limits the adoption of \textit{decentralization}. Decentralization is often viewed as a threat to the French tradition because it is opposed to the centralization and hierarchy\textsuperscript{724}. The National School for Administration (ENA) educates until today the public servants of France. The transferal of the school from Paris to Strasbourg and the decentralization expressed in it triggered protests and public debate. Protesters called the transfer a

\textsuperscript{721} The issue is only open for constitutional politics.
\textsuperscript{722} See \textsc{Kommer} 1997, 68-69.
\textsuperscript{723} The \textit{Southwest State Case}, 1 BVerfGE 14 (1951) is one example where the German Constitutional Court took the national interest as distinct from the federal interest or the interest of the Länder into account.
\textsuperscript{724} On April 27, 1967 the French people voted in a referendum against a statute that would have introduced stronger regionalism in France with 12’007’102 no against 10’901’753 yes. See \textsc{Projet de loi relatif à la création de régions et à la rénovation du Sénat} in \textsc{Godechot & Godechot} 1995, 457-94.
denationalization of the state, an act against history, or the destruction of the French educational system.

Federalism most of all in the American understanding with divided loyalties is incompatible with the French understanding of the state and the nation\textsuperscript{725}. The different importance ascribed to the interest of the individual can show the different notions of the state once more. Libertarianism in the United States includes that the interests of the individuals are identical with the interest of the state. According to the German concept there exists a national interest that can differ from individual interests and should succeed. The French concept is in this respect similar to the German one\textsuperscript{726}. SCHNAPPER generalizes and alleges that it is a necessary condition for the nation that the members agree that there is a public (national) interest that is distinct from the interest of the individual nationals\textsuperscript{727}. Her view coincides with ROUSSEAU’s theory of the volonté de tous that is composed of the will of the individuals and the volonté générale, the general will that incorporates the good for society.

The United States are however the proof that at least theoretically a nation is possible without the belief in the existence of a general will or of a national interest as distinct from the sum of the individual interests. Even the national welfare can be justified with individual interests without relying on a national interest. The well-being of co-nationals or others can become a private, individual interest based e.g. on personal belief in universal values or on economic considerations that the general well-being is better for the economy.

The United States is one of the countries with the highest numbers of private support organizations and volunteers. In a re-acting state it will

\textsuperscript{725} See e.g. HIGUCHI 2000, 127.

\textsuperscript{726} See e.g. HIGUCHI 2000, 127.

\textsuperscript{727} See SCHNAPPER 1994, 44. Even though it is not necessary that the conationals agree on the existance of a separate national interests it still needs a certain degree of solidarity.
need an even greater degree of solidarity when private initiative shall provide sufficient social security and support of the unfortunate.

The American state is however not completely passive. The United States acted repeatedly as “policeman of the world” based on the belief that the United States has the ideal political institutions and has to defend liberalism and constitutional democracy combined with the notion that it has certain responsibilities as a superpower. American nationalism incorporates a mix of chauvinism and messianic universalism. This can lead to the (mis)conception that the United States has the ‘duty’ to bring its institution and values to the other nations and countries of the world. Such a notion includes as well the danger that under the justification of messianism the United States is factually conducting power politics for its own sake.

The development of the welfare state in the United States is a further example where the state started regulating issues which were formerly regarded as outside of the proper sphere of the democratic process. During the New Deal the government started to be more active and intervened in the economy.

In *Lochner v. New York* the Supreme Court had ruled that the regulation of the maximum working hours for bakery employers was a state intrusion in the ‘liberty of contract’. In *United States v. Darby* the Court upheld the Fair Labor Standards Act which set maximum hours. The Court’s change of the interpretation of the Constitution concerning interventionist economic regulations of the state as well as e.g. the creation of a social security system and the active intervention in conflicts around the world show that the United States today is no longer a purely reactive state.

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728 See for the same development in France: BRUBAKER 1992, 11.
731 The fierce criticism of this development however shows that the development towards a more active function of the state only partly accepted.
§ 12.  Towards Identity

National identity is complex and based on multiple factors. Historical events, politics, the economic situation, ideological influences, all leave their traces on the national identity. Nations differ decisively. The American, French, and German nations developed differently and relied on different mechanisms to create identity and therewith unity.

In the introduction to this part three different nation-state concepts were distinguished. The United States, France, and Germany represent and therewith validate the three classic concepts. For the United States culture is irrelevant for the nation and therewith for the state. For France culture is relevant for the nation and therewith for the state though it was not relevant for nation-building. For Germany culture is relevant for the nation and therewith for the state and was already relevant for nation-building.

The context of nation and state building was decisive for the adoption of the respective nation-state concepts. Of main importance was the availability of common denominators (common culture (D) or common state (USA/F)).

Decisive for the respective nation-states were additionally amongst others the purpose of national political action (own statehood (D), political independence (USA), change of the political regime (F)), and the notion on how the interest of the nation can be realized (active state and common perception of the good (F/D), passive state and several perceptions of the good (USA)).

American nationalism developed within a given society on a defined territory: the population of the colonies. The dominant object of American nationalism was to gain and legitimize self-rule within and over the given territory. At the center of the American War of Independence was the rebuttal of English intervention. In this context national self-determination takes the meaning that the population or the demos of a territory shall have the right to decide about its own destiny.
All in the territory who are viewed as fit to govern - in the beginning only the wealthy white males - should have the right to govern the nation.

The sense of community was based on shared political institutions in which every capable individual can participate as a free and equal member. National identity is here based on civic ties not on prepolitical values. The universality of rights, the extraordinary adeptness of the American government to guarantee and fulfill these rights and to provide for the self-government of each individual were stressed in order to create the necessary cohesion to govern and to avoid insurmountable cultural, ethnic, or religious cleavages. Dividing cultural or religious issues were left to the private sphere and were deemed as irrelevant for national identity and for the state.

Similar to the American nation the French nation developed within a given state. The state was the frame of reference for nation building. As result of the French Revolution all citizens became members of the nation. The aim of nation building was to invest the people instead of the monarch or the nobility with the right to self-rule. The rule by the nation for the nation should assure that the common good was realized.

To enable the participation of all citizens a common culture was created. Cultural homogeneity should facilitate the democratic process. Assimilation was the expected and in most cases accepted consequence of being a citizen. A good citizen adopted the French way of life and therewith as well the French culture. The sense of unity is therefore not only based on the political institutions and universal values but manifests itself in a common culture. Culture is relevent for and promoted by the state.

German nationalism arose when there was not yet a unified German state. At that point in history the community could only be defined based on shared prepolitical values like common culture, language, and descent. German nationalism stressed the common cultural values and the imagined common descent to create the people’s belief in a distinct nation and differentiated itself from the surrounding dominant national groups most of all from the French. The reliance on presupposedly objective criteria like common culture, descent or language necessitated
the exclusion of all who did not share these traits. German ethnic nationalism defined the nation as a tightly knit community united and distinguishable by objective prepolitical criteria.

The German nation aspired to have its own nation-state. Its main and common aim was to carve out a territory for the German nation and to gain and legitimize external sovereignty. In this case national self-determination becomes the means to demand statehood for an ethnicity. National self-determination questions existing state borders and endangers minorities within the territory of the dominant ethnicity.

In different words:

- German nationalism initially could not stress common political institutions because there were none while initially American and French nationalism could not stress a common culture because there was no common culture.

- German nationalism stressed the common prepolitical identity as a community of descent or of a common culture while American and French nationalism stressed the common political institutions, universal rights, liberty, and equality.

- German nationalism excluded those with a different culture from the nation whereas American nationalism excluded culture from the national identity. France excluded preexisting culture but created a new culture.

- While German nationalism relied on preexisting culture and French nationalism created a common culture as a unifying means American nationalism banished dividing cultural issues from the national agenda. American nationalism created a unity that was at least theoretically not based on and cannot be threatened by the different ethnicities, cultures, or religions of the members of the nation.

- The participation in the shared political institutions guaranteed membership in the American nation while the shared culture

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732 This point will have to be qualified, see below at § 14 II.
guaranteed German nation membership and the willing assimilation expected and presupposed of French citizens together with the acceptance of universal values guaranteed French nation membership.
PART III
RECONSIDERATIONS FOR THE CONTEXT OF NORMATIVE DIVERSITY

§ 13. Introduction: The Increased Relevance of Diversity and the Idea of Normative Diversity

It is the underlying assumption of this third part that diversity should be accommodated by the state and that therefore a nation-state concept that can accommodate diversity should be promoted. In this introduction two arguments for a new nation-state concept will be given. On the one hand an increased relevance of diversity necessitates a nation-state that can accommodate diversity (I.), and on the other hand the recognition that diversity is enriching our life leads to demands for general policies of normative diversity (II.).

After the introduction the following section will analyze more into detail how the three classic nation-states cope with diversity. On the basis of the analysis of the different nation-state concepts above it will be shown that all three nation-states try to overcome diversity instead of accommodating or promoting it, however the means they apply for homogenization differ (§ 14). Afterwards Switzerland will be regarded as counter-example to the three classic concepts because Switzerland tries to accommodate diversity (§ 15). Finally the teleological definition of a nation-state that fulfills the demands of normative diversity will be developed theoretically and necessary redefinitions of the classic concepts in order to fulfill normative diversity will be regarded (§ 16).

I. Increased Relevance of Diversity

Diversity gained relevance within the state. It will be the task of states to develop mechanism with which diversity can be accommodated. Only two reasons for the increased relevance of diversity shall be regarded:
The new nation-state building processes in multicultural societies turn the question of diversity into a state issue (1). Globalization though leading to a decrease of external diversity will lead to an increase and strengthening of internal diversity also in the Western world (2). Based on these two examples of an increased relevance of diversity it will be shown that it needs a nation-state concept that can accommodate diversity (3).

1. Nation-State Building in Multicultural Societies

At the moment we are in the midst of a new era of nation-state building. Here only some aspects of the nation-state building processes in the former communist countries shall be regarded.

In multicultural societies the end of the era of socialism and communism questioned not only the political regime but the states as such. Monocultural countries could base the legitimacy of the state on the premodern homogeneous people (the ethnic nation legitimates the ethnic nation-state) and therefore had to solve ‘only’ the regime question. Multicultural societies in transition experienced not only the regime as illegitimate but regarded as well the common multicultural state as artifical and illegitimate.733

Due to the perceived illegitimacy of regime and state and the therewith-connected missing common political identity and legitimacy political mobilization was more often than not based on ethnicity. This ethnification of politics led inevitably to ethnic cleavages and to a state crisis if not state dissolution734. When diversity leads to an ethnification of politics the state itself is questioned.

733 See BASTA 1999, 522-24, esp. 523: “[At] the time of the fall of communism, the three multi-ethnic federations [USSR, Czechoslovakia and the Federal Republic of Yugoslavia] were not ‘merely’ illegitimate pre-modern societies in search of appropriate constitutional devices for the emerging ‘status activus’. They were the illegitimate pre-modern communities in which the common state was perceived as an imposed ‘otherness’ (‘Zwangsgemeinschaft’).”

734 See BASTA 1999, 528; cf. FLEINER 1996b: Thomas FLEINER demands that ethnic groups receive relevance only concerning cultural issues in order to exclude the ethnification of politics. He wants to disassociate the nation and the state in order
The creation of ethnic nation-states could only address the problem if the carved out territory of the state was mono-ethnic and there existed only one claim to the territory. In many instances, however, several ethnic groups claim the same territory. The new ethnic nation-states will include minorities unless ethnic cleansing takes place. The creation of ethnic nation-states in areas with multicultural populations tends to create a domino effect of nationalist secessionist movements.

In all cases in which an ethnification of politics took place or has to be expected the accommodation of diversity turns into a major state issue. In order to survive the state will have to **democratically integrate the political demands of different ethnic groups**. Otherwise the state risks to be sooner or later confronted with internal fragmentaion and secessionist movements.

### 2. The Influence of Globalization

Not only states in transition have to face an increased relevance of diversity but as well in other countries a resurgence of diversity is already visible or must be expected due to the phenomenon of globalization.

Globalization reduces some external diversity because it reduces the ideological differences between countries. Nation-state building did not only create geographic borders but as well ideological borders between states. In many cases – most of all in Western Europe -

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735 See FLEINER 1996b, 26-27, at 27: “The so-called right to territory [of an ethnic nation] gives often different nations overlapping rights, which reasonably cannot be questioned. It often depends on what historical period is more relevant. But just because there is no clear criteria to distribute territories among nations, the conflict on territories are merciless, every nation claiming to have total legitimate rights to the territory, which creates Greek tragedies.”

736 For a debate on the meaning of globalization, see e.g. BECK 1998.

737 For instance Catholic countries distinguished themselves from Protestant ones (France and Great Britain), Islamic countries from Christian (Algeria and
globalization led to universally accepted or in world regions accepted ideologies and with the world-wide interconnected economy to the attenuation of neighbor enemy perceptions. The universalization of mainly Western values led, however, as well to new tensions between world regions\textsuperscript{738}.

Universally accepted ideologies cannot serve as distinguishing means to define state borders or as a basis to define distinct common identity\textsuperscript{739}. National identity is therefore weakened by globalization.

At the same time globalization gives new importance to internal diversity. Globalization can give new relevance to the local level because the global economy takes place on a multi-level playing field\textsuperscript{740}. The relevance of the local level can intensify local demands and strengthen local (mostly cultural) identities\textsuperscript{741}. New minorities due to global migration can further intensify the diversity of the population\textsuperscript{742}.

Based on the assumption that individuals and groups try to maximize self-determination, in the globalized world the nation-state will only be

\textsuperscript{738} See foremost HUNTINGTON 1998 esp. 291-491; as well ALTERMATT 1998, 42-44: They stress the clash of civilizations. Globalization strengthens the domination of the Western world and leads to conflicts with other parts of the world. The feeling of being dominated by the Western world and of being forced to accept Western values can create counter-reactions.

\textsuperscript{739} It could be argued that countries with a common ideology had to form one state. Supranational trade organizations are perhaps already a step in this direction.

\textsuperscript{740} See e.g. JUN & WRIGHT 1996, 1-18.

\textsuperscript{741} This phenomenon is normally called Glocalization. For the issue of regional nationalism and globalization, see e.g. LANGE 2000, esp. 13-45.

\textsuperscript{742} See e.g. Joppke 1998, 5-46; esp. for the aspect of transnationalization SASSEN 1998, 3-76.

This process is accelerated by the diminished the influence of the national level. The nation-state justifies its existence through the fulfillment of the tasks assigned to it. See e.g. SALADIN 1995, esp. 189-94. The reduced influence jeopardizes the nation-state’s aptitude to fulfill the tasks and therewith as well the legitimacy of the nation-state.
perceived as legitimate when the different multi-level players and therewith as well the local groups perceive the nation-state as within their interest. Self-conscious cultural groups will demand the relevance of their diversity and might demand own statehood when the relevance is not granted\textsuperscript{743}. Based on a pragmatic approach it can be argued in favor of accommodating diversity. The demands for recognition of different groups can lead states to the pragmatic decision to accommodate the groups instead of jeopardizing peace and stability\textsuperscript{744}.

3. Need for a New Nation-State Concept

Only the political integration of politically mobilized ethnic groups at the state-building level and at the regime level promises to prevent state and regime crises. The set-up of the state and of the regime must provide reasons for loyalty. When the state is conceived as the common state and when the mobilized groups can expect that the political process takes their interests into account they have reasons to abstain from pursuing politics that question the state and the regime. The state as such and the political process will have to accommodate the different groups and therefore will have to accommodate diversity.

As it will be shown (§ 14) none of the three classic nation-state concepts is able to accommodate diversity. Thomas FLEINER argued that the inability to accommodate diversity is inherent to the notion of the nation-state. Therewith it is implied that it does not need a new nation-state concept but the disassociation of nation and state and therewith a new state concept\textsuperscript{745}.

\textsuperscript{743} See WALKER 2001, 625: In the context of the process of globalization and fragmentation that is going hand in hand she argues that "localized identities are now vigorously articulated, contested, and debated both in the national and the international arenas."

\textsuperscript{744} See WALKER 2001, 625.

\textsuperscript{745} See FLEINER 1996b, 30: “With the following statements I will argue that we can overcome the fundamental problem of nationalism only if we reconsider the totalitarian concept of the state”. He calls the state totalitarian because it has the
His demand is mainly but not only directed against the ethnic nation-state. Though the nation is a fact, ethnicity or culture should not be allowed to form the basis of political mobilization. Not the (pre)political nation should legitimize the state but only mankind as such. As a consequence the right to self-determination as political right should be bound to the territory of the state and should emanate from the whole population of the state instead of being linked to the nation and nation membership.

Here a slightly different approach will be pursued insofar as it will be probed whether a nation-state can be perceived that accommodates diversity. The here aimed at redefinition concerns not in the first place the notion of the state but the notion of the nation as constituent and constituted power. A redefinition of the nation will inherently influence the notion of the state.

In different words, this third part will look for a nation-state concept that can accommodate diversity. The redefinition of the nation-state concept so as to accommodate diversity promises to politically integrate mobilized groups while maintaining a feeling of belonging that can supersede ethnic loyalties.

The difference in approach is partly due to a more open understanding of the nation adopted in this analysis. According to the here used definition of the nation the nation is not necessarily the object of exclusive or supreme loyalty. With this understanding of the nation it is possible to conceive a nation that realizes diversity in unity.

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746 See Fleiner 1996b, 30-39. Therefore he wants to base sovereignty of the state not so much on Hobbes, Locke and Rousseau but on Athisius. Athisius gave sovereignty to mankind who then give limited mandates. For comments on Thomas Fleiner’s approach see Basta Fleiner 2000b.

747 See Fleiner 1996b, 34-35.
II. The Idea of Normative Diversity

The idea of normative diversity adds a value argument to the discussion. Diversity shall not only be accommodated because it is necessary for peace but as well because diversity as such is a value. Therefore the idea of normative diversity is going a step further than the arguments above. When diversity is viewed as a value it is not only for the state in crisis but as well for all other states desirable to adopt normative diversity as state policy.

In addition the idea of normative diversity promises a theoretical foundation for the elaboration of a new nation-state concept. Therewith it can as well serve as a point of departure for the evaluation of the classic nation-state concepts.

Normative diversity as one aspect of postmodernity is a counter-approach to modernity in so far as it does not accept the modern quest for identity and homogeneity but demands the acceptance and promotion of diversity.

The underlying hypothesis of normative diversity is that diversity itself is a value and that as value diversity merits to be acknowledged and promoted by the state. For instance Michel ROSENFELD’s theory of comprehensive pluralism relies on the notion that pluralism or diversity itself is desirable and should be accepted and promoted by the state based on the slogan “pluralism as norm is best for pluralism in fact”.

TAYLOR argues for the value of diversity based on (1) the presupposed equal value of all cultural groups, (2) the importance of group identity

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748 See e.g. WALKER 2001, 624; TURNER 1994, 154.
749 See e.g. TAYLOR 1994.
750 See e.g. DENNINGER 1994; ROSENFELD 1998a, 199-277.
751 See Michel ROSENFELD’s theory of comprehensive pluralism in: ROSENFELD 1998a, 199-277.
752 ROSENFELD 1998a, 200.
for the individual and (3) the enrichment of society through the influence of different cultures\textsuperscript{753}.

1. The view that regards all cultures as equally valuable will trigger demands in favor of the equal treatment of all cultural groups.

2. When relying on the importance of identity for the individual it is an easy and logical step to demand the protection of the identity as part of the individual's dignity. The protection of identity becomes quasi a human right\textsuperscript{754}.

3. Based on the argument that diversity enriches a society it is in the interest of society or the state to promote diversity.

Normative diversity therefore demands the recognition and equal relevance of all groups who are important for identity.

Normative diversity urges not only that the importance of diversity is recognized by the state but goes further in so far that the state is

\textsuperscript{753} See Taylor 1994: The equal worth is presupposed because universal and objective standards for the evaluation of cultures do not exist; similar approach e.g. in Karst 1989, 4: He stresses the importance of 'belonging' to a group as a basic human need. Exclusion is experienced by the individual but is based on the subordination of groups. To avoid exclusion the society has to accept group identities and the equal value of groups. See additionally Vincent 2001, 596: Vincent argues based on Kant: "The claim would be that nations make up a part of our identity. Identity is deserving of respect. The principle of respect obliges us to respect that which in others constitutes any part of their sense of their own identity."

\textsuperscript{754} See e.g. Fleiner 1996a, 12: In his book "Was sind Menschenrechte" he writes the following: "Damit ist aber auch all das, was den Menschen in seiner Umgebung, seiner Familie, seiner Geschichte, Kultur und Sprache geprägt hat, seine Identität und Wurzel, ebenso Teil seiner Würde. Denn wer dem Menschen den Orientierungsrahmen raubt, welcher sein Urteil und sein Handeln bestimmt, greift ebenso in seine Würde ein, wie wenn er den Menschen direkt zu Handlungen zwingt, denen er bei freiem Entscheid niemals zustimmen könnte." Similar Taylor 1994, 39: "The politics of difference grows organically out of the politics of universal dignity through one of those shifts with which we are long familiar, where a new understanding of the human social condition imparts a radically new meaning to an old principle." The approach relying on human dignity is criticized in Habermas 1998b, 118: He does not argue that the reliance on human dignity is wrong but that it is not satisfactory. Because of an universalization of human dignity the intersubjective aspect is lost and the individual is viewed as disassociated from society.
expected to promote diversity. Therewith diversity or culture turns into a value that is legitimately of political relevance\textsuperscript{755}.

In order to confront the concept of the nation-state with the idea of normative diversity a three step approach will be taken. First the approach of the classic nation-states concerning diversity will be regarded (§ 14) afterwards Switzerland will be used as an empirically verified example of a country that tries to accommodate diversity (§ 15). Finally a nation-state concept will be developed that can accommodate diversity (§ 16).


I. Introduction

We distinguished two completely different approaches to create unity in the nation-state. From these approaches follow as well the stance concerning diversity.

- According to a first approach the state defines the citizens as nation. The state can pursue different strategies concerning the cultural diversity of the citizens:
  - The state accepts but ignores diversity and tries to create a culture-blind national identity. Diversity is irrelevant (USA).
  - The state creates a nation by creating a culture and assimilates its citizens to this culture. Diversity is a sign of the malfunctioning of nation building (F).

\textsuperscript{755} See e.g. J.P. MÜLLER 1999, 42-43: He argues that the recognition or toleration of diversity alone is not enough. Recognition without relevance that treats all as abstract equals will lead to the leveling of differences. For examples, see SPINNER 1994, 60-112, 167-88. Political relevance is however the point where many authors distance themselves from theories of multiculturalism or pluralism. Instead of many see VINCENT 2001, 604: “There are many types of groups (family or religious associations) which are often central to a person's identity, but it would be odd to accord them separate political recognition.”
According to the second approach the nation-state relies on preexisting, prepolitical unity. Prepolitical criteria define membership in the nation. The nation is therefore - at least concerning the prepolitical criteria - necessarily homogeneous. Diversity questions the nation-state (D).

In the following the conceptual limits of the three nation-states concerning diversity shall be analyzed more into detail.
II. Homogenization through Culture-Blindness

Cultur-blindness necessitates the separation of the private and the public realm. Cultural affiliations are accepted as long as they influence only the private sphere. From the public sphere cultural issues are banned. Two problems are connected with the (theoretical or actual) culture-blindness, which reinforce each other: (1) The separation between the private and the public realm is not completely possible and becomes more and more difficult and (2) members of the nation or outside of the nation (First Nation Peoples) might fight against the political irrelevancy of groups.

1. Separation between Private and Public

A complete separation between the private and the public sphere is not possible. No state is culturally neutral\textsuperscript{756}. Already Alexis DE TOCQUEVILLE discussed the indirect influence of religion on politics in the United States\textsuperscript{757}. The closing of public schools and offices on Sundays, the opening of Congress with a prayer, public holidays with mostly Christian religious origin, or even sodomy laws show the influence of culture on public life.

One further example offers the discussion about abortion. Abortion is a legitimate subject for public discourse and public policy making. People who view abortion as murder based on their religious beliefs have the right to try to convince others of their views. Religion, which according to the separation between private and public should be

\textsuperscript{756} See TAMIR 1993, 54; AVINERI 1996, 192; cf. WALKER 2001, 629: WALKER discusses 'banal nationalism' and stresses the many often unconsciously taken-for-granted cultural influences. For a similar discussion in respect to the separation between state and religion in Germany, see DENNINGER 1998, 141-42.

\textsuperscript{757} See TOCQUEVILLE 1998 [1839/40], 119-24.
confined to the private sphere, enters necessarily and legitimately the public discourse.\textsuperscript{758}

“Post-enlightenment skepticism concerning the divide between Faith and Reason, coupled with the intrusive incursions into the private sphere by the welfare state and its comprehensive educational apparatus, have eroded the respective boundaries between secularism and religion and those between private and public sphere.\textsuperscript{759}"

The complete separation of the private and the public realm is not only for religious issues but as well for other cultural issues impossible. Language is an even more prominent example than religion. It must be decided which language shall be taught in school, which language can be used in contact with the authorities or in court proceedings.

Even the \textit{institutions of the American state are influenced by culture}.\textsuperscript{760} State institutions were developed based on experiences with English institutions. Anti-majoritarian devices were used to make the adoption of policies opposed to the value system of the wealthy Europeans more difficult.\textsuperscript{761} The Constitution still shows the earlier acquiescence to slavery.\textsuperscript{762}

It can even be argued that the political system is based \textit{on the male value system} and expression of identity through separation,

\textsuperscript{758} See \textit{Avineri} 1999, ix.
\textsuperscript{759} \textit{Rosenfeld} 1999, 40.
\textsuperscript{760} Cf. \textit{Freeman} 1995, 9; He argues that liberalism failed to recognize its national presuppositions. Liberalism suppresses the cultural nation but is applied in national frameworks; see \textit{Franklin} 1971, 10-11.
\textsuperscript{761} See \textit{The Federalist No. 10}, (Madison) (Clinton Rossiter ed., 1961); \textit{Richards} 1994, 87-92.
\textsuperscript{762} See e.g. U.S. Const. 1787: Art. I, § 2, cl. 3: Representatives and direct Taxes shall be apportioned among the several States which may be included in this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons \ldots three fifths of all other Persons\ldots
U.S. Const. 1787: Art. I, § 9, cl. 1: The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by Congress prior to the Year one thousand eight hundred and eight\ldots(emphases mine). See as well U.S. Const. 1787: Art. IV, § 2, cl. 3; Amendment XIII [1868].
competition, and achievement and is opposed to the female identification through connection and interdependence. The claim is that the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of one hegemonic culture. TAYLOR concludes based on this argument that the American concept cannot and should not claim to be culture blind.

The domineering influence of one culture or group - wealthy European males - on the constitution is perpetuated by the exclusion of other cultural influences. Members of the American nation who do not identify with the culture of the wealthy European males will demand that influences of this culture are eradicated or that their own culture is accorded the same importance as the other culture. As these demands are not fulfilled it can alienate parts of the nation.

2. Non Relevance of Diversity

As shown, the complete separation of private and public realm is not feasible. In addition, the complete ignorance of cultural identity has a high price for the individual. Cultural identity is part of the individual’s identity. The exclusion of the cultural identity from the national identity necessitates the negation of part of the individual’s identity and can lead to divided loyalties. The furtherance of a culture by the state would, however, jeopardize the success of American nationalism. American nationalism was successful because it

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763 See ROSENFELD 1991a, 279-80; cf. as well BASTA 1999, 529; TAYLOR 1994, 62: Both argue that already the principles of universalism, individualism, and liberalism are not value neutral.
764 TAYLOR 1994, 43.
765 See TAYLOR 1994, 62.
767 For instance the discussions about the celebration of Columbus Day show that parts of the American nation can understandably not identify with the celebration of this day.
768 See e.g. TAYLOR 1994, DENNINGER 1994.
left culture to the private sphere and removed it from the national agenda.

As discussed above according to American liberalism reverse discrimination or affirmative action is only acceptable as means to undo former discrimination. Affirmative action shall reestablish the level playing field where culture is irrelevant. Actions however “now urged on the grounds of difference, the goal of which is not to bring us back to an eventual ‘difference-blind’ social space but, on the contrary, to maintain and cherish distinctness, not just now but forever” are not justified from the system point of view.

The approach to accord group rights or collective rights is opposed to individualism. American nationalism does not reject collective rights as such but “cautions against structuring social and political relationships through collective rights.” In different words, according to the American understanding of the nation there cannot be a mediator between the state and the individual as such.

Culture can only be lived within a group. Groups or members of a group will demand that their culture is accorded factual equality. A small linguistic minority will need more funds to offer instruction in the minority language in relation to its members than a huge linguistic group. The equal treatment of groups does not necessarily coincide with the equal treatment of individuals.

The equal treatment of groups as opposed to the equal treatment of the individual poses a difficult issue in a liberal state based on an individualistic nation-concept.

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770 Taylor 1994, 40.
771 For the systemic limit to accord minority rights in the liberal state, see e.g. Freeman 1995, 9-14.
772 See e.g. Karst 1989, 148: “Our devotion for individualism inclines us to assume that individual destinies are self-made and makes us unready to recognize harms that people suffer because they are members of groups.”
773 Fleiner 1998b, 95; see as well Vincent 2001, 603; Rosenfeld 1998a, 216.
774 See Habermas 1998b, 120.
775 See Rosenfeld 1991a, 25.
According to American liberalism the individual is the subject of moral choice, and the purpose of society is to optimize the opportunities for individual self-realization by striking an appropriate balance between individual autonomy and individual welfare. Within this framework, moreover, individual interests ultimately prevail over group interests, and groups - including the polity as a whole - conceived as associations or aggregations rather than as organic units are justified in terms of their suitability for advancing individual interests.\textsuperscript{776} The American emphasis on individualism limits the justifications of group equality at the cost of individual equality.\textsuperscript{777}

Most of all political rights for groups through which they could give relevance to their culture are incompatible with the American nation concept. As has been seen concerning new immigrants assimilation is accepted in so far as the immigrants must renounce the relevance of their culture for the public sphere.

The non-relevance of diversity is sometimes pursued forcefully.\textsuperscript{778} When groups demand political rights or autonomy like the First Nation Peoples assimilation is openly advocated and pressed for.

The position of the First Nation Peoples is special because of their indigenous status and the political autonomy they had because of it. However the reaction of the United States to demands for political autonomy as group is telling about possible reactions to other groups with similar demands. The reaction of the United States to demands of political relevance will be (forced) assimilation.

The American nation concept can probably only be successful for immigration countries. Immigrants, who want to start a new life in a new country, are often ready to accept their cultural origin as their private business. Indigenous groups as most ethnic groups in Europe,

\textsuperscript{776} ROSENFELD 1998a, 216.
\textsuperscript{777} See ROSENFELD 1991a, 4.
\textsuperscript{778} See e.g. KÄRST 1989, 84-85 for measures to coerce conformity.
Asia, and Africa are however frequently not prepared to accept the political irrelevance of their culture\textsuperscript{779}.

Nations relying on prepolitical values have fewer problems to justify the furtherance of group equality and political rights. For these nations group identities are presupposed. Group equality at least for national or cultural minorities instead of or as a complementary to individual equality in certain situations or for special issues is not inherently opposed to the collectivistic nation concept\textsuperscript{780}.

While nations as \textit{ethnos} can accord preferential treatment to minority groups based on formal or factual group equality to mitigate disadvantages individualistic concepts of equality can justify only limited application of group equality. Preferential treatment of the members of one group as a means of minority protection or to further pluralism seems to be excluded because of individualism and liberalism.

The exclusion of culture from the national identity created problems in the United States but because of the weakness of the concerned groups it could not (yet) threaten the unity of the nation\textsuperscript{781}. In most cases American nationalism was able to accomplish that the loyalty to the nation superseded loyalties to a cultural group. The belief in the superiority of the American political institutions created a political culture that could create the necessary unity. Other nations that cannot rely on a comparable political culture do not necessarily succeed in creating superseding loyalties. The abstract ideas of popular

\begin{footnotes}
\footnotetext{779}{See \textsc{Fleiner-Gerster} 1995b, 53-56.}
\footnotetext{780}{See \textsc{Fleiner} 2000a, 105: In the Land Schleswig-Holstein in Germany e.g. the Danish minority has the right to elect at least one representative into the parliament. Even though Switzerland is not predominately an example of ethnic nationalism the Swiss courts accept positive discrimination. The Swiss courts allow that traditionally Rumantsch speaking communes can demand that all commercial signs and all names of companies in the commune are in Rumantsch while they do not allow a German speaking community to demand the same exclusive use of the German language, based on the argument that Rumantsch needs more protection than German.}
\footnotetext{781}{The Hispanic population is about to develop into a group strong enough to start a debate on national identity. See \textsc{Samuelson} 2001, 47.}
\end{footnotes}
sovereignty and human rights alone are not appealing enough for political mobilization.\footnote{See HABERMAS 1998a, 112-13.}
III. Homogenization through Presupposed Assimilation

1. Normative Unity

France realized the homogeneity of its nation of citizens through the creation of the French culture and through the respect for universal rights. All citizens are presupposed to assimilate and to be members of the nation.

This can create a paradox: The civic concept denies the existence of minorities however the authoritativeness of the nation can create minorities. Based on the notion that membership is based on equal citizenship (it is a civic nation) there can be no minorities\(^{783}\). All individuals are equal members of the nation. Because the French nation-state nevertheless promotes one culture and one notion of the common good there nevertheless can be dissenters. The nation cannot accommodate those who do not assimilate. From the conceptual point of view diversity in this respect is the sign for the malfunctioning of the system.

As a consequence the French government made a reservation to Art. 27 of the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS of

\(^{783}\) French Constitution 1958.

**Article 2 [State Form and Symbols]**

(1) France is an indivisible, secular, democratic, and social Republic. It ensures the equality of all citizens before the law, without distinction as to origin, race, or religion. It respects all beliefs.

(2) The language of the Republic is French.

(3) The national emblem is the blue, white, and red tricolor flag.

(4) The national anthem is the "Marseillaise".

(5) The Motto of the Republic is "Liberty, Equality, Fraternity"…

(6) Its principle is government of the people, by the people, and for the people.
1966\textsuperscript{784}, which guarantees minority rights, based on the argument that there are no minorities in France\textsuperscript{785}.

The French nation achieves itself a collectivistic quality and does not accept any holistic sub-groups within its nation\textsuperscript{786}. There is no room for group equality or the recognition of minorities within the French population. Factual minorities or diversity question the functioning of the nation concept. In completely successful nation building there would not be any outsiders.

In France the values of the state are mostly universal values\textsuperscript{787} so that a large part of the population can identify with these values. When the state however adopts non-universal values problems will arise. For collectivistic civic nations it is indispensable that assimilation is facilitated and works. If the notion of a collectivistic nation is combined with differentiation instead of assimilation there will be a dilemma because of the creation of minorities without the constitutional possibility to recognize minorities.

This is part of the dilemma of Turkey with their Kurdish population. Atatürk took over the French understanding of the nation. The Kurds however feel and are excluded and do not view themselves as belonging to the Turkish nation. The constitution and its legalistic interpretation however bar every possibility to accord the Kurds minority rights\textsuperscript{788}.

\begin{itemize}
  \item Article 27
    In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
  \item Declarations and reservations: In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned.
  \item However the values include as well the French language.
  \item See FLEINER-GERSTER 1995b, 51: “Der französische Nationalismus hat somit eine Fiktion geschaffen, die, wie z.B. die Türkei zeigt, gegenüber anderen Nationalitäten vollständig totalitar sein kann und die Existenz staatlicher Minderheiten grundsätzlich negiert.” Turkey is however not completely consistent
\end{itemize}
2. Non Recognition of Diversity

In France minorities do constitutionally not exist. The example of Corsica shows however that this argumentation though legally and formally avoiding the existence of minorities cannot avoid them factually.

Regional identities that demand recognition of cultural diversity question the nation of citizens. The allocation of limited legislative competencies to the Corsican Parliament provoked strong reactions.

Prime Minister Jospin presented a paper on the scenario for the future status of Corsica. It included the introduction of mandatory classes in Corsican language in primary schools and an extended power for local authorities to issue decrees. During a test period until 2004 the Corsican Parliament shall receive the right to adapt French legislation in the form of decrees.

The Corsican Parliament accepted Jospin’s proposal but demanded additionally that the two Corsican départements were merged into one, that the Corsican people is accepted as a community, and that the Parliament received within three to four years legislative competencies in the fields of zoning, environmental policy, and culture.

The proposal by Jospin - not to speak of the counter proposal by the Corsican Parliament - provoked fundamental criticism. President Chirac announced that the principle of French unity, of which he as president is the guarantor, must receive precedence over the demanded autonomy. He therefore stopped the debate on the proposal in the

in its policy in so far as it supports the Turkish minority in Cyprus. Similar PREUSS 1998, 127. For an account of Kurdish nationalism see e.g. IBRAHIM 1995, 36-60.


F Const. 1958: Art. 5
Council of the Ministers. Jospin announced that he would reintroduce the unchanged proposal so that afterwards the Parliament could decide on it.\textsuperscript{792}

An autonomy regime might violate the French Constitution. Chances that the Constitutional Council would deem the autonomy regime or parts of it as unconstitutional are high:

The Constitutional Council decided that the acceptance of cultural diversity adopted by the legislator by recognizing a Corsican people that is composing part of the French people was unconstitutional. The Council argued that the unity of the French nation is proclaimed in the Constitution and that every dismantling of this unity is against the very principles of the French State.\textsuperscript{793}


\textsuperscript{793} See Decision 91-290 (May 9, 1991) of the Constitutional Council, esp.: “En ce qui concerne l'article 1er : 10. Considérant que l'article 1er de la loi est ainsi rédigé : "La République française garantit à la communauté historique et culturelle vivante que constitue le peuple corse, composante du peuple français, les droits à la préservation de son identité culturelle et à la défense de ses intérêts économiques et sociaux spécifiques. Ces droits liés à l'insularité s'exercent dans le respect de l'unité nationale, dans le cadre de la Constitution, des lois de la République et du présent statut." ; 11. Considérant que cet article est critiqué en ce qu'il consacre juridiquement l'existence au sein du peuple français d'une composante "le peuple corse" ; qu'il est soutenu par les auteurs de la première saisine que cette reconnaissance n'est conforme ni au préambule de la Constitution de 1958 qui postule l'unicité du "peuple français", ni à son article 2 qui consacre l'indivisibilité de la République, ni à son article 3 qui désigne le peuple comme seul détenteur de la souveraineté nationale ; qu'au demeurant, l'article 53 de la Constitution se réfère aux "populations intéressées" d'un territoire et non pas au concept de peuple ; que les sénateurs auteurs de la troisième saisine font valoir qu'il résulte des dispositions de la Déclaration des droits de 1789, de plusieurs alinéas du préambule de la Constitution de 1946, de la loi constitutionnelle du 3 juin 1958, du préambule de la Constitution de 1958 comme de ses articles 2, 3 et 91, que l'expression "le peuple", lorsqu'elle s'applique au peuple français, doit être considérée comme une catégorie unitaire insusceptible de toute subdivision en vertu de la loi ;
Additionally the Constitutional Council had ruled out the ratification of the European Charter on Regional and Minority Languages. The government of Lionel Jospin had signed the Charter in May 1999. The Constitutional Council however decided that the Charter is not compatible with the French Constitution because a special status of regional or minority languages would violate three constitutional provisions: the indivisibility of the Republic, the equality of all citizens, and the provision that declares French as national language.\(^{794}\)

In an earlier decision the Constitutional Council had decided that a decree power for regional assemblies is constitutional.\(^{795}\) Legislating power however can be deemed as opposed to the Declaration of 1789, which declares that all citizens should be subjected to the same laws. While a decree power might be in accordance with this provision because the Constitution distinguishes between rules and principles and the decree power concerns the concretization of principles, legislating power might be deemed unconstitutional.\(^{796}\)

The French State adopted a policy, which could be characterized as ‘normative unity’. Normative diversity is opposed to the understanding of the nation and the state.

Nations that rely on prepolitical criteria can face similar problems when homogeneity is presumed but not realized. Israel as the state for the Jewish nation can serve as an example. Even though the Jewish religion was intended to unite the Jewish population of Israel it is at the same time a dividing factor.\(^{797}\)


\(^{795}\) Decision 93-322 (July 28, 1993) of the Constitutional Council.

\(^{796}\) For a short summary of the legal argument in favor of autonomy see Carcassonne 2000, 31; for an argument against see Reverier 2000, 30-32; as well critical Dufay 2000, 28-29.

\(^{797}\) In addition nations that rely on prepolitical criteria face problems when the country is multicultural due to groups who do not belong to the nation, e.g. because of Israeli Arabs. This case will not be treated here. While this chapter addresses the problems with the presupposed homogeneity of the nationals the case of non-nationals in an ethnic nation-state will be treated later.
Jewish national consciousness arose when there was not yet a Jewish state. Membership in the Jewish nation could therefore not be defined by citizenship. A national consciousness could only be based on prepolitical criteria like religion, descent or culture. Jewish nationalism had to be a Romantic-exclusivistic nationalism.

A sense of urgency and a lack of choice accompanied Jewish nationalism. Jews in Germany, Austria-Hungary and Russia were confronted with Romantic exclusivistic national movements that led to the exclusion of Jews and barred assimilation. Who is Jewish was not only defined by their own self-perception but as well by the exclusion from other nations because they were perceived as Jews.

A definition of Judaism, regardless of how secular or purely nationalistic, cannot deny the historical association of Judaism and religion. Jewishness contains religious overtones for a large majority (77%) of the Israeli Jews. Nearly every Israeli Jew celebrates some aspects of the religious tradition.

“Hence, any ideological position that asserts Israel ought to be a Jewish state must accept symbols, myths, ceremonies, and historical associations that evoke religious associations.” All different Zionist and political groups needed and used religious symbols to evoke a feeling of unity. The association of religion with the national identity provides a system of symbols and values that promises a basis for unity.


The notion of chosen people that the Jews share with the Singhalese and the Japanese favors as well the adoption of an exclusivistic nation concept. Only the chosen will belong. The Jewish religion is not missionary and very restrictive to conversion. In this respect the Jewish religion differs from the universalist Christian religions that aim at conversion and often used forced assimilation for its missionary purposes.

799 See Galnoor 1982, 103.

800 See Liebman & Don-Yehiya 1983, 15; cf. as well the narrative in the Declaration of the Establishment of the State of Israel, stressing that the Jewish people gave the world the Bible.


In addition to the different levels of adherence to religious commandments or traditions there are as well differences in the doctrine and practice itself. Ira SHARKANSKY distinguishes at least eight varieties of Judaism.\textsuperscript{803} Reform and Conservative Judaism or Messianic Judaism are not officially recognized in Israel and e.g. Sephardim and Ashkenazim or Hassidim and Mitnagdim are distinguishable and distinctive groups.\textsuperscript{804} The different groups are socially separated. Ultra-Orthodox, Orthodox, and Secular tend to read different newspapers, to live in different neighborhoods and to send their children to different schools.\textsuperscript{805} There are even different burial grounds for the more and less religious.\textsuperscript{806} Religious cleavages become more pronounced when the status of religion becomes formalized in the state.\textsuperscript{807} Religious cleavages in Israel are a basis for political mobilization and cultural and social separatism.\textsuperscript{808} Between the different groups two distinct kinds of conflicts about the role of religion in the state can arise: conflicts between secularism and religion and conflicts among groups with different religious ideologies.\textsuperscript{809}

There is a general agreement that the Jewish religion is one element of the Jewish national identity. Religious symbols and values can create a feeling of common national identity. However there is no complete consensus about the content of the religion and about the relevancy of the religion for the national consciousness. The issue is still not decided and finally very controversial, one of the reasons why Israel has no constitution.

Romantic nationalism demands a complete identification of every individual or every group in society with the national identity.

\textsuperscript{803} See SHARKANSKY 1996, 6-7.
\textsuperscript{804} See HOROWITZ & LISSAK 1989, 54.
\textsuperscript{805} See SHARKANSKY 1996, 87.
\textsuperscript{806} See SHARKANSKY 1996, 109.
\textsuperscript{807} See HOROWITZ & LISSAK 1989, 32.
\textsuperscript{808} See HOROWITZ & LISSAK 1989, 51.
\textsuperscript{809} See ROSENFIELD 1999, 39-40.
Differing notions about the national identity therefore threaten the nation itself. Religion, which is supposed to be a unifying force as element of the common identity, is at the same time a *dividing* force and questions national unity. Jewish identity and sentiments are shared as long as no precise definitions are required.\(^810\) The adoption of one binding definition would alienate parts of the nation.

The policy of normative unity is questioned by experienced diversity.

\(^810\) See Galnoor 1982, 51.
IV. Homogenization through Exclusion

German nationalism created cohesion by stressing the common culture. By doing so the German nation became exclusive to all who did not share the culture. This exclusion opens the doors to minority protection of excluded groups but as well and predominantly to discrimination.

The reliance on prepolitical criteria promises not only normative but as well factual homogeneity of the nation. A common culture can have a high integrative impact. However within the nation-state serious problems can arise. Ethnic nation-states are hardly ever descriptive nation-states. In probably all ethnic nation-states there are groups which are excluded because they do not share the prepolitical criteria. While the ethnic nation promises factual unity normative unity of the nation-state can jeopardize minorities.

Especially the position of non-nationals in respect to the nation-state is of interest here. Three issues will be regarded: (1) The drawing of borders so as to exclude non-nationals, (2) the exclusion of non-nationals from the constituent power, and (3) the exclusion of non-nationals from the constituted power. So as to have some ethical basis for the argument democracy is presupposed as universal value.

1. The Optimal Borders

German nationalism demands that the demos is identical with the nation and even one of DAHL’s criteria for an ideal democratic unit suggests that the nation should be the demos. An equation of the German nation with the demos however would contradict the universality of democracy.

The ideal democratic process presupposes the rightfulness of the unit itself. DAHL relies on seven criteria to decide which people has

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811 See for the principle e.g. HABERMAS 1999, 139.
812 See DAHL 1989, 207.
the right to a democratic government: Four criteria concern the **qualification of the people**. Two of these criteria shall guarantee that the people adopt an autonomous democratic system based on their own will to do so: The people in the polity must desire political autonomy and must want to govern themselves according to democratic principles. The other two criteria establish that the people do not want to misuse the democratic system. The people have to respect the rights of the members of their polity and of members of other polities and the people must only decide about issues that affect them directly\(^{813}\).

The German nation today has the necessary motivation and respect required by **Dahl**. The German nation wants to have political autonomy and wants to govern according to democratic principles. It respects the rights of its own members and of members of other polities and it agrees to limit its decisions to matters that concern them directly\(^{814}\).

Two further criteria concern specifically the **boundaries**. One criterion establishes that the boundaries must be clear to avoid quarrels about jurisdictions or even wars\(^{815}\). Only the second criterion directly concerns the question how to draw the boundary. The consensus among the persons whose interests are significantly affected should be higher than it would be with any other feasible borders\(^{816}\). This last criterion suggests that it needs homogeneity of the population for a democratic government\(^{817}\).

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\(^{813}\) See **Dahl** 1989, 207-08.

\(^{814}\) Germany tried to assure countries with ethnic German minorities that they will not interfere with internal politics and will not question boundaries. Suspicion remains however and is supported by the Basic Law that still provides that it applies to all German nationals and citizens alike (Art. 146 GG).

\(^{815}\) See **Dahl** 1989, 207.

\(^{816}\) See **Dahl** 1989, 208.

\(^{817}\) See the discussion in **Preuss** 1994, 163-64. Because of the missing homogeneity in the European Union some argue that the European Union cannot be democratized before a European people emerged.
DAHL’s last criterion tries to balance the other criteria and to take additional factors like administrative and economic efficiency into account. The gains of self-determination must outweigh the costs\textsuperscript{818}.

DAHL’s homogeneity criterion implies \textit{that the more homogeneous the people the better it is qualified for a democratic government}\textsuperscript{819}. Common decisions require a certain amount of solidarity and a basic agreement on a common decision making process and on a minimal common value-system.

The preconditions for the existence of civil society is a normative consensus of its members. This consensus concerns the moral and social order that prevails among them. It concerns both the central moral values on which civil society is based and the rules of behavior of its members - who are to promote rather than hinder the enforcement of those rules. It is this normative consensus that ties together the members of civil society and makes them a moral community and a distinct entity that can then act as a whole\textsuperscript{820}.

In a completely homogeneous society “the governors would be identified with the governed, the law makers with those subject to laws and as the organically cohesive polity would delimit a normative realm on duties rather than rights”\textsuperscript{821}.

German nationalism assumed an organic nation based on the shared ethnicity and culture. Ethnicity created a link between ethnic Germans

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\textsuperscript{818} See DAHL 1989, 208-09.

This last criterion does not seem to be helpful. There is no way to calculate the costs and gains. Economic costs and gains need not correspond with the costs and gains the people perceives on a more ideological or philosophical matter. The high costs could not stop Slovakia, Macedonia, or the Baltic States to demand political autonomy. Demands of autonomy are not based on tipping games as argued by LAITIN 1998, 135-57.

\textsuperscript{819} This conclusion must not go too far otherwise the individual person would be the ideal democratic unit because only one single person is truly homogeneous. In principle opposed to any homogeneity criterion is HEBEISEN 1999, 133: He argues with the Swiss example to contradict the necessity of at least pre-existing homogeneity.

\textsuperscript{820} RAU 1991, 6.

\textsuperscript{821} ROSEN Feld 1999, 44.
across state borders and facilitated a feeling of solidarity and responsibility to the co-nationals. The quest for national self-determination and later the preservation of the German state and the German culture was the common cause and common duty of all Germans.

German nationalism creates a **higher consensus** between the members of the nation than in relation to any other group. The ideal *demos* would therefore be identical with the nation and the ideal unit of democracy would be the territory settled by the nation\(^\text{822}\).

The territory is however not exclusively settled by the nation. Germany is **over- and underinclusive**. There are Germans settled outside of Germany e.g. in Poland and Romania and there are ethnic minorities in Germany e.g. immigrants or the Danish and the Sorbish minorities. A concept of a nation-state based on an ethnic nation is highly problematic when the boundaries of the state do not coincide with the boundaries of the nation\(^\text{823}\).

**National self-determination can be misused for the questioning of boundaries or even for genocide.** Dahl’s requirement of secure and unquestioned boundaries must take precedence over the homogeneity ideal\(^\text{824}\). The required respect for the members of other polities must

\(^{822}\) State boarders however hardly ever correspond with ethnic national settlement. There are hardly any countries with culturally homogeneous populations. Ethnic nationalism cannot only be used to determine ideal boundaries but at the same time it can also be misused to redraw existing boundaries and to opt for ethnic cleansing. Because ethnic nationalism can argue how to define “ideal” boundaries it can as well question existing boundaries. The quest for homogeneity must not be overdone. Ethnic nationalism must not question existing boundaries.

\(^{823}\) See Tamir 1993, xxi.

\(^{824}\) Similar results in Lakoff 2001, 109-11; Fleiner-Gerster 1995a, 131; J.P. Müller 1999, 40-41: Müller warns of the homogeneity criterion for the *demos*: "Das 'Volk' oder der 'Demos' der Demokratie stellt weder faktisch noch normativ eine homogene Einheit dar. Die Annahme, eine ethnisch, sprachlich oder religiös relativ homogene Bevölkerung innerhalb eines geschlossenen Territoriums sei Voraussetzung der Demokratie, entspringt einer Fixierung auf nationalstaatliches Denken, die etwa bei Carl Schmitt in der fatalen Forderung nach 'Ausscheidung oder Vernichtung des Heterogenen' gipfelte" (footnote omitted).
necessarily include the respect for the borders of the polity and for minority groups within 825.

In the German case the borders cannot and must not be drawn so as to include all and only members of the nation. Annexation, occupation and ethnic cleansing are not accepted means in international law. The right to self-determination should be bound to a specific territory and has to safeguard the interest of minorities 826.

2. Exclusion of Diversity from the Constituent Power

Based on the idea of the prescriptive or normative nation-state the nation takes the right to demand that the state is the state of and for the nation even though there are other groups. Excluded groups are therefore already excluded at the state-building level 827 and do not have an equal status on the constituted level because the state is supposed to be the state of and for the nation even though other groups might have equal citizenship rights 828. The exclusion from the nation turns them into more or less tolerated minorities.

The demand of minorities to receive completely equal status as groups tend to question not only the policies and strategies of the ethnic nation-state but can call into question the right of the dominant nation to alone claim the constituent power. They question the nation-state. In the case of secessionist movements the group who wishes to succeed demands to form itself the constituent power.

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825 Cf J.P. Müller 1999, 44-45: He demands only a minimal political consensus. The people must agree to solve issues peacefully through communication with respect to the needs of all individuals and groups.
826 See Fleiner 1996b, 34-36.
827 See Fleiner 2000b, 149-50.
828 See e.g. the Preamble of the Croatian and the Serbian Constitution. The same issue is creating a controversy in Macedonia. The Albanians demand to be recognized as state-building people next to the Macedonian people. The recent conflict in Macedonia primarily questions the state and not state policy. Minority rights are to a great extent realized. See Neue Zürcher Zeitung. March 19, 2001. Und was tut der Westen in Mazedonien?, 3.
Minority rights as human rights or equality rights do only address the status of minorities on the constituted level and are therefore not completely satisfying for many minorities. From the moment on when minorities question the legitimacy of the constituent power or when the majority fears that the minority might question the legitimacy of its constituent power minority conflicts do not so much call into question the policies of the state but the state as such.

Nation-states, whose homogeneity is based on culture-blindness or presupposed assimilation to a state created culture, do not face the same problems. At least conceptually all equal individuals form the constituent power and are transformed into equal citizens. No group receives preferential treatment or is excluded.

When however the nation-state is not viewed as culture-blind or when assimilation is not successful then the state can be confronted with similar issues. Here again normative and experienced inclusion can gape.

3. Exclusion of Diversity from the Constituted Power

After the position of non-nationals in relation to the constituent power was regarded, in this section the position of minorities within the constituted state shall be analysed. This analysis shall look at the fundamental problem of democracy in the ethnic nation-state.

According to Robert DAHL to have an ideal democratic process the demos must include all members except those who are objectively incapable of governing. He excludes from the demos children, transients, and persons proved to be mentally defective.

DAHL’s requirement is based on the notion that every person who is subject to the government and its laws should be a citizen and a member of the demos except for those who are not qualified to

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<sup>829</sup> Cf. FLEINER 1996b, 18-19: He stresses that problems still exist because it is not clear how to define the people and the demos.

<sup>830</sup> See DAHL 1989, 129, similar criteria in SCHNAPPER 1994, 94.
In different words, the ideal constitution of the demos can be decided based on objective principles while the nation defines itself based on subjective criteria.

Every nation can define what shall be the applicable membership criteria and who shall be a member. If the demos was allowed to define itself, only the assertion would be possible that the system is democratic in relation to its own demos but it would leave open whether it is democratic in relation to every subject.

Discrepancy between the membership in the demos and the membership in the nation can arise through differing definition of membership requirements for the nation and the demos.

Assuming for the moment that DAHL’s criterion really guarantees a perfect democratic process a nation who wants to have a democratic government must either fulfill DAHL’s criterion itself or grant citizenship to persons who are subjects but not members of the nation.

The German nation excludes persons from different ethnicities even though they are capable of governing. German nationalism created an exclusivistic nation. The nation-building process was marked by the increasing exclusion of all who did not share the German ethnicity. This exclusion led either to the creation of tolerated minorities or to persecution, expulsion, mass-execution, and genocide. The “purity of the nation” was viewed as an ideal.

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831 See DAHL 1989, 122-26; see as well LAKOFF 2001, 103.
832 Political activity is an objective criterion to distinguish the nation from other associations. The membership is based however on the perception of the nation itself.
833 See MILLER 1997, 17.
834 See DAHL 1989, 121-22.
836 E.g. the Danish and the Sorbian minorities.
As has been argued above citizenship today is still mainly national. The inclusion of a person into the nation has to be justified by his or her ethnicity. As a consequence German citizenship is normally accorded based on the *ius sanguinis* principle.

The exclusion of persons who do not have the German ethnicity is based at least partly on a **homogeneity ideal for the democratic process**. For instance in a case in which the Federal Constitutional Court declared voting rights for foreigners as unconstitutional the Court argued that only a “cohesive, unified group” can legitimize the German state. Based on this view **homogeneity is the basis for democracy**.

Even **American nationalism** did initially not include all adults that are today perceived as capable of governing. American nationalism however presupposes the inclusion of all who are equal and demands a justification for every exclusion. **Homogeneity is here based on formal equality**. The inclusion of new groups does not necessarily question the national identity itself while the inclusion of new groups in the German nation does threaten national self-perception.

Similar to American nationalism **French nationalism** expected to turn all subjects into citizens. Homogeneity was not based on formal equality but on **normative homogeneity**. The French state assumed that all citizens share a common identity.

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837 When however a child is found on German territory and relatives are unknown the child gets automatically the German citizenship. The German legislature however avoided introducing the *ius soli* principle even in this limited case. The citizenship is not accorded because the child was found on German soil but instead the law establishes a legal presumption that the child is born to German parents to justify the German citizenship. See *Reichs- und Staatsangehörigkeitsgesetz* vom 22. Juli 1913, Art. 4 (2): Ein Kind, das in dem Gebiet eines Bundesstaates aufgefunden wird (Findelkind), gilt bis zum Beweise des Gegenteils als Kind eines Angehörigen dieses Bundesstaates.


Unfortunately DAHL’s criterion of inclusiveness leaves an often used **loop hole** for exclusivist nations by excluding “transients”. He includes in this category foreigners who reside temporarily in the country.\(^{840}\) The meaning of ‘temporarily’ however is not clear. Some countries are very restrictive with naturalizing immigrants.

In Germany most persons who are not of German ethnicity are relatively **recent immigrants**. In 1992 Germany was the country with the highest immigration per capita in the world. It has the third highest percentage of foreigners in Europe.\(^{841}\) There is only a very small ethnic minority that is historically settled on German territory. By denying these immigrants the German nationality Germany excludes them from the political process.\(^{842}\)

The United States on the other hand relies on the *ius soli* principle and accords American citizenship automatically to all persons born on the territory\(^{843}\) and grants a right to American citizenship to all legal immigrants after 5 years of residence.

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\(^{840}\) See DAHL 1989, 128.

\(^{841}\) See GREIFFENHAGEN 1997, 106-07: Therewith Germany had a higher immigration rate than the traditional immigration countries. Still Germany always stressed that it is not an immigration country and does not wants to be regarded as multicultural. The recent discussion on the *Leitkultur* is a further example on the importance of culture for the national identity. For further information on the debate on new minorities and Germany as an ‘immigration country’, see FIJALKOWSKI 1998, 167-89; OLDENQUIST 1998, 225-40.

\(^{842}\) See LIMOUSIN, 1988, 7: Alain LIMOUSIN posed the question, how long someone should be considered an immigrant, for a paper about a history of immigration for France: “jusqu’à quand considérera-t-on une population comme immigrée, alors qu’il s’agit normalement d’un état transitoire et théoriquement non héréditaire? S’en tiendra-t-on au critère de la nationalité ou interrogera-t-on de degré d’intégration dans la société dominante?”.

He does not find a convincing answer and concludes based on this open question and on other factors that it is impossible to write a history about immigration.

\(^{843}\) Citizenship is in this case accorded even if the parents just arrived and do not (yet) have an attachment to the United States or do not even plan to stay. Already 24 hours after refugees from Kosovo arrived a child was born that got automatically the American citizenship, see The NEW YORK TIMES. May 7, 1999. Exodus from Kosovo Produces First United States Citizen, B1, B6. In most other countries this willingness to create new co-nationals does not exist.
The only possibility to bar DAHL’s loop hole is to demand that only non-residents may be excluded. Then however hardly any country meets the standards of democracy any more.

As a concession to democracy Germany reviewed its naturalization laws to be able to grant citizenship to persons who are not members of the nation. The legislator in Germany just passed a new naturalization law that facilitates the naturalization of its seven million foreigners. Children of non-German parents who are born in Germany have a right to German citizenship until the age of 23 even when they have an additional citizenship. When they reach the age of 23 they will have to decide for one citizenship\textsuperscript{844}. This law is the first serious attempt to loosen the otherwise strict \textit{ius sanguinis} principle.

The distinction between nationality and citizenship is opposed to the pursued equation of the \textit{demos} and the nation and compromises the notion of a nation-state. In this case the granting of citizenship does not necessarily bring the inclusion into the nation. Inclusion into the German nation demands complete assimilation to German culture\textsuperscript{845}. Many new citizens are not willing to renounce all old affiliations and therefore prefer to remain outside of the nation.

Today someone can have German citizenship without being a member of the German nation, or can be a member of the German nation without having German citizenship e.g. as a Romanian of German descent. He or she can be a German citizen and a member of the German nation at the same time or can be neither a German citizen nor a member of the German nation while living in Germany\textsuperscript{846}. Citizens


\textsuperscript{845} The states that emerged out of Yugoslavia adhere to an ethnic nation-concept and ethnic membership criteria for citizenship. People had to decide which membership to acquire. With the acquisition of membership in one nation they got at the same time excluded from the other. This was most of all problematic for persons with relatives in both nations and who viewed themselves as Yugoslavian and not e.g. as Serbian or Croatian.

\textsuperscript{846} Same conclusion in PREUSS 1994, 150.
of Germany who are not of German nationality have equal rights but are still unequal. They are unequal in rights.

Ethnic nation-states have to compromise the nation-state principle in order to fulfill the inclusiveness requirements of democracy while to civic nations inclusiveness comes naturally as one feature of the nation concept. While in the civic nation-state citizenship requirements tend to be identical with national membership requirements the attempt to fulfill the criteria of democracy of the ethnic nation-state leads to a disparity of citizenship and nationality.

The disassociation of citizenship and nationality can lead to a legitimacy crisis because it jeopardizes the homogeneity of the demos and questions the objective of the state to be the expression of the nation. The adherence to national citizenship however impairs democracy and curbs therewith the rational legitimacy of state actions.

Only a transformation of the ethnic national identity into a more open identity can promise a way out of the legitimacy dilemma. The high...
regard for universal human rights and democracy are already a promising beginning.

V. Conclusions

What made American, French, and German nationalism successful created at the same time some of Germany’s, France’s, and the United States’ biggest problems.

All three nation-states show important limits in respect to normative diversity. None of the three nation-states actively promotes diversity but they try to overcome diversity. In all three cases the promotion of diversity would question the nation-state. In the American and the French case the promotion of diversity would question the nation while in the German case the promotion of diversity would question the nation-state.

The strength of American nationalism is obvious. American nationalism managed to create an identity, which did not rely on ethnicity, religion, or cultural criteria. To assure that cleavages due to ethnic, cultural, or religious diversity will not become insurmountable and impair the possibility of peaceful living together it banned cultural issues to the private sphere. The culture blindness necessitated the separation of the private and the public sphere.

The vice however is inherent in the strength. On the one hand a complete separation between private and public is impossible. On the other cohesion could only be reached by disregarding cultural

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848 Same conclusion in PREUSS 1998, 128.
849 In the American case the recognition of the First Nation Peoples as equally constituting the American state would question similar to the case in Germany the nation-state.
850 As well the German and the French concepts defined some cultural differences as irrelevant for the nation, e.g., religious (Christian) diversity in the case of Germany and ethnic diversity in the case of France. However Germany and France defined some cultural elements as relevant for identity, e.g., ethnicity for Germany and language in France. In respect to Germany, see PREUSS 1998, 126-27.
affiliations and with it group identities and stressing pervasive individualism instead.

French nationalism tried to include like the American nationalism all citizens. However it did not banish culture from the national agenda but created a common French culture. French nationalism avoided the American deficit of culture-blindness but created other limits concerning diversity accommodation.

Because the French nation presupposes the inclusion and assimilation of all citizens, non-assimilation poses serious problems. Factual minorities will not be recognized because from the system point of view they cannot exist.

German nationalism relied on prepolitical culture. It did not presuppose inclusion and assimilation but created homogeneity through exclusion of all who did not share the German culture. Therewith it avoided both the French and the American limits concerning the accommodation of diversity. German nationalism did not exclude culture and it did not presuppose the belonging of those who felt that they did not belong.

The ethnic nation as integrative element in the nation-state poses however a serious problem. The danger of ethnic nationalism in this respect is obvious. The exclusion of other cultures opens the doors to minority protection of excluded groups but as well and predominantly to discrimination. The holocaust showed the extent of the danger. Even today the exclusion of the over seven million foreigners in Germany from the nation questions democracy and poses Germany’s most delicate problem. Minorities can receive a special status and/but they are excluded from the constitutive level based on the nation-state principle.
§ 15. Swiss Counter-Approach: Accommodating Diversity

Switzerland will be used as counter-example to the three classic concepts described above because it tries to accommodate diversity. Switzerland can show that diversity assertion need not jeopardize national identity and unity when the diversity is accommodated. Switzerland is therewith the empirical prove that a nation-state can (at least to some extent) accommodate diversity.

Switzerland is an atypical nation-state because of Switzerland’s limited modernity. It can even be put the question whether Switzerland’s institutional design is a relict of premodernity or perhaps the first and early glimpse at post-modernity. The Swiss State and its institutions developed pragmatically. The specificity of the Swiss nation-state concept is not so much the result of modernization but is due to the reluctance to complete modernization.

A contextual (empirical) approach will be able to explain best why Switzerland developed as it did and especially why it is willing and able to accommodate diversity.

The Swiss nation is normally described as a “Willensnation”, a nation that exists as long as and only because the Swiss or more precisely the constitutive groups are willing to be Swiss. Belonging to the Swiss nation includes similar to French national identity a voluntaristic element but while the French national consciousness relies on the will of the individual the Swiss nation is dependent on the will of the different composing groups.

The Swiss nation concept is an alternative to the purely civic or purely ethnic nation concepts. The Swiss nation is based on communal civism. On the one hand it relies like the French or the American nation concept on citizenship, however, the notion of the citizen is

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851 See e.g. LINDER 1999, 30; KOLLER 1998b, 103; FLEINER 1999, 420-22; critical STEINBERG 1996, xiii.
852 See FLEINER 1998b, 94.
853 See BASTA FLEINER 2000a, 77-82.
different. The citizen does not receive or enjoy his participation rights as an individual based on the principles of liberal universality but as a member of a pre-constitutional community, e.g. the canton or the commune. The Swiss concept of the nation relies therefore partly - like the German nation concept - on pre-political criteria.

The combination of prepolitical criteria and civism explains why so many scholars disagree about how to classify the Swiss nation. Some describe Switzerland as an ethnic nation, others as a civic nation. Both views are not completely accurate as will have to be shown.

The Swiss nation developed hand in hand with the consolidation of the Swiss State. A feeling of belonging together managed to create a unity despite of all differences. The Swiss nationals speak either Swiss-German, French, Italian, or Romansh. The nation does not have a common religion and the members belong to various different ethnicities. The Swiss nation encompasses diversity.

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854 See BASTA FLEINER 2000a, 79-81.
855 See e.g. SMITH 1991, 27: "Armenians, Swiss, Czechs, Kurds and Sikhs afford other instances of strategically located communities whose sense of common ethnicity ... was crystallized time and again by the impact of protracted warfare between foreign powers in which they were caught up" (emphasis mine). KRIESI 1999, 16-17: He bases his argument on citizenship law according to which citizenship is ascribed based on ius sanguinis.
856 See e.g. LINDE 1999, 30.
857 The example of Switzerland shows therefore as well that the distinction between civic and ethnic nations may be useful for some purposes but is not completely satisfying for a classification. See in this critique as well BRUBAKER 1999, 69.
858 Most Swiss are not multi-lingual. According to a 1990 census 63.7% of the population speak German, 19.2% French, 7.6% Italian, 0.6% Romansh and 8.9% other languages, see SWISS FEDERAL STATISTICAL OFFICE http://www.statistik.admin.ch/stat_ch/ber16/eufr16.htm (April 2001).
859 The population is mainly divided between Protestants and Catholics. The CONSTITUTION OF 1848 accorded religious liberty only to members of christian religions. Restrictions to free movement in one of the cantons were forbidden as long as the person had Swiss citizenship and belonged to one of the christian religions (Art. 41 of the SWISS CONSTITUTION OF 1848 cited in BLUNTSCHLI 1977 [1875], 438). The freedom of movement of persons with non-christian denomination could therefore be restricted. All cantons used this possibility and restricted the freedom of movement of their Jewish population. Only the
The different sovereign cantons united in order to protect themselves against the influence of the powerful neighbors without giving up their distinct identities. The often-claimed right to be and to remain different and free is important for the understanding of the meaning of being Swiss. In William Tell by Friedrich Schiller, a book that describes the founding myth of Switzerland, the fight of the Swiss against tyranny or freedom is the most prominent motif. Freedom must be here understood mainly as the absence of foreign influence and not so much as personal or individual freedom.

The foundation of Switzerland promised the cantons the opportunity to form a unity while preserving diversity. Diversity became a prime value of the nation. Federal institutions were supposed to institutionalize the given cultural diversity. Within the institutions

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860 See e.g. the first treaty of August 1, 1291 between Uri, Schwyz and Unterwalden, that is considered the founding document of Switzerland (for original text in Latin see Bluntschi 1977 [1875], 1).

861 See Schiller 1952, esp. Act II, Scene 2, 57-76.

862 Cf. Dürrenmatt 1991, 15-23: In a critical and cynic speech in honor of Vaclav Havel he compares Switzerland with a prison in which the Swiss fled because only there they felt safe from outside turmoil. E.g. at 15: “So läßt sich Ihren tragischen Grotesken auch die Schweiz als Groteske gegenüberstellen: als ein Gefängnis, wo man sich die Schweizer geflüchtet haben. Weil alles außerhalb des Gefängnisses übereinander herfiel und weil sie nur im Gefängnis sicher sind, nicht überfallen zu werden, fühlen sich die Schweizer so frei, freier als alle anderen Menschen, frei als Gefangene im Gefängnis ihrer Neutralität.” And at 16: “Das Gefängnis braucht keine Mauern, weil seine Gefangenen Wärter sind und sich selber bewachen, und weil die Wärter freie Menschen sind, machten sie auch unter sich und mit der ganzen Welt Geschäfte, und wie! und weil sie wiederum Gefangene sind, können sie nicht der UNO beitreten, und die Europäische Wirtschaftsgemeinschaft bereitet ihnen sorgen.”

863 Cf. Fleiner 2000b, 149: He writes: “Switzerland is by self-definition a ‘non nation-state’. The only legitimacy for the unity of the Swiss Confederation is a political concepts of direct democracy, federalism, a specific system of government, liberty of religion and equal rights of the three official languages German, French and Italian.” However, as argued above, when the nation is understood as a composed nation, the promotion of diversity need conceptually not negate the nation-state.

864 See Basta-Fleiner 2000a, 77-82.
differences become politically expressed\textsuperscript{865}. Compromises are the legitimate and legitimizing way to address political conflicts. The maintenance of diversity or at least of given diversity became a prime value of the nation.

However the Swiss nation is \textbf{only able to accommodate the given and institutionalized diversities} of the pre-constitutional communities. The main limit of the Swiss nation concept consists in the inability to integrate groups, which are not given and institutionalized from the structural point of view, e.g. foreigners, except through willing assimilation.

I. Nation-Building

Switzerland’s political history can be summarized as the continuous balancing of power to combine the highest possible degree of self-rule of the cantons with a low level of centralization. The maintenance and the promotion of structural mainly cantonal diversity legitimized the confederation and later the federation.

Here mainly those aspects of Swiss history will be stressed that are relevant for the Swiss understanding of the nation-state: the development of the state, diversity, compromise- or consensus-driven democracy, federalism, neutrality and finally of Swiss identity. These developments are depicted chronologically.

Swiss history can be divided into several eras. In the time between 1291 (the founding date of Switzerland) and 1798 (the French invasion) Switzerland consisted of a weak union of the sovereign cantons. At this time political and religious diversity characterized Switzerland, which already then adopted policies of compromise and neutrality for internal and external peace (1.). In 1798 the French invaders tried to introduce a centralized system that failed, however some ideas of liberalism and democracy were preserved at least in some parts of Switzerland. The

\textsuperscript{865} The Swiss Constitution does not give the cultural communities as ethnic communities relevance but accepts cultural communities as democratic communities. See \textbf{FLEINER} 1999, 422: He argues that the Swiss Constitution created a \textit{demos} composed on the \textit{demoi} of the cantons.
new cantons that were admitted during this time added linguistic diversity (2.). After the centralized system had failed Napoleon introduced a confederal system (3.). After the defeat of Napoleon tense discussions about the degree of modernization and about Swiss identity took place (4.) that finally led to the nation-state design of today (5.).

1. Safe-Guarding Diversity: Switzerland before 1798

Switzerland celebrates its founding year as the year 1291. In 1291 the three Cantons Uri, Schwyz, and Unterwalden signed a treaty in which they pledged to defend and support each other in the case of foreign interventions and to resolve all disputes among themselves through arbitration in order to safeguard local sovereignty and independence. The treaty was supposed to safe-guard external independence of the union and to protect the internal power structure.

Other cantons joined the union. Lucerne (1332), Zurich (1351), Glarus (1352), Zug (1352) and Berne (1353) were the first to join and formed with the three original cantons the Union of the Old Eight Cantons.

This Union was enlarged with the adhesion of Fribourg and Solothurn in 1481. The rural cantons of the Union of the Old Eight Cantons were first opposed to this enlargement of the Union because they feared that the two new city cantons would increase the disbalance between urban

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866 The here used terminology is imprecise. The expression canton was only introduced under French occupation. Before the cantons were called Ort or Stand.

867 Based on this view of Swiss history, federalism or at least certain federal elements are a pre-constitutional paradigm.

Cf. as well LINDER 1999, 27: The aim to protect local independence did not hinder the cantons to annex territory and to create subjected areas.

See DE ROUGEMONT 1989 [1970], 49. According to him the motto of the treaty was to unite in order to stay different: “Ils s’unissaient, en somme, pour rester différents!” (emphasis in original).

868 For instance the population of the three first cantons defended the city of Zurich against its rebelling rural population.

869 Bund der alten acht Orte.
and rural influence. Finally Fribourg and Solothurn were accepted with unequal rights (*Stanser Verkomnis*) in order to maintain the balance of power. The *Stanser Verkomnis* is the first important compromise in Swiss history. Basel and Schaffhausen joined the Union in 1501, Appenzell followed in 1513.

The new cantons did not sign and ratify the treaty of 1291 but concluded new treaties with all or some of the members of the Confederation. The Swiss Confederation was a union at different speeds.

Because of the continuance of cantonal sovereignty the cantons developed different political regimes. Most cantons had oligarchical systems that were to differing degrees centralized. The mountainous cantons relied for many decisions on the so-called *Landsgemeinde*, an assembly of the citizens that ruled through direct democracy. Cantonal self-rule created political diversity.

The Reformation added a new type or diversity: religious diversity. With the Reformation Switzerland became a patch work of different religious (Catholic and Protestant) groups. Religious cleavages soon developed into an issue of political debate.

The Thirty Year War increased religious cleavages and threatened the unity of Switzerland. Neutrality became a question of survival. Neutrality was the decision not to have a foreign policy in order not to

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870 See e.g. HILTY 1891, 104-05.
871 DE ROUGEMONT 1989 [1970], 44-45. Zurich for example concluded treaties with six cantons of central Switzerland and Berne. Berne on the other hand entered the union only in respect to the three founding cantons.
872 The maintenance of local diversity was not questioned by an unequal status in the confederation. Inequality could only question the purpose of the confederation when it included predominance of one of the members and therefore enabled factually a centralization of decision-making. Suspicion against predominance developed because hegemony never respects diversity, nor traditions and privileges of other groups. Paradoxically even a union that shall promote diversity will lead to some equalization to prevent the possibility of predominance. The guarantees of the defense agreement with the principle of arbitration for all conflicts among the cantons assured the inviolability of the small cantons and frustrated attempts for hegemony of the bigger cantons.
take sides in the conflict. Towards the end or the war the Swiss even managed to organize a common Protestant and Catholic defense against intrusion from the outside.\footnote{873}

The \textit{independence} of the 13 cantons was legally recognized after the Thirty Year War in the \textit{Westphalian Peace} of 1648. Therewith the union was official released of the Empire and formed from then on a loose confederation.

Until 1798 Switzerland stayed a \textit{loose union} united by a system of contracts between the different members. Switzerland consisted of 13 different mainly Germanic cantons as sovereign members, two allied \textit{Orte} and four subjected areas.

During about 500 years the loose confederation was a \textit{sufficient basis} to protect the liberties of the cantons. Swiss soldiers fought not only for Switzerland or their canton but also in about every war for about every power in Europe.\footnote{874} The military service for foreign powers was an important economic factor for Switzerland.\footnote{875}

When however \textbf{wars became national} and with it more political the influence of the Swiss military decreased. The new philosophy of war initiated through the French Revolution to fight “for the nation” which necessitated the identification with the nation excluded the Swiss soldiers. Nationals were supposed to fight and to die for their nation-state. From now on the size of the army depended on the size of the population. The nationalization of wars had as well a second side effect. To organize an army composed of untrained men a strict discipline and hierarchy became necessary.\footnote{876}

\footnote{873}{For the Thirty Year War and the so called \textit{Defensionale von Wil} see Körner 1986, 433-38.}
\footnote{874}{See De Rougemont 1989 [1970], 56-59; Favre 1970, 61: He stresses however that already in the 16th century Switzerland did not and could not conduct a policy of territorial expansion because of the missing unity of action and of political ideas.}
\footnote{875}{Contrary to other West-European states Switzerland did not have colonies. Therefore military service in foreign armies was one of the only ways to profit from the economic gains of colonies.}
\footnote{876}{See De Capitani 1986, 475.}
The armies of the Confederation could no longer compete numerically and discipline-wise with the new armies of the nation-state. The treaty system on which the Confederation was based was inflexible and no longer sufficient for an effective common defense.

In the future the effective protection of diversity would need a stronger centralization. Stronger centralization in the future was a reaction to nation-state building in the neighboring countries. However the cantons did not attempt to catch up but paradoxically the centralization was a means not to modernize the Swiss State completely. Centralization had to increase the effectiveness of the union or the State so that the cantonal sovereignty could be further protected.

The decrease of military importance went hand in hand with an increase of discontent about existing inequalities. There were differences between the city cantons and the rural cantons as well as between Catholic and Protestant cantons. There was discontent because of corruption, differences in wealth and power, or because of the status as subjects. Some of the discontented looked towards the outside for help. The French were willing to annex Switzerland because of its strategic position between Austria and Italy. Armed opposition against an invasion was rightly expected to be poor.

2. The Unsuccessful Attempt to Create Unity in a Centralized State

In 1798 the French invaded Switzerland and forced on Switzerland its first constitution and constituted with it the Helvetic Republic, a

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878 See FAVRE 1970, 19: Peter Ochs and La Harpe demanded the French Directoire to intervene to start in Switzerland a revolution. An incident at the border functioned as the pretext for the French invasion.
879 See AUBERT 1967, 4.
880 See FAVRE 1970, 19: It was the Swiss Peter Ochs who prepared the draft of the Helvetic Constitution. The Constitution was modeled to resemble the French Directorial Constitution.
strongly centralized state which was in organization similar to the French state\textsuperscript{881}.

\textit{A. The French Idea of a Swiss State and a Swiss Nation}

The territory was divided into 19 cantons, which were more or less equal in size. These cantons were only administrative units with neither a right to self-rule nor to shared rule\textsuperscript{882}. Sovereignty became completely centralized. The founding of the Helvetic Republic was a \textbf{decisive rupture} in Swiss history that carried with it a legitimacy and identity crisis\textsuperscript{883}. The institutions meant a complete break with Swiss traditions and the abrupt transformation from a confederation of states to a centralized unitary state\textsuperscript{884}. The power holders tried to forge a Swiss nation to overcome the deficit of legitimacy and identity\textsuperscript{885}.

The Swiss nation should \textbf{resemble the French nation}. All citizens as free and equal partners should form the nation and from the nation should emanate undivided and indivisible sovereignty\textsuperscript{886}. One Swiss national citizenship was introduced in the place of the cantonal and communal citizenship that existed before\textsuperscript{887}. Patriotism, the identification with and the love for the mother country, should create unifying emotion\textsuperscript{888}.

During the Helvetic Republic a \textbf{Swiss nation did not emerge}. The institutions that worked so well in creating a nation in France, the centralized school system and the army were missing in the Helvetic

\begin{thebibliography}{99}
\item \textsuperscript{881} See Guggenbühl 1998, 33; Favre 1970, 19.
\item \textsuperscript{882} For the concepts of self-rule and shared rule, see e.g. Stauffer & Töpperwien 2000.
\item \textsuperscript{883} See Guggenbühl 1998, 37. The only Swiss trait of the constitution was its title, which called the constitution a Helvetic Constitution.
\item \textsuperscript{884} See Aubert 1967, 5.
\item \textsuperscript{885} See Guggenbühl 1998, 37.
\item \textsuperscript{886} See Guggenbühl 1998, 37. Of course only in theory, actually the Helvetic Republic was a protectorate of France.
\item \textsuperscript{887} See Favre 1970, 19-20.
\item \textsuperscript{888} See Guggenbühl 1998, 42.
\end{thebibliography}
Republic. The experience of diversity without unity was still stronger than an experience of diversity in unity.

Already very quickly it became obvious that a centralized system could not work in Switzerland. The Helvetic Republic did not stay all the time unitary. Napoleon was forced to re-institute in Switzerland a decentralized system of state organization and therefore to rely again on the pre-political identities of the cantons as main legitimacy basis. The French idea of the nation was too far removed from Swiss reality. Not even politicians were able to explain the basis for the supposed unity and solidarity in a centralized state\textsuperscript{889}.

With the \textit{Malmaison projects} Napoleon suggested already in 1801 a federal system for Switzerland. He was inspired mainly by the American Constitution of 1787\textsuperscript{890}. The Swiss Constitution of 1802 took over some ideas of these projects and introduced a system with some federalist features. This Constitution was even accepted in a referendum\textsuperscript{891}.

The French rulers demanded housing and food and several taxes. Parts of France’s battles against other powers were conducted on Swiss territory. The harvest was poor and the winter hard. This led to an explosive atmosphere and several attempted coups d’état were the result\textsuperscript{892}. For the time of the Helvetic Republic AUBERT distinguishes a

\textsuperscript{889} See GUGGENBÜHL 1998, 38: Already in 1798 a fight about languages erupted. German speaking members of the Grosse Rat (Parliament) claimed that the Swiss nation had to be a German nation. Of course the French- and Italian-speaking co-citizens did not agree. All statutes were therefore drafted and printed in all three languages and the money received a Latin imprint. To prevent the breaking apart the government had to accept that the centralized unified state would not have a centralized and unified language.

\textsuperscript{890} See AUBERT 1967, 6-7; F. FLEINER 1923, 2.

\textsuperscript{891} See AUBERT 1967, 6-8. For the adoption of the Constitution it needed the approval of the majority of the population. Abstentions were however counted as approval. About 92500 voted against, 72500 in favor and 167000 abstained. The Constitution was therefore adopted.

\textsuperscript{892} See AUBERT 1967, 6.
minimum of nine different political regimes which were to differing degrees centralized or federalist, democratic or authoritarian\footnote{See Aubert 1967, 9; as well F. Fleiner 1923, 2.}

\textbf{B. The Heritage of the Helvetic Republic}

The heritage of the Helvetic Republic is more \textbf{decisive} than normally perceived. For the first time the cantons were attributed equal status. The equality was preserved from then on with minor exceptions\footnote{See Hafelin & Haller 1998, 16; Linder 1999, 27.}. Additionally ideas anchored in the French Revolution were introduced\footnote{See Hafelin & Haller 1998, 16.}

Because of the equality of the old and new cantons the Helvetic Republic had a further very important outcome. While before 1798 the Swiss Confederation of the thirteen \textit{Orte} was predominantly Germanic now Italian and French speaking cantons joined the Union as equal members\footnote{See Aubert 1967, 9; cf. Labrot 1998, 135-40: He describes the specificity of the identity of the French-speaking part of Switzerland due to the later adhesion to Switzerland and to the different political tradition.}. \textbf{Linguistic diversity} gained importance. Additionally the borders of the Cantons created by Napoleon did not take religious affiliation of the population into account\footnote{See F. Fleiner 1923, 3.} so that a \textbf{cross-cutting of cleavages} was introduced\footnote{The cross-cutting of cleavages is one reason why a complete fragmentation between religious or linguistic groups did not happen.}

For the first time Switzerland had experienced political systems different from a confederal system. For the first time it had had a council as an executive, a bicameral parliament, had been confronted with the idea of a mandatory school system, with an income tax, and with the idea of liberalism and fundamental rights granted in the Constitution of 1798 even though soon again restricted\footnote{See Aubert 1967, 10.}. 

3. **Unity in Switzerland Cannot Mean Unification**

Through the Act of Mediation in 1803 Napoleon concluded the *Malmaison* projects. He introduced a **confederate state organization** even though he called it federal. The thirteen cantons received again sovereignty. They lost however the subjected areas. St. Gall, Grisons, Aargau, Thurgau, Tecino, and Vaud were accepted as independent cantons.

The Mediation Act distinguished three different types of cantons: rural cantons, city cantons, and new cantons. In the rural cantons the *Landsgemeinde*, the assembly of all citizens, was reintroduced. In the city cantons moderate aristocracies or estate systems were reestablished and in the new cantons representative democracy was introduced. The confederal institutions received only very few and limited competencies, for instance in the fields of defense and foreign policy.

The Mediation Act guaranteed the status of the cantons and the federation as such. Napoleon as mediator officially had to consent to every change of state organization. The new state organization was much closer to Swiss traditions. Switzerland stayed however factually

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900 See e.g. Aubert 1967, 14; Favre 1970, 22. State organization in the mediation Act was more similar to a confederation than to a Federation if we regard the legal quality of founding document which was a contract and not a constitution, the institutions which only represented the cantons and not the population as a whole, and the fact that changes of the Mediation Act were only applied to the Cantons which accepted the amendment.

901 See Häfelin & Haller 1998, 16.

902 See Aubert 1967, 12: The most important confederal institution was the Diet which functioned similar to a bicameral parliament. The cantons sent instructed representatives. The six most populous cantons had each two votes the other cantons each one. Concerning disputes among the cantons however the votes of all cantons had the same weight. The presidency rotated among six ancient rural cantons of whom three were Catholic and three Protestant.

903 See Aubert 1967, 11-14: Certain cantons however did not respect this provision. They changed their Constitutions only with asking for the consent of the federal parliament, the Diet. Additionally decisions of the Diet to change the Act of Mediation were only applied in respect to the cantons whose instructed representatives had voted in favor.
and legally subjected to France with the status of a protectorate\textsuperscript{904}. The imposed political regime was never really accepted by the population\textsuperscript{905}.

The common resistance against France created an (even though weak) feeling of unity\textsuperscript{906}.

4. How Centralized Shall Switzerland Be?

A. Restoration

After the reign of Napoleon the Restoration started. The Confederation of the Mediation Act dissolved and the old and new cantons formed a new confederation, which was much looser than the one of 1803. Again the cantons or the peoples of the cantons were the basis of legitimacy. A completely unitary system was never again introduced nor seriously attempted.

Within many cantons the old rulers seized power and tried to institute conditions similar to before 1798\textsuperscript{907}. While individual inequalities were re-instituted the equality of the new and the old cantons remained. The new cantons had opted for a much closer union but as a concession for their equality they accepted a very weak central power\textsuperscript{908}. The pact the cantons could finally agree on was very vague and imprecise and did not even guarantee explicitly the equality and the borders of the new cantons\textsuperscript{909}. In contrast to the situation before 1798, however, the cantons were united based on only one pact instead of a whole system of treaties\textsuperscript{910}.

\textsuperscript{904} Instead of many F. Fleiner 1923, 3; Aubert 1967, 11.
\textsuperscript{905} See Favre 1970, 22.
\textsuperscript{906} See Andrey 1986, 602-03.
\textsuperscript{907} See Häfelin & Haller 1998, 17.
\textsuperscript{908} See Aubert 1967, 15.
\textsuperscript{909} See Aubert 1967, 16-17.
\textsuperscript{910} See Aubert 1967, 17.
In order not to increase the strong internal tensions between the cantons the Diet decided that **Switzerland should remain neutral** towards the outside. Neutrality should not only promote external peace by avoiding that Switzerland became the target of strategic power politics of the surrounding countries. The nation-state building processes in the neighboring countries rendered the neutrality of the cantons even more vital for Switzerland than it was before.

The nationalization of politics demanded exclusive loyalty of the citizens as nationals. Switzerland with its territorial position between France, Germany, and Italy and its French, German, and Italian speaking population had to abstain from taking sides in the conflicts among the neighboring countries. Only neutrality could avoid that any of the different constitutive groups of Switzerland who nevertheless felt close and loyal to the respective populations of the neighboring countries felt excluded in Switzerland. External neutrality should therefore promote internal peace.

At the **Vienna Congress** in 1815 the neutrality of Switzerland and the new cantons were explicitly recognized. Furthermore the cantons that had formerly been rulers over subjected areas were granted an indemnity. Three additional cantons were welcomed into the confederation: the Valais, Geneva and Neuchâtel, the latter with a very ambiguous status because it was at the same time a principality of Prussia. Switzerland lost as well some territory (the Valteline, Bormio, and Chiavenna).

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911 See Aubert 1967, 14-15.
912 See e.g. De Rougemont 1989 [1970], 78.
913 Berne who had to accept huge territorial losses was accorded the city of Bienne and parts of the canton of Basel which form the Jura today.
914 The ambiguous status threatened Switzerland because there were attempts to rule Switzerland from Neuchâtel and to bring Switzerland back into the German Empire. In 1848 the Republicans declared Neuchâtel unilaterally independent of Prussia. In 1857 the independence from Prussia was officially recognized in the Paris treaties.
915 See Aubert 1967, 17.
B. Regeneration

In 1830 an important change took place. During the regeneration period mainly the progressive Protestant cantons started to argue in favor of a federal state. One main reason for the pressure to form a federation was based on economic reasons. Industrialization necessitated a larger economic market. The projects for a more centralized federal state gave new importance to nation building. Centralization should further integration and integration should again facilitate centralization. The July Revolution in France readied the arguments for change.

Between 1830-46 still a multiplicity of different understandings of identity existed. There was an important difference between the feeling of belonging in the Protestant in comparison to the understanding of identity in the Catholic cantons. Nationalism in the 19th century tried to integrate all members of the Swiss society rationally and emotionally but its philosophy was mainly based on Protestant thought.

Catholicism was based on universality and hierarchy. Rome required loyalty of the members of the Catholic Church with disregard to state borders. The Protestant churches in Switzerland were organizationally limited to the different cantons and were organized democratically. Liberal ideas were therefore closer to the Protestant Cantons and did not contradict church and state organization.

916 See Kreis 1999, 172.
917 See Altermatt & Bosshart-Pfluger & Tanner 1998, 13: Even the centralization of the post was argued not only based on economic reasons but even mainly with the need to strengthen the national unity.
918 This shows that the animosity against France because of French occupation decreased quickly. Metternich was now viewed as more threatening to Swiss independence than liberal France.
919 See Meyerhofer 1998, 49.
921 See Meyerhofer 1998, 57.
922 Mainly followers of Zwingli and Calvin.
French liberal ideas gained importance in the Protestant cantons. The republicans in the 1830s defined the Swiss nation by relying on the principles of the French Revolution. Nation membership should mean popular sovereignty, equal liberty, equal rights and equal happiness for all citizens. Two years after the July Revolution twelve Swiss cantons had revised their constitutions to reflect the liberal ideas.

The Republicans relied on Swiss history i.e. on the motif of freedom to defend their position that Switzerland had to establish a Republican form of government to purify itself and to get rid of the remaining influences of the aristocracy. The motif of freedom reached centrality particularly as opposition to the conservative (more aristocratic) Catholic cantons and was often openly anti-clerical.

For the creation of the nation a political consciousness should be created through which a mobilization not only of an elite but also of the whole (male) population could take place. With the Regeneration in the liberal Protestant cantons an identity which could overarch religious and cantonal diversities started to develop.

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925 See Meyerhofer 1998, 53.
926 See Altermatt & Bosshart-Pfluger & Tanner 1998, 12.
927 See Favre 1970, 23-27: The Catholic cantons started to fear the anti Catholic sentiments already in 1815. Therefore they pressed for an article in the pact which guaranteed the status of convents in the Swiss cantons. The violation of this article in the 1830s led later to the formation of the Sonderbund (see below at § 15 I.4.C.).
929 See Cribelz & Hofstetter 1998, 170-72: For instance in Geneva until 1846 history was reduced to historical moralizing lectures with an overarching Christian message. While in the beginning the Christian message was based on Protestant values later on it became more open to integrate as well the Catholic population in Geneva. In 1846 Swiss history was first introduced as a subject in the curriculum of schools in Geneva. Christian values became substituted by a Republican messianism and the Republican government tried to achieve a complete separation between church and religion.
The Cantons with a Protestant majority used extensively the school system to create and transmit national values similar to France. The new educated middle class demanded influence in the political process. A democratization of politics and life in general took place and the Protestant cantons demanded a revision of the confederation treaty to reflect the new liberal ideas. In 1832 a first project for a revision of the pact to introduce federal elements was presented. This project however was too far reaching in the eyes of the conservative cantons and not enough centralized for the liberal cantons.

C. The Sonderbund War

The political elite in the Catholic cantons felt threatened by this development. The identity of the population of the Catholic, mainly

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930 In Catholic Cantons these attempts were largely missing. Schools were often religious schools and propagated anti-liberal and anti-national values.
931 See LINDER 1999, 34.
932 See HÄFELIN & HALLER 1998, 17.
933 For the Project Rossi, see e.g. FAVRE 1970, 25.
935 See FAVRE 1970, 26-27: The conservative Catholic cantons had reasons to feel threatened. For instance in 1832 seven liberal cantons concluded a treaty in which they promised each other to defend their liberal constitutions. These seven cantons agreed for example on “ecclesiastic reforms” which included the control and influence of the state over convents as well as the guarantee for mixed marriages.

The canton of Aargau, in which there existed nearly numerical parity between Protestants and Catholics, adopted a constitution which abolished the equal representation of the two confessions in the political institutions. A bit later the canton voted in favor of the dissolution of the Catholic convents on the territory of the canton of Aargau, even though the existence of convents was guaranteed in the Confederal Pact. The Diet (confederal institution) ordered the canton to respect the pact. This order was however not executed. The canton even proposed to the Diet to prohibit the convent of the Jesuits. As a counter reaction the canton of Lucerne invested the convent with the absolute control over the education system in their canton. Armed groups from the canton of Aargau and Berne attacked Lucerne without that the confederation would have helped the attacked canton as guaranteed in the confederal pact. The formation of a special union for defense purposes between the conservative cantons was the outcome of the omission of the confederation.
rural cantons was still much more defined by religious and cantonal affiliation than by a common Swiss identity. The Cantons and the religion stayed the main source of identity. Religious beliefs did not only influence politics but religious affiliation decided over political influence.

The Catholic cantons formed a secret special union (Sonderbund) and pledged to defend each other against the Protestant cantons whenever necessary. According to the Confederal treaty special unions between the members of the confederation were forbidden. When the Protestant cantons in the Diet (the only confederal institution) found out about the secret union they pleaded for its dissolution. Instead of dissolving the Sonderbund the Catholic cantons left the Diet. The Diet decided to dissolve the Sonderbund with force. The Sonderbund War started.

The Sonderbund War was short (26 days) and ended with the complete defeat of the Catholic cantons. Only little more than one hundred lives were lost. The victory of the Protestant cantons meant as well the

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936 See CRIBLEZ & HOFSTETTER 1998, 184. In Protestant the identity was transformed earlier than in the Catholic cantons. Similarly as well KRIESI 1999, 14; but cf. LINDER 1999, 28: he puts the stress a bit differently. While CRIBLEZ & HOFSTETTER pay more attention to the different development of identity and religious denomination, LINDER stresses that the conservative minority opposed the progressive cantons in their attempt to abolish the unanimity requirement for all decisions in the Diet. Here again we see that the overlapping of cleavages endangers unity more than crosscutting.

937 Cf. LINDER 1999, 37-40: He stresses that the Catholics were more partial to their co-followers than the Protestants. Additionally the Catholics founded a Catholic party.

938 Cf. FAVRE 1970, 26-27: This was hypocritical because the Protestant cantons had as well formed a special union to safeguard their liberal constitutions.

939 It is interesting to compare the Sonderbund War with the Civil War in the United States. Both took place about the same time and were partly fought over differing meanings of the nation (see above at § 8 I.A.). Switzerland was lucky that its war was much less bloody, partly because of the reluctance of the General Dufour to have Swiss fight against Swiss.

940 For a good, longer account of the Sonderbund War, see REMAK 1997; for a short account see LINDER 1999, 29.
victory of the proponents for a stronger centralization. However the winners moderated their demands.

Within some months a Constitution for a Swiss federal state as a compromise between the centralistic French system and the confederal system with a strong sovereignty of the cantons was drafted and voted on\textsuperscript{941}. The new Constitution of 1848 was adopted by a majority of the people and a majority of the peoples in the cantons even though the treaty of union could only have been amended with unanimity\textsuperscript{942}.

5. The Aftermath: Diversity in Unity

A. Constitutional Politics as Conflict Management

Already shortly after the adoption of the Constitution of 1848 Switzerland entered a time of constitutional stability. At that point Switzerland had found the institutions and the state organization which fitted its needs and which could work in modern times. The national identity is mainly based on the identification with this state organization.

In 1848 Switzerland adopted a constitution and an institutional set-up which is very similar to the one of today. Since 1848 Switzerland has been no longer a union of states but a federal state. The experience of the Helvetic Republic facilitated the introduction of federalism, which included some modern centralizing elements. At the same time, however, federalism included guarantees against forced

\textsuperscript{941} See LINDER 1999, 29: The different cantons had to approve the Constitution according to their rules. In the cantons of Fribourg and Grisons the parliament decided, in Lucerne a popular vote took place but abstentions were counted as approval, all other cantons conducted popular votes.

This Constitution continues the tradition of compromises.

\textsuperscript{942} For this so called bootstrapping in general and in the United States of America see ELSTER 1994.
centralization. The Constitution was therefore a compromise between the conservative and the progressive cantons.

Federalism could maintain the sovereignty or autonomy of the cantons and introduce centralization through federal institutions. Based on the examples of the liberal Protestant Constitutions democratic features were introduced (mandatory constitutional referendum, representative democracy for legislating and separation of powers). The Constitution however slightly disfavored the Catholic cantons.

From the 1860s onwards a democratization of the cantons took place and many of the direct democratic instruments in the cantons were introduced between 1860 and 1874. This democratization was initiated by the middle classes, the main losers of modernization who wanted to gain political influence by these means. The democratization did not necessitate a secularization because at least in the Protestant cantons legitimacy was not viewed as religious legitimacy.

The Constitution of 1874 continued the latent anticlericalism of the Sonderbund War and of the first Federal Constitution. The revision mainly aimed at a stronger centralization and a further democratization. A first proposal was rejected because of the opposition of the conservative Catholic cantons and the French-

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944 See KRIES 1999, 15.
945 See DE ROUGEMONT 1989 [1970], 98: “Nous avons vu que les deux réalité antagonistes sans lesquelles n’est point de fédérations, l’union et les autonomies, ne sont pas supprimées, oblitérées ni mélangées, mais au contraire composées, assurées et articulées dans leur mariage. Un bon mariage ne suppose pas que l’homme se féminise et que la femme se masculinise, bien au contraire. … Ce complexe de tensions, toujours renouvelées et toujours à nouveau composées, et la vie même d’un régime fédéral, le secret de son dynamisme équilibré.”
947 See STEINBERG 1996, 221.
948 See KREIS 1999, 174-75.
949 The provincial and Protestant Switzerland feared the power of the universal powerful Catholic Church.
speaking federalists\textsuperscript{950}. The first were opposed to the anticlericalism the later to the centralization. To receive a majority in favor of the revision concessions were made to the French-speaking federalists\textsuperscript{951}. In general however, the new Constitution of 1874 introduced only minor institutional changes\textsuperscript{952}.

In the 1930s there were new attempts for a total revision of the federal constitution. The young liberals started the revision process but soon the campaign in favor of the initiative to revise the Constitution became dominated by the right wing party called \textit{Frontisten}. In a referendum in 1935 the project to revise the constitution was clearly rejected by 72.3\% of the voters\textsuperscript{953}.

There were \textbf{numerous partial revision} of the Constitutions as e.g. the creation of the canton of Jura (1979), the introduction of equal rights for men and women (1971), further strengthening of direct democracy (Initiative for the partial revision of the Constitution 1891), and a creeping centralization of competencies.

In 1999 finally a \textbf{second total revision of the Constitution} took place after another reform project in the 1970s was defeated. The total revision of the Constitution was not an ambitious project but limited itself to a revision of the text without introducing substantial novelties\textsuperscript{954}.

\textsuperscript{950} In contrast to the situation in the United States the federalists in Switzerland opted against centralization.

\textsuperscript{951} See KREIS 1999, 176; STEINBERG 1996, 222-23. The doctrine of Papal infallibility had led to a reemergence of anti Catholic sentiment because the doctrine was viewed as a threat to Swiss democracy. State authorities used their privileges about the selection and election of Bishops to get rid of Bishops who excommunicated priests because they did not accept the doctrine of infallibility. Jesuits were prohibited to operate on Swiss territory in 1874. This prohibition was only lifted in 1973.

\textsuperscript{952} See FAVRE 1970, 30-31; Some of the more relevant changes are the following: The Constitution included the formation of one army, introduced the facultative referendum and instituted the federal court permanently.

\textsuperscript{953} See KREIS 1999, 179.

\textsuperscript{954} This total revision was mainly seen as necessary because of the many partial revisions of the Constitution which left the text chaotic and not easily accessible.
The adoption of the first Federal Constitution of 1848 and the first total revision of the constitution took place while important historical events took place in neighboring countries. The Constitution of 1848 was influenced by the revolution in France, in 1874 the French-German war took place, in both world wars there were attempts to completely revise the constitution. The influence of upheavals, revolts, and wars in the neighboring countries on Swiss internal affairs and especially on Swiss unity necessitated the discussion of Swiss identity and the repositioning of Switzerland and the Swiss system through constitutional politics.

Already the discussion about constitutional reform facilitated the rebalancing of the interests of different groups and therewith strengthened loyalty. As well today Swiss identity is in a crisis. Politicians however did not dare to address the crisis in the revision process but adopted a strategy of textual change without substantial change. Several partial revisions shall now bring a new balance of power.

B. The Willensnation

The political arena during the second half of the 19th century was open to and even desperate for unifying ideas. The young federal state had constituted itself in 1848 based on a rather weak consensus and quite strong coercion of the Catholic cantons. The Sonderbund War of 1847 was still vivid in the memories, and the opposition against the new State was important but internally divided. The recent history

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955 See KREIS 1999, 189, 192-93: During strong internal crises there was however no willingness to reform the constitution.

956 Cf. KRIESI 1999, 13: He describes this effect for the discussions on a total revision in the 1960s.

957 See e.g. LINDER 1999, 29; FAVRE 1970, 28: In the canton of Lucerne for example a majority voted against the Federal Constitution in the popular referendum but the Constitution was nevertheless declared accepted because those who abstained were considered as in favor.

958 See KAESER 1998, 76-77.
could not be used as a means for unification because the history told more of differences than of unity.\footnote{959}{See HAUSER 1998, 247-48.}

The political leaders tried to forge a nation to create the necessary unity and legitimacy. Even though actions of the Federal Government to strengthen national cohesion were welcome the main actors of nation building were the cantons and local communities.\footnote{960}{See HAUSER 1998, 250-51.}

In the second half of the 19th century the concept of the Willensnation gained dominance.\footnote{961}{See MEYERHOFER 1998, 49.} As it was clear since the Helvetic Republic the Swiss State could not do without the cantons. The cantons had to maintain their constitutive status. Therefore only a concept of the nation which accepted cantonal loyalty and with it diversity could have chances of success. \textbf{Unity had to be based on the voluntary association of the cantons.} Only on the basis of this voluntary association a national identity which encompassed cantonal identities could be envisaged. Diversity was accepted as value.\footnote{962}{See e.g. FLEINER 2000a, 127.}
The voluntary association will only last as long as the cantons are convinced that staying in the federal state is better than opting out. The system had to convince the cantons and the whole people of Switzerland of unity. In the beginning the unity of the Swiss people consisted only in their rights to political participation in the common state. As already Rousseau had understood rationalism or reason must be paired with emotions that the people can be mobilized. Therefore Switzerland tried to create in addition to the rational an emotional basis for unity. In a first step the rational basis for unity will be regarded (a). Afterwards emotional links for unity will receive some attention (b).

a. The Nation and Federalized Democracy

aa. Democracy and Federalism

It is the purpose of the Swiss State to maintain and promote diversity in unity. This purpose of the state is expressed in the Federal Constitution of 1999:

Preamble

… We, the Swiss People and Cantons… are determined to live our diversity in unity respecting one another…

Art. 2 Purpose

The Swiss Confederation shall … promote … the cultural diversity of our country.

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963 See Linder 1999, 35.
964 See De Rougemont 1989 [1970], 142: Après cinq siècles d’existence à la fois communal et impériale, puis cantonale et en somme anarchique, la Suisse a pris conscience d’elle-même en tant qu’unité fédérale. Et cela signifie, au concret, qu’elle voit les gages de sa force et de sa cohésion civique dans cette diversité, précisément que tous les grands Etats voisins ont de tout temps considérée comme cause faiblesse matière, de divisions morales et de guerres civiles.
965 The reference to a Swiss people is new in the Constitution of 1999. In the preambles and the Art. 1 of the Constitutions 1848 and of 1874 the union of the peoples of the cantons was stressed. This change in the legitimacy basis received hardly any attention in the process of constitutional revision. For comments on these changes see Fleiner 1999, 420-22.
Federalism and participatory democracy were the means to promote diversity. The federal system enabled the forming of a federalized democracy. The Swiss State is not the only one that relies on the combination of federalism and democracy but the function this combination serves differs from most other cases. Swiss state and nation building could not do without the cantons and therewith as well without federalism. Democracy and federalism are closely linked. Federalism does not have the function of checks and balances for a majoritarian democracy but united the participatory democracies of the cantons under a common federal government.

According to the Swiss understanding democracy shall facilitate self-determination. This aim can be best achieved when small groups

966 See Lidija R. BASTA FLEINER. 2000. Can Ethnic Federalism Work? Paper for the Conference Facing Ethnic Conflicts, December 14-16, 2000. Bonn, 7: “Here, federalism has not been introduced as a corrective, but rather as a structural principle of consensus-driven democracy. Due to the communal character of the Swiss democracy, based upon the principle of communal liberty, civism does not aim at reconciling federalism and democracy, but has embraced instead (participatory) democracy as a federalist element to articulate and protect interests of structural minorities within a multicultural society. Since federalism has been introduced as a structural principle of such consensus-driven democracy, one can argue that Switzerland is a federalised democracy. More pointed out, the substantive legitimacy formula of the Swiss federal system not only reconciles federalism and democracy, but rather understands them as intrinsically linked to each other” (emphasis in original).

967 Cf. LINDER 1999, 24-25: He stresses that both federalism and democracy were not invented in Switzerland, that Switzerland’s institutions were largely influenced by the United States, that however only in Switzerland these mechanisms were used to find a balance between different cultural groups.

968 See GUZZI-HEEB 1998, 146.

969 Cf. LINDER 1999, 34: He notices a general reluctance to limit majoritarian democracy with checks and balances but underlines the movement to invest the people with real decision-making power. For a criticism of such approach, see BRASS 1991, 333-48.

can decide over the issues that concern them directly. Federalism is therefore viewed as promoting democracy. Federalism can provide for self-rule of the communes or cantons and does nevertheless offer common institutions for the decision on tasks, which surmount the capacity or capability of the smaller unit.

According to Thomas FLEINER the Swiss state is based on two social contracts. One contract was concluded by the Swiss nation, the other by the peoples of the cantons. The social contract of the nation has the purpose to strengthen the democracies of the cantonal and local communities.

Federalism incorporates different levels of democratic communities. Swiss citizenship reflects not only the importance of the pre-constitutional communities but as well the different levels of democratic polities. Swiss persons have three citizenships. He or she is a citizen of a commune, a canton and the federal state.

Federalism, which enabled a democratic decision making very close to the people, became an identifying factor in itself. Federalism promised a unity through the federal institutions combined with diversity on the local level. In combination with direct democracy it could ensure that minorities are not outvoted.

Democracy is here understood as tool for conflict management and prevention.

971 See FLEINER 1999, 431-32.
972 See FLEINER 1999, 421-22.
973 See CH Fed.Const. 1999: Art. 37 Citizenship
1 Every person who has the citizenship of a Municipality and of the Canton to which it belongs, has Swiss citizenship…

See e.g. AUER & MALINVERNI & HOTTELIER 2000, 127-128.

Dual citizenship concerning cantonal or communal citizenship is generally accepted. Dual national citizenship is normally as well possible unless it is excluded by the legislation of the other concerned state.

974 See FURRER 1998, 103.
bb. Integration Through Federal Institutions

The federal institutions do not only serve as decision-makers in the area of federal competencies but also fulfill an integrative function\textsuperscript{975} and establish not a derived but original legitimacy\textsuperscript{975} of federal decisions.

The Federal Council\textsuperscript{976} who is at the same time head of the state and executive government has the most important integrative effect. Switzerland does not rely on a president as an integrative personality but designed its executive as a council of seven members\textsuperscript{977}. The Presidency rotates among these members. The president is only primus inter pares.

The Federal Councillors are elected in a common session of the two chambers of parliament. The Constitution provides that the members of the Federal Council must be from different regions.\textsuperscript{978} This assures the representation of different cantons and of the different linguistic groups\textsuperscript{979}. The dominance of one party in the Federal Council was however soon viewed as illegitimate. The parliament agreed unofficially on the so-called magic formula\textsuperscript{980}. The magic formula is

\textsuperscript{975} See e.g. LINDER 1999, 22: He stresses that Integration was a much more important and a more difficult task than in most other nation-states.

\textsuperscript{976} For the Federal Council see e.g. KLÖTI 1999.

\textsuperscript{977} Cf. HOBBES 1970 [1651], 155-66: In order to guarantee peace between different groups HOBBES envisaged the Leviathan as integrative figure who can if necessary enforce peace. The Leviathan will however only be able to fulfill this integrative function when he is viewed as neutral arbiter. When in a multicultural society the president is regarded (as well) as the representative of one group he loses this neutrality. Thomas FLEINER cautions therefore of a strong president for multicultural countries: see FLEINER-GERSTER 1995b, 61-62.

\textsuperscript{978} Adopted in a Referendum in April 1999. Before the revision, the Constitution of 1874 regulated in Art. 96 that the members of the Federal Council must be from different cantons (Kantonsklausel).

\textsuperscript{979} See e.g. FLEINER 2000a, 120. The Constitution does not establish fixed quotas. There is not always an Italian speaking member in the Federal council. There are however at least two French speaking members.

\textsuperscript{980} See ALTERMATT 1991, 45: The magic formula as we know it today was agreed on in 1959. Yet already in 1848 did the Neue Zürcher Zeitung stress that the elections of the Bundesrat were legitimate because the main parties and religions were represented. Before the institution of diversity elections became increasingly difficult. E.g. in 1854 and 1864 it needed six ballots to agree on a
based on a consensus between the four most important parties to integrate the interests of the biggest possible percentage of the population within the decision making process. More than 80% of the population are today represented in the Executive.\textsuperscript{981}

Representation of different parties meant at the same time representation of different religions because party association corresponded with religious association\textsuperscript{982}. Catholic Conservatives had to fight a long time to win seats in the Federal Council because of resentments originating in the \textit{Sonderbund} conflict. Catholic Conservatives won representation in the Federal Council for the first time in 1891\textsuperscript{983}.

In 1919 proportional elections for one chamber of parliament were introduced. The liberals lost their absolute majority in Parliament. This gave the Catholic Conservatives more power for negotiations. In 1919 they got a second seat and in 1954 a third seat in the Federal Council\textsuperscript{984}. The political system lost its opposition\textsuperscript{985}. Today especially women demand a better representation in the Federal Council.

The Parliament\textsuperscript{986} consists of two chambers. One chamber is representing the Swiss people as a whole. Members are elected according to the proportional system. The cantons are the candidate. The magic formula increased the legitimacy and facilitated the selection process.

The magic formula, however, tends to perpetuate the distribution of power. The party that gained the most votes in the elections in 1999 (The Swiss People Party) still has only one seat.

\begin{footnotesize}
\textsuperscript{981} See e.g. Furrer 1998, 102.
\textsuperscript{982} For the party system see e.g. Ladner 1999.
\textsuperscript{983} See Altermatt 1991, 46-48; Steinberg 1996, 221.
\textsuperscript{984} See Altermatt 1991, 49-50.
\textsuperscript{985} See Furrer 1998, 113. The Swiss people with their possibility of direct democratic participation form the opposition in Switzerland.
\textsuperscript{986} For the Parliament see e.g. Lüthi 1999.
\end{footnotesize}
constitutencies. The population of small cantons can elect at least one representative. The other chamber is composed of two representatives for each canton. Both chambers have got the same powers: E.g. legislation must pass both chambers to be accepted. This guarantees on the one hand a special influence of the smaller cantons on the decision making process and serves therefore their interests of not being out-voted, on the other it can establish an original legitimacy of federal decisions based on the representation of the whole population.

The Federal Court, the court of last resort, is composed of 32 judges who are elected by Parliament. These judges shall mainly assure the compatibility between cantonal and federal law and the right application of federal law. They can however not rule on the constitutionality of federal law. This limitation of the court is based on the argument that the decision of a handful of judges shall not overrule the democratic will of the people. Similar as in the case of the

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987 As a consequence federal parties are much weaker than cantonal ones. Politicians must be accepted in their constituency that is in the canton to win elections. 
See e.g. Ladner 1999.

988 See Linder 1999, 35-36: Special representation was the ‘indemnity’ for the loss of undivided sovereignty of the cantons.

989 The small cantons were predominantly conservative cantons. This representation functioned therefore as well as a safeguard of the losers of the Sonderbund War.

990 See e.g. Kalin 1999.

991 In other countries e.g. in the United States the Supreme Court has the function to weigh over the balancing of the different interests. The Swiss Federal Court does not review the constitutionality of federal statute and is hesitant to interfere in cantonal matters.

For instance the court had to review the constitutionality of church taxes for legal persons. While individuals do not have to pay taxes to churches of which they are not member based on the liberty of conscience, in twenty cantons legal persons have to pay church taxes. Because legal persons do not have a religious belief they cannot claim the right to religious freedom and therewith they also cannot avoid paying taxes. The Federal Court decided that the cantons would have to change their constitutions and fiscal laws. The Federal Court could only initiate a modification when there are serious and objective motives to do so. See Neue Zürcher Zeitung. August 12/13, 2000. Aus dem Bundesgericht: Kirchensteuerpflicht juristischer Personen, Keine Abkehr von langjähriger
Federal Council the judges are selected so as to represent the whole (Swiss) population.

Already the constitution of the Legislature, the Executive, and the Judiciary provide for the political institutionalization of differences. There are still many more mechanisms based on **formal and informal agreements**[^992], which try to further assure that the interests of different groups are taken into account: e.g. the presentation of draft legislation to interest groups[^993].

**Direct democracy** serves as a further important safeguard of the will of the composed people and was the most effective protection against centralization[^994]. The inclusion of different groups in the Federal institutions desolves the opposition on the institutional basis. Direct democracy invests the people as main opposition force.

With the **initiative** the citizens can demand the revision of the Federal Constitution and with it they can define the political agenda[^995]. With

[^992]: See Linder 1999, 43.

[^993]: Interest groups are asked to participate in the drafting of legislation to reduce the chance that a referendum will be demanded. When the interests of different groups are already taken into account in the consultation process chances are much lower that a part of the population will demand a popular vote.

[^994]: The people was normally more reluctant than politicians to delegate tasks to the federal level. Whereas centralization promised to the politicians federal moneys and less responsibility for the people it meant less self-determination.


1. 100 000 citizens entitled to vote may propose a total revision of the Federal Constitution.

2. This proposal shall be submitted to the vote of the People for its approval.


1. 100 000 citizens entitled to vote may propose a partial revision of the Federal Constitution. …

2. An initiative … shall be submitted to the vote of the People and of the Cantons. The Federal Parliament shall recommend its approval or rejection. If it recommends its rejection, it may submit its own counter-draft…
the referendum they can restrain the federal institutions in their
decisions by having the right e.g. to approve or reject proposed statutes,
constitutional amendments or inter-, and supranational treaties.996

Direct democracy, though for many votes it only needs a simple
majority, does not lead to the introduction of a majoritarian democracy.
On the contrary, politicians normally make efforts to avoid that the
people too frequently make opposition. Because already relatively
small interest groups can inititiate a referendum or an initiative and
because of a generally low turnout at votations a strongly concerned
minority has chances to succeed. Therefore politicians usually try to
find compromises before they present new drafts or policies to the
people.

Because of these mechanisms only politics of compromise can be
successful997. Swiss democracy is consensus driven998. Solutions that

996 CH Fed.Const.1999: Art. 140 Mandatory Referendum

1 The following shall be submitted to the vote of the People and the Cantons: a. Revisions of the Federal Constitution; b. The entry into organizations for collective security or into supranational communities; c. Federal Statutes declared urgent which have no constitutional basis and whose validity exceeds one year; such Federal Statutes must be submitted to the vote within one year after their adoption by the Federal Parliament.

2 The following shall be submitted to the vote of the People: a. Popular initiatives for the total revision of the Federal Constitution; Popular initiatives for partial revision of the Federal Constitution in the form of a general suggestion which were rejected by the Federal Parliament; c. The question whether a total revision of the Constitution should be carried out if both Chambers disagree.

997 See STEINBERG 1996, 221: He shows that the Conservative Catholic could only so quickly be integrated into the Swiss polity and nation because of the representation of different parties in the Federal Council, the possibilities of
negatively affect prime interests of one group have only limited chances of success\textsuperscript{999}. It is not the idea to introduce the tyranny of majority but to prevent the tyranny of any group, including the majority\textsuperscript{1000}.

In accordance to this approach the majority is just one group amongst others. Politics are not expressed as majority – minority relations but try to guarantee equal opportunities to all accepted groups that have a stake in the decision\textsuperscript{1001}.

Politics of compromise are not just a consequence of Swiss institutions but the institutions realize the purpose to maintain and promote diversity. Compromises are the, for the purpose necessary and legitimate as well as legitimizing form of politics. The Swiss institutions try to create a legitimacy basis that is homogeneous enough that the different groups can remain heterogeneous.

Problems between the different composing groups were minor\textsuperscript{1002}. STEINBERG argued therefore that the political institutionalization of differences led to the dissolution of these differences\textsuperscript{1003}. DE ROUGEMONT puts the stress a bit differently. He argues that in Switzerland the acceptance of diversity unites and that attempts to unify divide\textsuperscript{1004}. Differences are not dissolved but they will not lead to

direct democracy, and the proportional representation in most important institutions.

\textsuperscript{998} Therefore it is called Konkordanzdemokratie; cf. PRZEWORSKI 1997, 64: He argues that “democracy cannot be a result of a substantive compromise, but it can be a result of an institutional compromise.”

\textsuperscript{999} The compromise driven culture became part of the Swiss way of life. See e.g. LINDER 1999, 51-52.

\textsuperscript{1000} See FLEINER 1999, 431-32.


\textsuperscript{1002} See e.g. FLEINER 1979, 120-22.

\textsuperscript{1003} See STEINBERG 1996, 206-33. This is an interesting thesis. If it were true than the institution of diversity would on the long run abolish the diversity it was supposed to protect. The representation of the different linguistic groups did however not manage to completely eradicate tensions. Linguistic cleavages which unfortunately sometimes overlap with ideological and partly social cleavages are increasingly questioning the Swiss unity and consensus.

\textsuperscript{1004} See De ROUGEMONT 1989 [1970], 181.
fragmentation as long as the differences are accepted or even promoted
and not suppressed.

National cohesion was reached through differentiation\textsuperscript{1005}. Even
though integration succeeded this integration did not mean
homogenization but on the contrary was only possible because of the
maintenance of differences. Loyalty is still not centralized but divided.
Federalism in this sense is open for multiple loyalties and can attain the
self-determination of multiple groups\textsuperscript{1006}.

The political institutionalization of diversity promised and achieved
that conflicts are solved by political means. In Switzerland diversity is
and shall be expressed in the political process. The expression of
diversity does in this case not lead to the dominance of one group as
would happen in a purely majoritarian democracy but balances the
interest of the different groups. This limits the felt need to adopt extra
democratic means. Switzerland with its diversity cannot afford to have
winners and losers\textsuperscript{1007}.

c. Cantonal and Communal Democratic Self-
Determination

Art 3 of the Swiss Constitution of 1999 states that

\begin{quote}
The Cantons are sovereign insofar as their sovereignty is not
limited by the Federal Constitution; they shall exercise all rights
which are not transferred to the Confederation.
\end{quote}

There is no consensus on the meaning of cantonal sovereignty\textsuperscript{1008}.
Broad agreement exists however that the cantons maintain all

\begin{itemize}
\item \textsuperscript{1005} See MEYERHOFER 1998, 51.
\item \textsuperscript{1006} See DE ROUGEMONT 1989 [1970], 200.
\item \textsuperscript{1007} See BASTA FLEINER 2000a, 77-102.
\item \textsuperscript{1008} This dispute results from the inadequacy of sovereignty theories in respect to
federal countries. For instance FLEINER 1995a, 183-84 argues for divided
sovereignty. F. FLEINER 1923, 37-39 follows the traditional theory of sovereignty
and argues that sovereignty is indivisible. Therefore he interprets cantonal
sovereignty as cantonal competence. NAWIASKY tries to tackle the issue by
assuming a sovereign super state above the federal level and the states, see
NAWIASKY 1956, 161.
\end{itemize}
competencies, which are not explicitly transferred by the Constitution to the Federation\textsuperscript{1009}. The Cantons have their own Constitutions, their own flags, and they have institutional, organizational, financial, and political autonomy\textsuperscript{1010}. The most important powers of the cantons include the right to regulate culture, education, policing and zoning. Their existence and territory is guaranteed in the constitution\textsuperscript{1011} and their peoples legitimize the cantons and have a constituent role in the Swiss State\textsuperscript{1012}. The necessity of a double majority for all revisions of

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\textsuperscript{1009} See e.g. SCHOLLENBERGER 1905, 95-96; F. FLEINER 1923, 37-39, FLEINER 2000a, 106: “This provision is the formal confirmation for the very truth that the residual power, the residual sovereignty finds its roots in the cantonal autonomy and not in the central organ such as for instance the crown, which has residual jurisdiction in the UK.”

This interpretation is partly questioned by the new Art. 42 that introduces a subsidiarity principle:

CH Fed.Const. 1999: \textbf{Art. 42 Tasks of the Confederation}

\begin{itemize}
\item The Confederation shall accomplish the tasks which are attributed to it by the Constitution.
\item It shall assume the tasks which require uniform regulation.
\end{itemize}

While criticism was raised that this article could be understood as giving the federal level the right to assume competencies without the explicit transfer in the Constitution, and therewith to enlarge the power of the federal level, a majority interprets this article as further limiting the powers of the federal level. According to them the article should be read that the federal level assumes only the tasks within its competencies which really necessitate a uniform regulation. Against this view speaks that a first draft included the restrictive wording “only assumes the tasks...” (emphasis mine) but that the ‘only’ was deliberately suppressed. For the arguments and relevant bibliography see e.g. THALMANN 2000, 162-69.

\begin{flushright}
\textsuperscript{1010} See AUER & MALINVERNI & HOTTELIER 2000, 298-99; FLEINER-GERSTER 1986, 64-66: He describes the enormous difference in the organizing of the cantons resulting from the sovereignty by relying on the example of the neighboring cantons of Basel-Land and Berne. When the Laufenal decided to leave the Canton of Berne and join the Canton of Basel-Land multiple provisions had to be taken to avoid administrative chaos.

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\textsuperscript{1011} CH Fed.Const. 1999: \textbf{Art. 53 Existence and Territory of the Cantons}

The Confederation shall protect the existence and the territory of the Cantons...

\begin{flushright}
\textsuperscript{1012} See GREBER 2000, 7-10. The constitutive character of the peoples of the cantons was clearly expressed in Art. 1 of the Federal Constitution of 1848. The Constitution of 1999 changed the wording slightly by adopting “The Swiss People and the Cantons ...form the Swiss Confederation” instead of “The Swiss People and the Peoples of the Cantons ... form the Swiss Confederation”.
\end{flushright}
the Swiss constitution and the second chamber of parliament function as safeguards against a forced centralization\textsuperscript{1013}.

All cantons transfer part of their competencies to the communes or municipalities\textsuperscript{1014}. The Swiss Constitution of 1999 guarantees the communal autonomy as transferred by the cantons\textsuperscript{1015}. The transfer of competencies or autonomy is meant to enable the self-determination of small communities and therewith to further democracy. Because of the three-level federalism not only cantonal diversity but the diversity of small communities could be maintained, too\textsuperscript{1016}. Different groups did not necessarily receive special rights as groups but local autonomy based on equal citizenship served as a safeguard of group interests\textsuperscript{1017}. Based on local self-rule many conflicts because of cultural or religious differences could be avoided.

Self-rule of the cantons and the communes favored not only the maintenance of diversity. Decisions on categorical conflicts\textsuperscript{1018} could be left to the democratic decision-making of the lower level. The common institutions favor peaceful common decision-making and

\begin{footnotesize}
\begin{enumerate}
\item See CH Fed.Const. 1999: Art. 140 and 142.
\item For communal autonomy see e.g. BAPST 2000; AUER & MALINVERNI & HOTTELIER 2000, 77-104. Sometimes the cantons transfer as well competencies to districts and create therewith a further level in the federal state. One canton only has districts instead of municipalities.
\item CH Fed.Const. 1999: Art. 50
The autonomy of the Municipalities is guaranteed within the limits fixed by cantonal law…
\item This is the probable reason why we still find e.g. Protestant communities that are completely surrounded by Catholics (See the commune of Waltensburg in the Kanton of Grisons. Local autonomy disfavored the assimilation of minority groups).
As well the cantons differ decisively e.g. in their understanding of the state or their legal tradition. See FLEINER 2000a, 111-14.
\item See LINDER 1999, 41; FLEINER-GERSTER 1995b, 56-59: However some language rights in Switzerland must be understood as group rights. For instance the board of the public radio and TV was divided into different commissions for the four linguistic groups. The smaller linguistic groups receive percentage-wise more funds than the bigger ones.
\item For the concepts of categorical conflicts and the danger of majoritarian democracy in this respect see FLEINER 1998c, 355-60; LINDER 1999, 26, 35.
\end{enumerate}
\end{footnotesize}
therewith integration while self-rule prevents fragmentation on issues for which compromises cannot be reached\textsuperscript{1019}.

The decision not to decide can serve positive goals: “By tying our tongues about a sensitive question, we can secure forms of cooperation and fellowship otherwise beyond reach”\textsuperscript{1020}. Gag rules\textsuperscript{1021} help to find a modus vivendi among divided people\textsuperscript{1022}. The federal level provides for representation of different groups and the protection of certain individual rights but can stay neutral otherwise. If it had to decide it would have to take sides. The policy of the federal level to remain neutral internally and externally was indispensable for internal peace.

The internal neutrality of the Federal level is however not negative or passive but positive or active\textsuperscript{1023}. Because the given diversity is viewed as a value the equal value of the different given cultural groups

\textsuperscript{1019} Even in areas in which the federal level is competent and has acted the cantons still have some possibilities for self-rule. Swiss federalism differs from American federalism. The federal level does not implement the greatest amount of its statutes and decisions but leaves it to the cantons. (Vollzugsföderalismus). Within the framework given by the federal level the canton can implement statutes or decisions in accordance with its own traditions. For the differences in implementation see e.g. PARLAMENTARISCHE VERWALTUNGSKONTROLLSTELLE, February 11, 2000. Evaluation: Wie offen ist der Schweizer Binnenmarkt?

\textsuperscript{1020} HOLMES 1997, 19.

\textsuperscript{1021} See HOLMES 1997, 27. HOLMES uses the concept of gag rules in a limited way: gag rules are here only used for fully purosive and tactically justified acts of omission.

\textsuperscript{1022} See HOLMES 1997, 39.

\textsuperscript{1023} For the distinction between positive and negative see KÄLIN 2000, 41-42: Negative neutrality is the decision to promote none of both while positive neutrality includes the promotion of both. For positive neutrality in the U.S. see Monsma 1993.

Active and passive set the emphasis a bit differently. While passive neutrality is always negative neutrality, active neutrality can not only mean the promotion of both or several cultures (Switzerland) but as well the promotion of the effacement of diverging culture.
is accepted, too. The federal level shall not act as culture-blind arbiter but will aim at the balance between different cultural groups.\footnote{1024}

Here religious diversity can serve as an example. The Reformation turned Switzerland into a patchwork of religious divisions.\footnote{1025} According to a 1990 census 40% of the Swiss population are Protestants and 46.1% Roman Catholics. 8.9% did not answer or answered that they do not belong to a religious community. The remaining 5% were Muslims, Orthodox, Jews, ‘old Catholics’ and others.\footnote{1026}

Tensions between the religious groups were mitigated and did not directly question the union because the confederal level decided not to decide and stayed relatively neutral\footnote{1027} and guaranteed freedom of religion for individuals\footnote{1028} while the cantons could find appropriate solutions for the relationship between church and state.\footnote{1029} The federal level may only act to maintain the balance between the different groups and to guarantee religious freedom. Switzerland’s institutions

\footnote{1024} Cf. above at § 9 I.5.C: Neutrality in France was active, too. But here the activity was aimed at the effacement of religiosity. The good French could not be Republican and religious at the same time. In the U.S. neutrality is passive.


\footnote{1027} The federal level is not completely neutral. On the one hand the preamble shows a Christian tradition in so far as it starts with an evocation of God Almighty, on this other hand it still slightly disfavors the Catholic religion because the setting up of dioceses need the consent of the Confederation while the Protestants can organize themselves freely (CH Fed.Const. 1999: Art. 72).

\footnote{1028} See Fleiner 2000a, 127-28.

\footnote{1029} The cantons adopted various systems. Some cantons instituted one official church and two cantons opted for the strict separation of state and church. Most cantons however grant a special status to several religions.

\footnote{1030} CH Fed.Const. 1999: Art. 72 Church and State

1 The regulation of the relationship between church and state is a cantonal matter.

2 The Confederation and the Cantons may, within the framework of their powers, take measures to maintain public peace between the members of the various religious communities...

provided a setting to balance the power of the different religions and to favor compromises\textsuperscript{1031}.

**External neutrality** can be viewed as the corollary of internal neutrality. External neutrality is in the same way a necessary means to avoid alienation and fragmentation as internal neutrality. Switzerland stayed outside of European religious wars so that the solidarity between the Protestant and Catholic cantons might not be negatively affected. Switzerland fought its wars between Catholics and Protestants in times of relative religious peace in the surrounding countries\textsuperscript{1032}.

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\textsuperscript{1} The freedom of religion and philosophy is guaranteed.

\textsuperscript{2} All persons have the right to choose their religion or philosophical convictions freely, and to profess them alone or in community with others.

\textsuperscript{3} All persons have the right to join or to belong to a religious community, and to follow religious teachings.

\textsuperscript{4} No person shall be forced to join or belong to a religious community, to participate in a religious act, or to follow religious teachings.

Cf. KÄLIN 2000, 33-34: When analysing and comparing different cases of religious disputes in Switzerland he noticed that the Federal Court demanded that the State treat all different groups equally in comparison to Germany where often the protection and maintenance of the majority culture was viewed as legitimate State aim.

\textsuperscript{1031} See STEINBERG 1996, 210-11.

For example the federal court presses for compromises instead of decisions on right and wrong. In Switzerland fierce day-to-day fights arose about the right of religious groups to conduct processions. Many cantons forbid any processions for the sake of religious peace. Other cantons forbid the mowing of grass or the making of noise on Sundays that was meant to obstruct processions. The Swiss federal court advised the parties to look for compromises. Processions should be forbidden only when they endanger religious peace, when they are used to provoke, or to attract new members. However compromises should prevail as long as they are feasible e.g. a procession through a rural neighborhood instead of along the main street in the village (Decision of the Swiss Federal Court: BGE 49 I 138-159). The interdiction of processions to attract new members shows as well an attempt to uphold the power balance of the religious groups.

See as well LINDER 1999, 39 for the influence of referenda and proportional representation in one chamber of the parliament.

\textsuperscript{1032} See STEINBERG 1996, 212; LINDER 1999, 28: The main religious conflicts in Switzerland took place in 1529, 1531, 1656, 1712, and 1847.
The cantons themselves did sometimes but not always adopt gag-rules. Very often the cantons expected and expect assimilation within their territory. Therefore religious diversity could become a dividing force within the cantons. The canton of Appenzell split into two half-cantons because of religious disputes. Most border-disputes until today are at least partly motivated by religious differences. When however the federal level is viewed as neutral different religious affiliations do not question the loyalty to the common Swiss State. A common identity, which does not rely on religion, is not questioned by religious diversity. When a government wants to preserve the loyalty and support of all groups it has to respect their diversity and must abstain from any solution that would alienate one group.

Language shall serve as a second example. Concerning language passive neutrality is impossible. The state cannot do without an official language while it can promote the complete separation between state

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1033 Some cantons introduced one religion as religion of the canton (e.g. Vaud), others adopted the complete separation between church and religion (e.g. Geneva), others again accepted several religions (e.g. Bale).
Cf. FLEINER 2000a, 133: Up to the 1970s the Constitution of the Canton of Fribourg stipulated that whenever the majority of a commune insisted on a religious schools the canton was as well obliged to provide for a religious school for the minority.

1034 See LINDER 1999, 41; FLEINER 2000b, 150-51: According to the Swiss Constitution within the canton all Swiss citizens without difference to their cantonal citizenship have equal right.
Problematic is therefore a provision in the Constitution of the Canton of Jura, which accords cantonal voting rights as well to citizens of the canton who do not reside in the canton.

1035 See SCHOLLENBERGER 1906, 403-06.


1037 Concerning language see LINDER 1999, 42; HOTINGER 2000.
Tri- and bilingual cantons normally accept all languages of the canton but not all Swiss languages as official languages. Therewith they adopt a policy of neutrality towards the different cantonal groups but expect assimilation of others. On the level of communes normally only one language is officially recognized and persons from other language groups have to use the official language for communication with communal authorities.
and religion. Switzerland’s policy concerning language shows the respect for the different given linguistic groups. Based on the value of diversity the Swiss State confers to all four national languages the status of an official language on the federal level.

The language policy on the federal level is hardly disputed. Much more disputed are however the policies of the cantons because the cantons regulate sensitive issues like education and other cultural issues. The approach concerning languages in respect to the Cantons in the federal Constitution is ambiguous. On the one hand the Constitution supports the territoriality principle on the other it proclaims the freedom of language.

The territoriality principle shall avoid conflicts between the linguistic communities. Due to the territoriality principle the minorities do not need to fear to become marginalized or assimilated to the majority language. For the sake of peace the Federal Court supports the territoriality principle though it can be opposed to the principle of the freedom of languages.

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1038 See Fleiner-Gerster 1995b, 57; Stauffer & Töpperwien 2000, 61-64.
1039 See CH Fed.Const. 1999: Art. 4 and Art. 70. The Romansh language is however slightly disfavored. It is only an official language for communication with persons of Romansh language. Laws however will only be published in German, French and Italian. The three versions have equal validity. In other cases the Romansh and the Italian are slightly favored. Art. 70 (5) says: “The Confederation shall support the measures taken by the Cantons of Grisons and Ticino to maintain and promote Romansh and Italian.” The Constitutional provisions show the attempt to create a balance between the different linguistic groups.
1040 See CH Fed.Const. 1999: Art. 70 (2) The Constitution emphasizes that the “Cantons shall designate their official language. In order to preserve harmony between linguistic communities, they shall respect the traditional territorial distribution of languages, and take into account the indigenous minorities” (emphasis mine).
1042 See Hottinger, 44.
1043 For cantonal regulations and the tension between the freedom of language and the territoriality principle see Hottinger 2000.

The Swiss Federal Court normally gave more weight to the territoriality principle than to the freedom of language or religion. Mainly three issues are debated.
The moment when the federal level is not any longer viewed as the guarantor of the balance between the different groups then those who feel disadvantaged, will start to feel excluded and their loyalty to the common state suffers\textsuperscript{1044}.

Today inter-religious and linguistic issues can only lead to important political mobilization when there is an overlapping of cleavages. Crosscutting of cleavages normally mitigates tensions, overlapping cleavages enhances them\textsuperscript{1045}. In the case of the secession of the Jura from the Canton of Berne, the population of the Jura did not only have a different religion but spoke a different language and were economically disadvantaged\textsuperscript{1046}.

The \textit{peaceful cohabitation} of different groups is partly due to the fact that cleavages do normally not overlap. For instance in the Canton of Fribourg there is a Catholic French speaking majority and a German speaking Protestant minority while the Canton of Valais has a German speaking Catholic minority and a French speaking Catholic majority. The French speaking Canton of Vaud is predominantly Protestant. Additionally French speaking cantons are not necessarily rich or poor even though the German-speaking cantons tend to be more affluent. Still more important for the peaceful cohabitation than the cross-cutting

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One issue concerns the language of instruction in school. Are the parents allowed to send their children in a private school or in a school in a neighbor commune so that the children can receive instruction in their mother tongue? See instead of many BGE 100 Ia 462 (1974) and BGE 122 I 236 (1996) for the territoriality principle and schooling. The court had as well to decide in several instances on the language of court proceeding. See instead of many e.g. BGE 121 I 196 (1995) concerning the territoriality principle and the language in criminal law cases. Another dispute concerns advertisement. Can a canton or a commune prohibit advertisement in other languages? See BGE 116 Ia 345 (1990) for the territoriality principle and publicity in another language.

\textsuperscript{1044} This happened in respect to the Catholic cantons. They felt threatened by the Protestant cantons and felt that the Diet did not stay neutral but indirectly supported the Protestants. The Diet did not even intervene when Protestant groups from a neighboring canton tried to remove the conservative Catholic government in the canton of Lucerne. This shows additionally that sometimes non-action does not mean neutrality.

\textsuperscript{1045} See \textsc{Horowitz \& Liessak} 1989, 33; \textsc{Holmes} 1997, 47.

\textsuperscript{1046} See \textsc{Steinberg} 1996, 90-93.
of cleavages is are the combination of federalized democracy and constitutional politics.

dd. The Case Jura

The case of the secession of the Jura from the Canton of Berne can show the working together of federalism, democracy, and constitutional politics as tools for peaceful conflict management. At the Vienna Congress the Canton of Berne had received the Jura as an indemnity for the loss of its subjected territories\textsuperscript{1047}. Secessionist movements were always latently present and increased after World War II. The Jura opted for the establishment of an own canton.

The proper procedure for the secession was vividly debated. Art. 1 of the CH Fed.Const. 1874 included the enumeration of all Cantons. The creation of a new canton would therefore need a revision of Art. 1 of the Constitution. In Art. 5 of the CH Fed.Const. 1874 the Confederation guaranteed the territory of the cantons. Focal point of the discussion was whether the new canton could be created by the ordinary procedure for the revision of the Federal Constitution or whether it needed the consent of the concerned canton because of Art. 5 CH Fed.Const. 1878\textsuperscript{1048}.

The solution, that was finally adopted used constitutional politics and assured a procedure true to the principles of federalism and direct democracy. The people of the Canton of Berne revised their Constitution. With this revision they constitutionally laid down the procedure for the creation of a new canton and accepted at the same time a secession of the Jura in accordance with the procedure.

The revision prescribed a cascade of popular votes. In a first popular vote the population of the six districts that formed the Jura voted whether they wanted to leave the canton. The population of the Jura

\textsuperscript{1047} See AUER & MALINVERNI & HOTTELIER 2000, 312.
\textsuperscript{1048} See DARBEILAY 1987, 340-53: Some proponents of secession believed that it were easier to reach the revision of the Federal Constitution than to achieve the consent of the Canton of Berne.
voted with a rather small majority in favor of leaving Berne\textsuperscript{1049}. In a second popular vote the three Southern districts, which were predominantly Protestant like the Canton of Berne, could vote separately and voted with a clear majority to remain with the canton of Berne. In a third popular vote communes that were now near the borderline between the canton of Berne and the districts that had voted for secession could express themselves. Two communes that otherwise belonged to a pro-secession district decided to stay with the Canton of Berne, eight communes changed the district so as to join the to-be canton of Jura.

The result showed the influence of \textit{overlapping cleavages}. Those areas that had a triple minority status in the canton of Berne departed: They were Catholic, French-speaking and economically disfavored. One district, the Laufental, did neither want to stay with the Canton of Berne nor join the new Canton of Jura but decided instead to join the Canton of Basel-Land\textsuperscript{1050}.

To change Art. 1 CH Fed.Const. 1874 and because of Art. 5 CH Fed.Const. 1874\textsuperscript{1051} a popular vote was conducted on the federal level. The people and the cantons expressed themselves in favor of the revision of the Federal Constitution. On January 1, 1979 the Canton of Jura finally joined the other 25 cantons\textsuperscript{1052}.

Through this cascade of popular votes the border between the Canton of Jura and the Canton of Berne could be fixed according to the wishes of the population. Minorities did not have to fear to be out-voted but had the possibility to decide to which canton they wanted to belong. While

\begin{itemize}
  \item[1049] 34'000 voted no, 36'800 yes.
  \item[1050] See Auer & Malinverni & Hottelier 2000, 316-17; Fleiner-Gerster 1986, 64-66: He shows the administrative difficulties created through the integration of the Laufental in the Canton of Basel-Land.
  \item[1051] See Fleiner-Gerster 1986, 58-59: Based on CH Fed.Const. 1874: Art. 5 as well a federal popular vote for the district that joined the canton of Basel-Land was conducted. It was agreed that all important transfer of territory needs the consent of the federal level even though no textual revision of the Constitution is necessary.
  \item[1052] For accounts of the Jura conflict see Steinberg 1996, 90-98; Basta Fleiner 2000a, 90-94; Auer & Malinverni & Hottelier 2000, 312-13, 316-17.
\end{itemize}
the change of the Bernese Constitution achieved cantonal legitimacy, votes in the districts and communes guaranteed the legitimacy of the decision for the concerned communities. With the federal vote the Swiss nation legitimized the independence of the Canton of Jura.

The Constitution was not so much used as the set rules of the game, limiting the will of the people but enabled a “process of permanent and substantially unlimited democratic decision-making”\(^{1053}\). Through constitutional politics powers could be re-balanced in accordance with the purpose of maintaining diversity.

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**Means or Values - Sonderfall Schweiz**

In the short introduction to this section it was said that first rational reasons and afterwards emotional reasons for unity should be regarded. The institutionalization of federalized democracies was classified as rational reason. Federalism and democracy however were partly transformed from functional paradigms to values. Many Swiss experience their institutions as something special, which cannot be understood by outsiders but are typically and only Swiss\(^{1054}\).

**Federalism and democracy** were not adopted because of their abstract value but the Swiss federal and cantonal institutions were developed pragmatically to establish a system, which could enable a democratic decision making very close to the people\(^{1055}\). Today for many Swiss federalism and democracy are however more than just means. Federalism and democracy as such became identifying factors\(^{1056}\).

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\(^{1053}\) BASTA FLEINER 2000a, 82 (footnote omitted); see as well STEINBERG 1996, 73; RESZLER 1986, 66-72.

\(^{1054}\) See for these arguments (‘Sonderfall Schweiz’) BASTA FLEINER 2000a, 75, FN 1.

\(^{1055}\) For the pragmatism see LINDER 1999, 31.

\(^{1056}\) See SANDOZ 1998, 83-90; KOLLER 1998a, 73-82; LINDER 1999, 25; FLEINER 1979, 120; FLEINER 2000a, 116-17: Direct democracy was as well a safeguard of federalism. Because federalism guarantees the citizens’ self-rule in the canton and the commune the citizens are interested in maintaining cantonal competencies.
Neutrality which was initially adopted to minimize internal fragmentation during war times underlined during the East West conflict the specialness of Switzerland as a neutral self-sufficient country that minded only its own business. The Cold War could provide again the outside enemy who necessitated unity within. At least an important part of the population views neutrality not only as means but as well as value.

Neutrality, federalized democracy, and with it a political culture, which favors compromises, turned into common and therewith uniting values.

The strong Swiss economy and prosperity strengthened the Swiss feeling of unity additionally. Switzerland had started as a poor country that even had to encourage emigration to be able to feed its population. Now it belonged to the richest countries in the world. The economic success was used as a further proof of Switzerland’s specialness and even of Switzerland as a role model for other countries.

The Swiss Constitution however stayed an instrument of power. It was regarded as guideline on how to govern and not as limitation of the power of government. The Constitution was never transferred into a value as such. The Constitution is not so much a sacred document and but a tool for the continuous re-balancing of power. When however federalism, democracy, and neutrality are viewed as values, reason

1057 See Furrer 1998, 103.
1058 See Furrer 1998, 110.
1059 See Kriesi 1999, 19.
1060 See e.g. Linder 1999, 19.
1061 See Furrer 1998, 103. The success was as well partly due to the tradition of compromising, cf. Linder 1999, 51-52: For instance labor unions and employers concluded a contract in 1937, the so-called peace treaty, in which they agreed to solve all conflicts through negotiations instead of strikes and exclusion. The Swiss are normally opposed to extreme means and solutions.
1062 Otherwise it would not have been possible to completely revise the text of the Constitution in 1999 out of esthetic reasons.
alone will not be sufficient enough to change the constitution in this respect\textsuperscript{1063}.

b. The Nation and Emotions

Rational reasons must be paired with emotions. In most other nation-building processes wars and shed blood as well as charismatic uniting figures were important factors for the creation of an emotional link between co-citizens and as well co-nationals\textsuperscript{1064}. Switzerland did neither take part in the wars between the emerging nation-states of the 19th and 20th century nor did it have a charismatic leader who could have strengthened nation building. Without emotions however nation-building will not take place\textsuperscript{1065}.

The Swiss defined themselves to a large extent by distinguishing themselves from the neighboring nations. The French-speaking Protestant Swiss from the Catholic French, the free Italian-speaking Swiss from the unfree Italians, the (at least originally) progressive German-speaking Swiss from the conservative Germans and finally the democratic Swiss from the monarchic neighbors.

For a positive identity the nation-builders relied increasingly on the freedom fighters in the Middle Ages and William Tell was adopted as the unifying symbol in all language areas\textsuperscript{1066}.

The state and the nation became sacralized based on the myths of William Tell: The Swiss were depicted as the united peoples of different cantons, who free by nature, were willing to fight for and defend their freedom\textsuperscript{1067}.

\textsuperscript{1063} Cf. KRIESI 1999, 19: He discusses the difficulty of European integration when neutrality is viewed as value.

\textsuperscript{1064} See for the principle HETTLING 1998, 20: He think as examples of the Napoleonic wars and Bismark as important influences of the nation-building process.

\textsuperscript{1065} See HETTLING 1998, 21.

\textsuperscript{1066} See GUGGENBÜHL 1998, 38; LINDER 1999, 23.

\textsuperscript{1067} See SCHILLER 1952, esp. 57-76; for the importance of a national history in Switzerland see e.g. HILTY 1891, 1-4.
Freedom was however never understood as individual freedom in the liberal sense. Freedom was always understood as the right to political participation in the small community and therewith to determine the own fate within the community. The idea of freedom was therefore not a concept to limit state power but freedom was nearly identical with democracy.

Switzerland was declared the country where freedom is born. The Swiss described themselves as the *Volk der Hirten* (people of shepherds), or as a *Bauernstaat* (state of farmers). With the consent of God the people of farmers changed the feudal order and the Swiss people as the chosen people was put in the place of the aristocracy.

In order to strengthen the national identity and to create a civil society, Switzerland tried to create common experiences. For instance exchange years or military service in another linguistic region or another canton, the national shooting contests, and national expositions should create the necessary identification with the co-nationals inspite of diversity.

At the same time however there were as well unsuccessful attempts to rely on a common ethnicity and deriving from it a specific Swiss

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1068 See F. Müller. 1998, 255; see as well Guggenbühl 1998, 38-41 for the use of the myth during the Helvetic Republic. Patriots tried to interpret the history so as to justify the break with traditions and the institution of a centralized Republic. They emphasized the farmers’ fight against tyranny in the middle ages. God must have been on the side of the freedom loving farmers because he brought them victories and helped them to overcome the feudal order. The drawback of this interpretation of history was however that it could as well be used by the opponents of the Helvetic Republic who stressed mostly the fight against foreign and therewith as well against the French occupation.

1069 See Guggenbühl 1998, 35.

1070 See Guggenbühl 1998, 35.

The closeness of the people to nature (Naturverbundenheit) and especially to the Alps became part of the myth of the Swiss nation as an independent, free, healthy, down to earth, modest, and brave people who was purified by the battle with and the beauty of nature. See Guggenbühl 1998, 36, 39; Hauser 1998, 249.


character. The new discovery of an early civilization on Swiss soil promised a flexible basis for a national identity. Earlier attempts had tried to construct the Helvetians as common ancestors\textsuperscript{1073}. While the history of the Helvetians was too well known and too conflictual\textsuperscript{1074} to be used as a basis for nation building the Lacusters were so removed in time that legends could be created.

In 1854 archeologists discovered prehistoric settlements in lake areas in Switzerland with mansions built on wooden pillars within the water\textsuperscript{1075}. The inhabitants of these settlements were called the Lacusters and were soon alleged to be the prehistoric ancestors of all peoples in Switzerland\textsuperscript{1076}. The history of the ancient tribe or tribes was not known and therefore apt to function as a common denominator for the Swiss identity by creating or developing an imagined common history and ancestry\textsuperscript{1077}.

Their way of living on platforms on the water in many regions of Switzerland could be used to allege an early union and the early radical particularism of the Swiss\textsuperscript{1078}. Their probably modest way of life in isolation on the lake platforms with the absence of richness was used to argue for a simple, hard working, egalitarian, and democratic Swiss national character deriving from the Lacustrian traditions preserved through voluntary isolation and particularism\textsuperscript{1079}.

\textsuperscript{1073} See Guggenbühl 1998, 38: For instance in Bale flyers were distributed that claimed that the Swiss were of the same ethnic origin.
\textsuperscript{1074} See Kaeser 1998, 78; Guggenbühl 1998, 38. The Helvetians had accepted and partly even supported the Roman occupant and savage acts by Helvetians to celebrate their triumphs were well known.
\textsuperscript{1075} See Kaeser 1998, 81.
\textsuperscript{1076} See Kaeser 1998, 75.
\textsuperscript{1077} See Kaeser 1998, 75.
\textsuperscript{1078} See Kaeser 1998, 81.
\textsuperscript{1079} See Kaeser 1998, 81; cf. F. Müller 1998, 263-64: Willing isolation influenced political decisions already since 1888. The Grütl (trade union) decided that they would not follow the German example and adopt an international orientation of the trade union.
During the Third Reich many Swiss tried to stress that they belonged to a nation distinct from the German nation. Germans based their argument that the German speaking Swiss population belonged to the German nation on a common ethnic origin. Some Swiss who argued in favor of a distinct identity followed the German line of argument and tried to prove that the Swiss had an ethnic origin separate of the Germans. Here again the Lacusters were invoked as the Swiss ancestors. Even though Germans and Swiss shared the same language it was alleged that their ethnic origin was different. It was argued that the Swiss of all four language groups shared physical and character traits as well as a strong sympathy for each other which could only result from the common ethnic origin as descendants of the Lacusters.

The attempt to construct a distinct Swiss ethnic identity was very much criticized already during the Third Reich. The critics stressed the ethnic diversity of the Swiss without necessarily concluding that the German speaking Swiss should be viewed as members of the German nation. The common history and the common (political) values had formed the Swiss into one people and one nation but not a common ethnicity.

c. Xenophobia as Side-Effects of Nation-Building

When a national consciousness developed with it xenophobia appeared. Since 1888 even though the percentage of foreigners augmented only slightly between 1850 and 1919 restrictions for immigrations were...
continuously on the national political agenda because of fears that foreigners posed a threat to Swiss national identity. The difference between the Swiss and the non-Swiss was never conceptualized but taken for granted. While for instance the presupposition for naturalization in the Canton of Neuchâtel had been basically the same for Swiss and non-Swiss and had been regularly further reduced until 1887 from 1888 onwards there were gross differences in the treatment of non-Swiss and Swiss for naturalization in Neuchâtel.

While before 1888 identity was still mainly Cantonal identity and the non-Swiss as well as the Swiss were regarded as foreigners the difference in treatment of non-Swiss and Swiss after 1888 suggests that a national identity overarched cantonal identity so that there was greater willingness to naturalize Swiss than non-Swiss. While the we included in the beginning only the citizens of the Canton and excluded everybody who was not a citizen of the canton after 1888 the we included all Swiss and excluded the foreigners.

The Federal Council stressed that the people of the Canton of Neuchâtel were composed of all Swiss persons residing on the territory of the Canton irrespective of the Canton they were coming from. One remainder of the equal treatment of Swiss who where not from the Canton of Neuchâtel and of foreigners are the voting rights. Since 1849 foreigners have the right to vote in the Canton of Neuchâtel. The right to vote was formerly based on the argument that in application of the

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1086 See CHrist 1998, 238.
1088 Cf. DE ROUGEMONT 1989 [1970], 187: He gives examples for the reluctance of intermarriage between persons from different cantons. Often the reluctance to marry someone from a neighboring canton was higher than to marry a foreigner or someone from a canton further off.
1089 Cited in CHrist 1998, 241: “Le peuple d’un Canton est composé de tous les citoyens suisses qui habitent sur son territoire; les citoyens suisses, dans leur ensemble, qui habitent sur le territoire du canton de Neuchâtel, sans distinguer entre les ressortissants neuchâtelois, par opposition aux non-Neuchâtelois; désormais, il désigne les Suisses, neuchâtelois ou non.”
equality principle the Canton had to accord the right to vote to foreigners when they accorded it as well to Swiss persons from other Cantons residing on the territory\textsuperscript{1090}. Between 1874 and 1888 foreigners did as well have the right to be a candidate for political office\textsuperscript{1091}.

Arguments about the nation were often used with the purpose to include or exclude specific groups\textsuperscript{1092}. The exclusion of foreigners was partly based on the argument that no other country had so advanced and democratic political institutions as Switzerland and foreigners just cannot understand and appreciate Swiss institutions\textsuperscript{1093}. Citizenship was therefore normally ascribed based on the \textit{ius sanguinis} principle\textsuperscript{1094}.

The feeling of superiority is however accompanied by self-criticism and as well sometimes by a feeling of inferiority\textsuperscript{1095}. The expression that something is typically Swiss has a pejorative meaning\textsuperscript{1096}.

\begin{thebibliography}{99}
\item \textsuperscript{1090} See \textsc{auer} & \textsc{malinverni} & \textsc{hottelier} 2000, 197; \textsc{linder} 1999, 60.
\item \textsuperscript{1091} See \textsc{auer} & \textsc{malinverni} & \textsc{hottelier} 2000, 197.
\item \textsuperscript{1092} For the principle see \textsc{altermatt} & \textsc{bosshart-pfluger} & \textsc{tanner} 1998, 14; \textsc{kury} 2000, 101; example e.g. in \textsc{bergier-report} 1999, 96. For the debate on anti-Semitism in Switzerland see e.g. \textsc{feigel} 2000, 11.
\item \textsuperscript{1093} F. \textsc{müller} 1998, 261; compare for instance for the reluctance to assume that a foreigner is apt to participate in the Swiss democracy \textsc{favre} 1970, 89-90: “Notre peuple considère la nationalité suisse comme un bien extrêmement précieux. La naturalisation ne peut dépendre automatiquement de certains faits tels que la naissance sur le sol suisse ou une activité prolongée sur notre territoire. Elle ne doit être octroyée qu’à des personnes jugées aptes à participer à notre vie nationale. Aussi bien l’autorité appelée à se prononcer sur le mérite d’un candidat à la nationalité suisse doit-elle disposer d’un pouvoir discrétionnaire d’appréciation et de décision.”
\item \textsuperscript{1094} See \textsc{mattioli} 1998, 224. The Swiss made of politics an ethnicity.
\item \textsuperscript{1095} Cf. F. \textsc{müller} 1998, 262: It is often argued that the foreigners (mainly Germans in comparison to Swiss Germans) have better skills to express themselves and had therefore better chances on the job market.
\item \textsuperscript{1096} See \textsc{de rougemont} 1989 [1970], 268-69.
\end{thebibliography}
d. Losing National Identity

Swiss national identity leaves room for diversity but Switzerland has to work continuously to preserve the unity. Fifty years after the Second World War the Swiss nation faces an identity crisis. Switzerland had to face recession (real or imagined) and experienced hatred against foreigners. Its democracy did not necessarily safeguard against atrocities. Independence had turned into self-isolation and marginalization. Federalism accords less and less self-rule to the cantons, and neutrality has turned into a farce. Normality questioned the Swiss specialness. The Swiss have more and more difficulties with the definition of the nation.

Reasons for the identity crisis are multiple but not yet reflected upon in a complete and satisfying way. Here as well only some reflections on possible reasons and mechanisms shall be offered.

The Swiss population is increasingly skeptical that the Swiss institutions and the Swiss political culture are adequate for the changing times. While the institutions favor compromises they enable though continuous but slow change. A strict understanding of neutrality led to self-isolation. In the age of globalization self-isolation leads to marginalization. Recession and unemployment questioned additionally the adequacy Swiss institutions. Some even predict the collapse of Switzerland if it continues its federal tradition. The increasing complexity of the tasks the state has to fulfill disfavor cantonal autonomy. To optimize effectiveness and as well factually as a result of European integration a centralization of competencies took and takes place. Switzerland is in a dilemma. It sees the need for centralization but does not really want to centralize.

1097 See Bernhard 1998a, 19.
1098 See Kriesi 1999, 13.
1099 See Bernhard 1998a, 19.
1102 See Kriesi 1999, 15.
Increasing **centralization** limits the possibility for self-rule. The cantons are losing importance. The more centralized the state is the more it has to decide and therewith take sides. As long as no categorical conflicts are involved problems should remain minimal.

However more decisions are influenced by culture than often perceived\textsuperscript{1103}. In this case culture influences as well what is perceived as rational. With different perceptions of rationality a majority, whatever this majority is, will have to decide on the better arguments or the ‘right’ view of things.

The French and German speaking cantons e.g. have very differing understandings about the appropriate tasks of the state\textsuperscript{1104}. These differences became obvious in the popular vote on insurance for child bearing. Here the French speaking part of Switzerland was clearly in favor and the rest of Switzerland opposed\textsuperscript{1105}.

With centralization a certain **fragmentation** between the different linguistic groups appeared. In most of these cases the French speaking population felt that their interests were not enough taken into account. In general the French speaking are more open to international integration than other parts of Switzerland. For example the French speaking part of Switzerland was strongly in favor of the adhesion to the Economic European Space (EES) while the German and Italian speaking were opposed\textsuperscript{1106}. They argued that adhesion respectively

\textsuperscript{1103} Cf. the discussion on the separation between religion and state or between the public and private realm above at § 11; § 14 II.1.

\textsuperscript{1104} See e.g. FLEINER 2000a, 104-06.

\textsuperscript{1105} The law was rejected by 61.05% of the population. In the German speaking cantons the law had a very low rate of acceptance: AI: 14.05; AR: 22.71; GL: 20.51; NW: 22.3; OW: 24.65; SZ: 20.26; UR: 22.07, whereas in the French speaking cantons and in the italian-speaking parts there were majorities in favor. FR: 54.09; GE: 74.26; JU: 70.34; NE: 62:83; TE: 62.58; VD: 64.02.

\textsuperscript{1106} 49.7% were in favor of adhesion. In some French-speaking cantons the adhesion was approved by over 80% of the voters while in some German-speaking parts less than 20% approved. As well a split per linguistic groups appeared in the vote for the bilateral accords with the European Union. The German and French speaking parts were clearly in favor while the Italian speaking was clearly opposed.
non-adhesion would lead to a higher unemployment\textsuperscript{1107}. Here the French as a numerical minority were outvoted in the referendum.

The divergent stand about European integration shows as well a different perception about \textit{neutrality}. More German and Italian than French speaking see neutrality as a value. With the peaceful integration of Germany, France, and Italy in the European Union neutrality as presupposition for internal peace lost importance. With the European integration conflicts between the three countries which could split the Swiss population into hostile groups are much less probable. When neutrality is viewed primarily as a means it is legitimate to abandon it when it is no longer necessary. For those who view neutrality as a national value, however, to give up neutrality questions national identity\textsuperscript{1108}.

When fragmentation is experienced and the feeling arises that the own group is the perennial loser, the federal state is no longer perceived as neutral. New forms of cooperation between the cantons and between the federal level and the cantons shall increase the influence of the cantons on the federal level and shall prevent further centralization.

\textbf{Privatization} of formerly state-owned enterprises or even New Public Management promoted the feeling of being disadvantaged of the French speaking population further. Privatized enterprises do not necessarily act in accordance with politics of compromise but aim at cost effectiveness. This can give new relevance to before disfavored regions but can as well have the opposite effects\textsuperscript{1109}.

The two above described phenomena question the rational basis of unity and the effectiveness to maintain diversity. The following shows that as well the \textbf{emotional basis} is partly in jeopardy. Switzerland

\textsuperscript{1107} See KRIESEI 1999, 19; for the differences between the French-speaking part of Switzerland in general, see LABRROT 1998, 135-40; DU BOIS 1999.

\textsuperscript{1108} See KRIESEI 1999, 19; for a discussion on Swiss neutrality see HUNZIKER 2000, 14.

\textsuperscript{1109} The decision of Swissair to decrease the number of international flights from Geneva and to concentrate them in Zurich turned into a political issue. The French-speaking felt unjustly disfavored by this decision and feared the economic predominance of Zurich.
relied on a mythic history\textsuperscript{1110}. This interpretation of history is increasingly questioned\textsuperscript{1111}. The Swiss reluctance to face their involvement in the Third Reich and their actions afterwards is the most prominent example\textsuperscript{1112}. During the Second World War Switzerland for instance applied a restrictive and discriminating immigration and residency policy concerning Jewish refugees and turned thousands of refugees over to German authorities\textsuperscript{1113}. Switzerland initiated the indication of a J for Jews in German passports, traded looted gold during the war and tried to hinder the restoration of Jewish property after the war\textsuperscript{1114}. Only recently the idealized self-image became confronted with the reality. Switzerland’s position and policies during and shortly after the Third Reich did not match the self-perception and the demands the Swiss had concerning them\textsuperscript{1115}. While some movements started to establish the truth and to enable the confrontation with the history others still did not want to acknowledge Switzerland’s faults\textsuperscript{1116}. They were looking for excuses and possibilities to avoid facing their own history and to uphold the image that because of neutrality and clever politics Switzerland had managed to stay outside of the war and was better than other countries\textsuperscript{1117}.

Their anger was mainly directed at the United States who according to their view were playing power politics out of financial selfish reasons\textsuperscript{1118}. They fitted their weak resistance against demands from the

\textsuperscript{1110} See above at § 15 I.5.B.b. for William Tell as founding myth.  
\textsuperscript{1112} See especially BERGIER-REPORT 1999.  
\textsuperscript{1113} Persecution because of religion or ethnicity were not accepted as a reason for asylum.  
\textsuperscript{1114} The discussion on dormant bank accounts is only one example.  
\textsuperscript{1115} See BERNHARD 1998a, 20.  
\textsuperscript{1116} See M. KOHN 1997, 90-93  
\textsuperscript{1117} For the arguments see M. KOHN 1997, 89.  
\textsuperscript{1118} One welcome thesis was e.g. that the USA (only) picked Switzerland because it was too weak to defend itself. The followers of this thesis argue that if Switzerland had been in the European Union the United States would not have
outside in terms compatible with their national identity. Once again the Swiss had to fight for their freedom, independence, and democratic values against a much stronger power from the outside that wanted to impose its view. Voluntary self-isolation and non-cooperation were the reaction. Switzerland reacted to “defend itself” instead of taking an active role\textsuperscript{1119}. However the self-isolation this time was hard to be represented as a virtue. A much larger percentage of the population became aware of the atrocities the official Switzerland had committed with the support of an important part of the population. Self-isolation this time meant the continuation of moral wrong and actual wrongdoing.

On the one hand Swiss myths are questioned on the other hand a \textbf{growing disinterest} in politics and history can be remarked\textsuperscript{1120}. The percentage of Swiss citizens taking part in elections is decreasing in an alarming way. This disinterest affects the basis of the national identity. When national identity is anchored in the participation in the political institutions and in a certain understanding of history disinterest in this field questions the identity itself.

As was shown above, the rational and the emotional bases of Swiss unity and national identity are questioned. Switzerland has to reposition itself in the world. A careful re-balancing and redefinition has to take place. There are however already many proposals for change. One can hope that here again constitutional politics can be

dared to accuse Switzerland. So e.g. \textsc{Linder} 1999, 20: “Die Ablehnung des EWR-Vertrages 1992 durch Volk und Stände hat die Schweiz um die Chance gebracht, ihren Platz im europäischen Integrationsprozess noch vor der Ost-Erweiterung der EU zu finden. Das erhöht auch das Risiko politischer Verletzbarkeit des Landes, wie etwa die Kritik aus den USA an der Rolle der Regierung und am Geschäftsgebaren der schweizerischen Banken im Zusammenhang mit jüdischen Vermögen während und nach dem Zweiten Weltkrieg zeigt” (emphasis mine).

\textsuperscript{1119} See \textsc{Kohn} 1997.

\textsuperscript{1120} See \textsc{Hilty} 1891, 1-4; \textsc{De Rougemont} 1989 [1970], 136; \textsc{Linder} 1999, 65-68: He analyzes the decreasing political participation. At the same time he notices decreased knowledge of the political system and a link between the two. In Cantons with a rather high participation the population has as well a better knowledge of the political processes.
used to reestablish effective institutions that can guarantee the balance between different groups.

C.  *Inherent Limits of the Nation*

Not only national identity is questioned the nation concept as such has limits in respect to diversity accommodation. The Swiss nation-state concept manages to accommodate diversity that was preexisting at the time of state-building but does not have the same openness towards new diversity.

Several elements of national identity were distinguished:

- **Political aspects:**
  - A political culture that aims at the institutionalization of given diversity and that regards other political systems as inferior.
  - The political system that facilitates the institutionalization and integration of given diversity: Constitution as tool for conflict management, federalized democracy, and neutrality.

- **Pre-political aspect:**
  - The Cantons and Communes are viewed as the pre-political basis of the Swiss nation-state and the peoples of the cantons have a constitutive status as democratic units of historically and culturally united peoples.
  - Swiss mystic history.

By establishing the different elements of the nation the outsiders are already *de contrario* defined. Outsiders are all those who do not share the common political culture\textsuperscript{1121} or whose diversity is not politically institutionalized\textsuperscript{1122}. All persons who are not integrated in a canton, or who do not share the Swiss mystic history are equally excluded\textsuperscript{1123}.

\textsuperscript{1121} See e.g. FLEINER 1979, 120: While Switzerland can be tolerant in regard to its linguistic and cultural minorities, political dissenters question the nation.

\textsuperscript{1122} See below in this section.

\textsuperscript{1123} See BASTA FLEINER 2000a, 80, 99-100.
In accordance with the subject of this analysis especially the **limits in the accommodation of diversity** shall be regarded. The political institutionalization of diversity aims at the accommodation of diversity. Therefore the limits of the political institutionalization have to be at the center of this analysis.

As expressed in the preamble and in Art. 3 CH Fed.Const. 1999 the Swiss State has the purpose to maintain and promote diversity. Even though the language of these two provisions suggest that all kind of diversity is included only preconstitutional diversity is promoted. The Swiss system politically institutionalizes the diversity of the pre-constitutional entities: the cantons and communes. In other words the diversity that is given from the structural point of view is institutionalized and accommodated, not so however non-given or new diversities\(^ {1124}\). Switzerland has a **static** understanding of diversity\(^ {1125}\).

Art. 70 (2) CH Fed.Const. 1999 can illustrate this limiting interpretation. In regard to the official languages of the cantons the Federal Constitution states that *indigenous* linguistic minorities shall be taken into account\(^ {1126}\). The theorem that defines relative diversity by relying on pre-constitutional criteria limits the inclusiveness of the Willensnation. Minorities, which are not given from the structural point of view, do not benefit from the same political

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1124 See BASTA FLEINER 2000a, 99-100. Therefore some authors regard systems like the Swiss one as inherently undemocratic. See e.g. BRASS 1991, 333-48: He argues (at 334) that “a fully-developed consociational system is inherently undemocratic and violates both the rights of non-recognized groups and the rights of individuals.”

1125 Same conclusion in SCHINDLER 1995, 53-54: He calls Swiss federalism static because it does not try to change society but to maintain the diversity of the cantons.

1126 CH Fed.Const. 1999: Art. 70 (2)

\(^2\) The Cantons shall designate their official languages. In order to preserve harmony between the linguistic communities, they shall respect the traditional territorial distribution of languages, and take into account the indigenous linguistic minorities.
institutionalization. They will only be included through willing assimilation to a canton and a commune\textsuperscript{1127}.

\textbf{Immigrants} are the most prominent example. The procedure for naturalization tries to guarantee that only assimilated candidates receive Swiss citizenship\textsuperscript{1128}. In most cantons the communes have the most important influence on the naturalization\textsuperscript{1129}. They demand a certain length of stay in the commune but check as well whether the person is integrated into the life of the community\textsuperscript{1130}. The importance of Swiss history for the national identity and the strong expected identification with the Swiss way of politics make assimilation difficult. In some communes a popular vote decides on the acceptance of the candidate\textsuperscript{1131}. Only when the commune, the canton, and the federal authorities agree to accord Swiss citizenship the person can be naturalized. There are however some trends to facilitate naturalization or even to make it automatic at least of third generation immigrants\textsuperscript{1132}.

\begin{itemize}
\item \textsuperscript{1127} See BASTA FLEINER 2000a, 99-100.
\item \textsuperscript{1128} See KRIESI 1999, 17; cf. FAVRE 1970, 81: “La politique suisse de naturalisation part de l’idée que les personnes assimilées à la population de l’État doivent être incorporées à la communauté nationale.” (emphasis mine). FAVRE 1970, 90-91: “En vertu de l’art. 14, l’enquête doit donner une image aussi complète que possible de la personnalité du requérant et des membres de sa famille. Ainsi, c’est la conduite morale et politique du requérant, son activité professionnelle et ses ressources, l’ensemble de ses rapports avec la communauté qui doivent être examinés. L’enquête doit permettre de constater si le requérant est honnête et s’il est assimilé.”
\item \textsuperscript{1129} See CH Fed.Const. 1999: Art. 38 (2) Acquisition and Loss of Citizenship
\begin{enumerate}
\item [2] [The Confederation] shall set minimum requirements for the naturalization of foreigners by the Cantons, and grant naturalization permits.
\end{enumerate}
\item \textsuperscript{1130} See e.g. BE Cant.Const. 1993: Art. 7 (2)
\begin{enumerate}
\item Cannoral citizenship is based on communal citizenship.
\end{enumerate}
\item \textsuperscript{1131} See e.g. DE ROUGEMONT 1989 [1970], 110.
\item \textsuperscript{1132} Popular votes on naturalization tend to be discriminatory. After a popular vote in the Commune of Emmen proved to disfavor candidates from Eastern Europe a vivid debate on the constitutionality of such votes took place. See e.g. AUER 2000, 13.
\end{itemize}
Foreigners do not receive the same right to be different. While Swiss cultural diversity is not perceived as threatening the Swiss way of life or the Swiss culture but is viewed as enriching, new cultural influences are soon viewed as threatening Swiss values. There remains a distinction between We, the Swiss, and They, the foreigners even when they have a Swiss passport. They receive equal rights but are still not equal because of the missing institutionalization of their diversity\textsuperscript{1133}. BASTA FLEINER argues therefore that equal representation were only possible with the introduction of a majoritarian democracy. This however would jeopardize the Willensnation as composed nation\textsuperscript{1134}.

The process of the political inclusion of women can however relativate the inherent limits of the Swiss nation. Like in all nations that are based at least partly on citizenship and political participation the exclusion of women from political rights led as well to an exclusion of women in the building of the nation\textsuperscript{1135}. Switzerland introduced voting

\textsuperscript{1133} Cf. Mattioli 1998, 217-26: The position of the Jews can serve as a second example. Even though the Jews already settled in Switzerland many centuries ago they were still regarded as foreigners and were excluded from the political process. While they had to respect the laws they did receive neither political rights nor state membership. The Constitution of 1848 provided for their unequal treatment. A revision of the Constitution to change the status of the Jewish part of the population needed a referendum with the majority of the Swiss population and the majority of the cantons in favor. With a lost popular referendum anti-Semitism even received “democratic legitimacy” as it happened in the Canton of Aargau. It needed the pressure of France, the United States, and the Netherlands who demanded a better status for the Jewish population as a presupposition for trade treaties that the Jews were accorded political rights on the local and cantonal level in 1856. Only in 1874 with the total revision of the Constitution did the Jewish part of the Swiss population receive equal rights.

In 1993 with Ruth Dreifuss for the first time a Jewish person got elected into the Bundesrat. Her being Jewish was no issue in the very short election campaign. She was elected as representative of the French-speaking and the women. It is not probable that the magic formula will be redefined to include always a Jewish person in the Federal Council.

For a debate on anti-Semitism in Switzerland see e.g. Feigel 2000, 11.

\textsuperscript{1134} See Basta Fleiner 2000a, 100.

\textsuperscript{1135} See Hettling 1998, 19.

Consider however that the inclusion of women and the possible future inclusion of the non-structural minority groups cannot necessarily be equated. While it was assumed that women are represented by their male relatives, it was never
rights for women on the federal level only in 1971. The last canton accorded female suffrage in 1991\textsuperscript{1136}. Today however the percentage of women in the government and the parliament is higher than in most other European countries. Proportional representation and the tradition of formal and informal quotas accelerated the process of inclusion of women in the political institutions\textsuperscript{1137}. The debate about female suffrage showed, too, that political institutionalization of a new group is only possible when and because a strong popular movement backs the political inclusion\textsuperscript{1138}.

The formation of the Canton of Jura can serve as a second example. While before the constitution of the new canton the interests of the Jura were represented or supposed to be represented by the Canton of Berne today the people of the Canton of Jura have constituent power and relevance on the constituted level. Through the creation of this new canton a new relevant group could be added: the nation received one more composing part. Constitutional politics based on the respect for federalism, democracy, and diversity enabled the democratically legitimized self-definition as a relevant group.

II. National Identity and Political Activity

The Swiss nation differs decisively from other nations\textsuperscript{1139}. The Swiss nation is not the result of homogeneity or homogenization or of unification but the product of the attempt to create institutions, which allow for self-rule of the composing entities and some common action.

\textsuperscript{1136} The Swiss Federal Court changed the interpretation of the Cantonal Constitution of Appenzell Inner Rhodes in order to accord voting rights as well to women. See BGE 116 Ia 359 (1990). Nevertheless the movement to give women the right to vote started on the cantonal and not on the federal level. The cantons of Basel, Geneva, and Vaud were the first to introduce female suffrage, 12 years before it was introduced on the federal level.

\textsuperscript{1137} See LINDER 1999, 54-55.

\textsuperscript{1138} See LINDER 1999, 62.

\textsuperscript{1139} See DE ROUGEMONT 1989 [1970], 141.
The Swiss nation incorporates diversity\textsuperscript{1140}. With the constitution of the Swiss state the different composing groups agreed not to create a nation-state of and for the dominant ethnic group, e.g. the nation-state of and for the German speaking majority, but opted for a state in which different groups are equal constituent partners\textsuperscript{1141}.

Some authors argue based on the missing homogenization and the will to stay diverse that \textit{the} or \textit{a} Swiss nation does not exist\textsuperscript{1142}. The denial does not take all realities into account.

The Swiss \textbf{believe in belonging together} and common institutions provide for stability and concerted political action. Their feeling of unity is anchored in their wish to belong and to stay together. This wish is based on the one hand on rationality because they are convinced that the Swiss institutions serve their interests. On the other hand emotional links are based on a common understanding of history and on the belief that the Swiss political institutions that institute federalized democracy are the most democratic and most just\textsuperscript{1143}.

\begin{footnotesize}
\textsuperscript{1140} See Fleiner 2000a, 127; Linder 1999, 22.
\textsuperscript{1141} See Linder 1999, 53-54.
\textsuperscript{1142} At the world exhibition Ben Vautier aroused the emotions of many Swiss by stating "La Suisse n'existe pas". Other reacted to his thesis and looked for possible interpretations. There were several parliamentary interpellations on this subject an Federal Councilor Jean-Pascal Delamuraz responded with the following sentence: ":..il n'existe pas une Suisse, ou la Suisse, mais un ensemble de manières, de pensées, d'habitudes, de modes de vie qui forment la vie communautaire helvétique" (Amtliches Bulletin Nationalrat 1992, 887). For further responses see e.g. Bergier 1998; J.P. Müller 1999, 104-13, Koller 1998b.
\textsuperscript{1143} Cf e.g. Kymlicka 1998, 13: Switzerland seems to question his understanding of the nation as an ethnic nation because of the stability and feeling of belonging together. "In Switzerland as in most multination states, national groups feel allegiance to the larger state only because the larger state recognizes and respects their distinct national existence." He negates that the Swiss form a nation based on his understanding of the nation as a community of language (at 18). He is not sure how a feeling of unity can ever exist in a multinational state and is surprised about the level of unity that exists in Switzerland (at 181-191), esp. at 187: "There are important examples of stable multination states, such as Switzerland, which show that there is no necessary reason why the members of a national minority cannot have both a strong national consciousness [cantonal consciousness (expl. mine)] and a strong feeling of patriotism and commitment to
\end{footnotesize}
Nation building had negative side effects as in other nation-states. The definition of the nation led as well to the exclusion of others. Xenophobia exists in Switzerland. In all these respects the Swiss nation does not differ decisively from other nations, e.g. from the American nation.

However the Swiss nation does not demand exclusive loyalty of its members but expects and accepts divided loyalties. **Diversity** is a shared value of the nation. As a consequence the Swiss nation-state has the purpose to maintain and promote diversity. In this respect the Swiss nation differs from most other nations. The German and the French nation aim at homogeneity. The American nation accepts diversity, but only as long as the diversity affects the private sphere. The nation-states of these three nations do not have the aim to promote diversity but want to overcome diversity.

The maintenance and promotion of given diversity is a fundamental and legitimizing principle of the Swiss nation-state not only on the level of constitutional design but as well on the state-building level. The nation, which is at the same time the Swiss people and the compilation of the peoples of the Cantons, constituted the Swiss State. Therewith the different peoples of the Cantons have a constitutive function. In the constituted state the institutionalization of federalized democracy as consensus-driven democracy strengthened national unity but assured at the same time the maintenance of diversity. Diversity was politically institutionalized. Constitutional politics allow the continuous rebalancing of the interests of the encompassing and the composing entities in accordance with the value of diversity.

Because of the concept of a composed nation together with federalized democracy culture could be taken into account without excluding those who do not share this culture and without jeopardizing the national unity through tensions based on cultural diversity.

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the larger polity… [This] sense of patriotism is so strong that the Swiss are, in some ways, a single 'people', as well as being a federation of peoples.” (Citation omitted, emphasis mine).
There are however as well limits to the inclusiveness of the nation. The nation incorporated the given diversity of the cantons. Non-given and new diversities did not receive the same political institutionalization. The experience with female suffrage and the formation of the Canton of Jura show, however, that non-relevant diversity can turn into relevant diversity when a general consensus exists that this diversity shall be accommodated and maintained.

The case of the Jura suggests that the most peaceful way to define the relevance of diversity is to rely on democratic means that guarantee the self-determination of all concerned groups.

§ 16. Towards Normative Diversity

Switzerland is a real world example of a state that has as a task to accommodate diversity. The respect for diversity was not so much based on ethics. For Switzerland the accommodation of diversity was the only way to guarantee its survival. Switzerland is the empirical proof that a nation-state can accommodate diversity.

In this section the empirical result shall be complemented with a theoretical approach. Based on a confrontation of the concept of the nation-state with the idea of normative diversity a teleological definition of the nation-state that realizes normative diversity will be developed.

Afterwards it will be regarded in how far the United States, France and Germany but as well Switzerland would have to redefine their understanding of the nation-state in order to completely realize normative diversity.

I. Towards a New Nation-State Concept

A state is culturally diverse because there are different cultural groups. Normative diversity demands that groups and therewith group identities
are recognized and relevant\textsuperscript{1144}. This is however inconsistent with the
nation-concepts analyzed above.

All three classic concepts try to overcome diversity. In the American
and the French State cultural group identities are constitutionally not
relevant respectively not recognized. The American State excluded
cultural issues from the public sphere and therefore deemed the
affiliation to a cultural group as irrelevant. The French State
presupposed the assimilation of all citizens to French culture and the
French nation. Conceptually all citizens are included in the nation and
share therewith also a common culture. From the system point of view
other cultural groups do not exist. \textit{The only relevant (USA) respectively
existing group (F) is the nation and the nation incorporates all citizens
as equal individuals.}

According to the German nation-state concept different groups are
recognized. The nation is formed by exclusion therefore the excluded
necessarily belong to a group distinct of the nation unless there are no
excluded because the border is drawn so as to include only nationals.
While the distinct groups are recognized they are not necessarily
relevant. Because the nation-state as state of and for the nation has the
purpose to further only the interests of the nation the interests of the
\textit{excluded groups are necessarily irrelevant}. When relevance is given to
these interests than the nation-state principle is questioned.

The results from the analysis of the American, French, and German
nation concepts and the principle of normative diversity combined with
the understanding that the nation-state is the state of and for one nation
leads to the following three-step conclusion:

1. In accordance with the nation-state principle in the United States
   and in Germany \textit{only the nation is relevant}, in France only the
   nation is constitutionally \textit{existing and relevant} for the nation-state.

2. For the realization of normative diversity the equal relevance of
different groups has to be recognized.

\textsuperscript{1144} See above at § 13 II.
3. To create a nation-state for which different cultural groups are existent and relevant these groups must as well be existent and relevant for the nation. In different words only when the nation conceptually incorporates different groups (composed or multi-layered nation) these groups can be existent and relevant for the nation-state.

These conclusions can be expressed in a simple mathematic equation:

\[ r: \text{relevant}; N: \text{nation}; G_a, G_b, G_c: \text{different groups} \]

When \( r = N \) \( \rightarrow \) Nation-State
and \( r = G_a + G_b + G_c \) \( \rightarrow \) Normative Diversity
it follows that \( N = G_a + G_b + G_c \) \( \rightarrow \) Composed Nation

To this result leads as well Michel ROSENFELD’s theory of comprehensive pluralism\(^{1145}\) when regarded in the light of the nation-state principle. ROSENFELD argues that pluralism itself is desirable and should be accepted and promoted by the state\(^{1146}\).

For the realization for his ‘pluralism as norm’ he suggests the distinction of first and second order norms. Second order norms are all norms that are associated with the integrating mission of comprehensive pluralism while first order norms are norms that concern other conceptions of the good. The aim of comprehensive pluralism is to negotiate the tensions between first order and second order norms\(^{1147}\).

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\(^{1145}\) See Michel ROSENFELD’s theory of comprehensive pluralism in: ROSENFELD 1998a, 199-277.

\(^{1146}\) See ROSENFELD 1998a, 200.

\(^{1147}\) See ROSENFELD 1998a, 200-01; cf. TAYLOR 1994, 61: It seems that TAYLOR accepts as well states in which only the collective goal of the dominant group is pursued. This reading adopts WALZER 1994, 101. With this interpretation however only the identity of some groups is acknowledged. This approach cannot be combined with his second principle, which stresses the equal worth and equality of all cultures.
Comprehensive pluralism is a conception of the good but it offers the advantage that it encompasses and supports all other conceptions of the good unless they interfere with pluralism itself\textsuperscript{1148}. 

Transposed into the language of national identity this would lead to the following: \textit{National identity has to encompass all other identities without dissolving them. The nation integrates different groups without presupposing or pursuing assimilation but by furthering diversity.}

The nation-state is supposed to further the interests of the nation. When the nation is understood as a composed nation then the nation-state has consequently to \textbf{promote the interests of the different groups} as the interests of the nation as such. The \textit{promotion of diversity can be seen as within the interest of the nation and therewith within the legitimate interest of the nation-state.}

The nation-state is the state of and for the nation. When the nation is a composed nation then the nation-state is supposed to be at the same time the state of and for the different groups.

\section*{II. Teleological Definition of the Nation-State}

The introduction of normative diversity leads to a teleological definition of the nation-state.

\begin{quote}
\textit{When the nation is viewed as composed nation than this will influence the nation-state. When the nation-state is the state of and for a composed nation the nation-state must be viewed as the state of and for all composing groups. In order that a state can be viewed as the state of different groups these groups must form the constituent power. In order that the state is perceived as the state for the constituent groups the groups and their collective goals have to be acknowledged at constituted level. The purpose of the state must not be to bridge or homogenize diversity but to maintain and promote all diversity.}

\textit{The institutions of the state must represent the composed nation and must therefore integrate the different composing groups. There must be}
\end{quote}

\textsuperscript{1148} See ROSENFIELD 1998a, 200-01.
some mechanism that can balance the different interests in accordance with the value of diversity.

III. Redefinitions for Normative Diversity

The three classic concepts would have to be redefined in a decisive way, Switzerland in some instances, if these countries wanted to realize normative diversity. It would need (1) a redefinition of equality in a way that groups can be recognized as equal and relevant at the state-building level as well as at the level of constitutional design. Additionally (2) the state would have to accept and promote different conceptions of the good. In other words: the institutions of the state would have to be able to represent and balance different conceptions of the good in accordance with the value of diversity.

These redefinitions would attack the very substance of national identity and would therefore be likely to dissolve the nations. The analysis on the following pages shall not be understood as policy recommendations for the United States, France, Germany, and Switzerland but will give some indications how the concept of a multicultural state that took its diversity seriously had to look like.

1. Redefinition of Equality

The promotion of diversity necessitates the reinterpretation of equality. The American and the French concepts must be redefined so as to accept group equality in addition to individual equality. The German concept must be redefined so as to recognize other groups as equally relevant.

Equality must be understood in the context of diversity. Erhard Denninger confronts the trias of liberty, equality, and fraternity, which are the outcome of the French revolution and mirror the paradigms of the modern liberal state, with the post-modern paradigms of security, diversity, and solidarity.
The new paradigms are not supposed to replace the modern paradigms but to complement them\(^\text{1149}\). Here mainly the paradigm ‘diversity’ in relation to equality is of interest. Equality must be understood in the context of diversity so that a shift from formal individual equality to an attributive and distributive differentiating equality can take place\(^\text{1150}\). The understanding of equality in the tradition of the French Revolution or American Revolution was opposed to group equality and any kind of privileges. The equal participation of all (pre-supposedly) equally concerned should guarantee the right outcome in the decision making process\(^\text{1151}\).

The new consciousness that individual identity is influenced by group identities and that because of this fact persons are not all equally concerned by decisions led to the demand for an understanding of equality, which is attributive in so far that it does not deny group attributes and distributive differentiating in so far as it realizes the different needs of different groups\(^\text{1152}\).

DENNINGER therefore opts for a view of equality, which recognizes different group identities and different group-needs and -interests.

\(^{1149}\) See DENNINGER 1994, 29-35, 44-46: Liberty and with it individual freedom must be complemented with security because only in a society which can offer a certain degree of social and as well legal security individual freedom can be realized. Solidarity shall be the counterweight to the centrifugal effects, which the promotion of of diversity or pluralism can have. DENNINGER distinguishes solidarity from fraternity. While he understands fraternity as a strongly emotional feeling towards the members of the own group he defines solidarity as a much broader phenomenon which encompasses humanity and with it as well not only the members of the own group but the other who does not belong. His understanding of solidarity is therefore different from the way this term was used in this analysis. This analysis does not make a distinction between fraternity and solidarity. See the criticism of the paradigm ‘solidarity’ in PREUSS 1998, 128-31: He argues that solidarity in DENNINGER’s understanding would necessitate fraternity duties towards strangers (at 130: “Brüderlichkeitspflichten gegenüber Fremden”).

\(^{1150}\) See DENNINGER 1994, 39.

\(^{1151}\) See DENNINGER 1994, 36-37.

Charles TAYLOR argues as well for a reinterpretation of equality. The concept of equal dignity of all human beings led to politics of equality and an equalization of rights. The relevance given to identity today demands however politics of difference. Instead of attempts to homogenize, the distinctness of every individual and every group shall be recognized in its particularity.

The history of the American nation already shows a redefinition of the understanding of equality. While in the beginning difference was correlated to inequality in a second stage, identity was correlated to equality. The American nation would have to proceed to a third stage where difference is correlated to equality.

Because equality is one element of the nation concept a change of the notion of equality would introduce the equal relevance of groups at the constituted and the constitutive level. The American state would therefore not only have to accept the political relevance of different groups within the state and introduce e.g. positive discrimination but would have to perceive different groups already as equal at the state-building level. This would jeopardize the American conception of the state and the nation.

The discussion of multiculturalism in France shows already a tendency towards the acceptance of diversity. The understanding that multiculturalism or diversity should not only be accepted but as a universal value even be fostered can be counted as step towards the implementation of the post-modern paradigm of normative diversity.

Germany already partly accepted others as relevant for the realization of democracy. Diversity could be introduced as value of the nation similar to the value of human rights. This would lead to the relevance of groups at the state-building level.

While Germany and France already introduced some even though limited aspects of normative diversity in the constitutional design they

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1155 For the concept see again ROSEN Feld 1996, 165-66.
did not conceptually include groups at the state-building level. The discrepancy between state-building and constituted level however will always question the complete equality of the groups and the legitimacy of the nation-state. Both France and Germany would have to accept the relevance of groups at the state-building level.

Erhard Denninger distinguished four functions of the Constitution: (1) the creation of power, (2) the limitation of power, (3) the legitimation of power, and (4) the integration of the people. According to Denninger the fifth function of the constitution is to reflect the self-definition and self-image of the self-constituting people and the fundamental conditions of its collective existence.

For the cases of France, the United States, and Germany it would need a reconstituting of the State in order that their constitutions can fulfill the five functions as distinguished by Denninger. For the integration of the people and to reflect the self-definition and self-image of the nation as composed nation and to define normative diversity as value these countries would have to reconstitute state and nation.

This would completely change the concept of the nation-state. For the German nation-state it would have the result that the state is not exclusively the state of and for the German nation. When other groups are viewed as equally relevant this would lead to the consequence that there is not any longer a nation-state unless an encompassing new national identity could be created that incorporates the German cultural identity as one relevant identity. The reasons for unity would have to be completely redefined.

For France the relevance of groups at the constitutive level would not necessitate the complete redefinition of unity. Cultural assimilation was viewed as means for political unity. Unity is not based solely on

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1156 See Fleiner-Gerster 1995b, 54.
1157 See Denninger 1994, 16 (based on a comparison between the new Constitutions of the Länder in Germany and the German basic law and an analysis of the legal theory of the state).
1158 See Denninger 1994, 18.
the common culture but as well on political criteria. The acceptance of
the equal relevance of other cultural groups would necessitate the
redefinition of the means for national unity and the meaning of the
good citizen. Even though this would be less far going than in the
German case it would still be decisive.

Switzerland recognizes groups at the statebuilding level and in the
constitutional design. The respect for diversity is however not
completely universal but based on particularity. So as to accept new
diversities Switzerland would have to recognize the equality of
preexisting and new diversities\(^ {1159}\).

Most of all when normative diversity is interpreted as universal in so
far as all diversity, old and new, is deemed to be relevant new groups
can come into existence and become relevant. The appearance of new
groups that demand and receive relevancy will affect the composition
of the nation and therewith as well of the constituent and constituted
power. National identity will therefore not be static but evolving\(^ {1160}\).
The recognition of new diversity as relevant that is not based on a
consensus of the nation can however jeopardize national identity and
unity.

There must be mechanisms to peacefully define the relevancy of
diversity. The case of the Canton of Jura suggests that the relevancy of
groups can be defined peacefully through a democratic procedure that
realizes the self-determination of all affected groups\(^ {1161}\).

\(^{1159}\) At least at the moment this redefinition would probably lead to the disintegration
of the nation.

\(^{1160}\) All national identity evolves over time. The composed nation is in this respect no
exception. However it is disputable whether a nation can exist with such an open
and readily changeable concept of national identity.

\(^{1161}\) Cf. HABERMAS 1998b, 120: He argues that “nur die Betroffenen selbst können in
öffentlicher Auseinandersetzung die Kriterien klären, unter denen Gleiches gleich
und Ungleiches ungleich behandelt werden soll” (footnote omitted).
2. Redefinition of the Tasks and Institutions of the State

As consequence of normative diversity a redefinition of the tasks and the institutions of the state would be necessary. Normative diversity would necessitate the recognition of different group interests or in different words the acceptance of different conceptions of the good. The acceptance of different group interests will need institutions that enable the balancing of different conceptions of the good in accordance with the value of diversity.

Comprehensive pluralism, which could serve as a means to realize normative diversity, is opposed to German and French nationalism in so far as it necessitates the equal acceptance of several perceptions of the good. It is opposed to American nationalism because it serves as the basis for the state’s active support of culture.1162

As well Denninger stresses that his post-modern paradigms lead to a teleological or result oriented function of the constitution in so far as pluralism is accepted as telos.1163 Taylor argues that all theories that aim at taking diversity into account necessitate an active state. “They are thus in the end not procedural models of liberalism, but are grounded very much on judgements about what makes a good life – judgements in which the integrity of cultures has an important place.”1164

However, comprehensive pluralism would minimize the conceptual change of the German and French nation concept because the theory does not only demand the equal relevance of different perceptions of the good but comprehensive pluralism offers an encompassing

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1162 See Rosenfeld 1998a, 200-01; cf. Habermas 1998a, 118-19 = Habermas 1999, 143: He argues that multicultural societies can only be held together when not only liberal individual rights and political participation rights are guaranteed but also social security and the “reciprocal recognition of different cultural forms of life. Democratic citizenship can only realize its integrative potential – that is, it can only found solidarity between strangers – if it proves itself as a mechanism that actually recognizes the material conditions of preferred forms of life.” (emphasis mine).

1163 See Denninger 1994, 50-51.

1164 Taylor 1994, 61.
**conception of the good.** The nation could adopt comprehensive pluralism as its conception of the good. It is however doubtful that the institutions can support the necessary negotiations between first and second order norms.

With the American nation concept it would harmonizes in so far as comprehensive pluralism can fulfill the American ideal of the equal worth of different perceptions of the good even better than liberalism\textsuperscript{1165}. The above analyzed impossibility to attain a complete separation of the private and the public, showed that the state cannot offer the truly culture-blind playing field on which all conceptions of the good can be realized by the individual.

The example of Switzerland suggests that the political institutionalization of diversity can take different interests into account and can balance different conceptions of the good\textsuperscript{1166}. Jörg Paul MÜLLER sees the function of democracy not so much in expressing the will of a homogeneous people but in affirming difference\textsuperscript{1167}.

Normative diversity would therefore necessitate a **new model of democracy**\textsuperscript{1168}. As shown above, Claus OFFE distinguishes two models of democracy: procedural and result oriented democracy.

\textsuperscript{1165} See ROSENFELD 1998a, 216-17.
\textsuperscript{1166} Same conclusion in PREUSS 1998, 128-29.
\textsuperscript{1167} See J.P. MÜLLER 1999, 41: “Sinnstiftende Aufgabe eines demokratischen ‘Demos’ ist Anerkennung der Heterogenität, die Bejahung der Differenz der Menschen oder von Gruppen als lebendiges Substrat der Demokratie. Der demokratischen Verfassung geht es nicht in erster Linie darum, einem homogenen Volk umfassenden Ausdruck zu verschaffen, sondern darum, mit einer Vielzahl von Partikularitäten umzugehen und zu kooperieren, die verschieden sind in religiöser, sprachlicher und kultureller Hinsicht.”
Result oriented democracy cannot provide for rational legitimacy, democracy as procedure, which demands fix rules of the game in order to limit the government, cannot necessarily guarantee (1) that diversity as value is taken into account and (2) that different perceptions of the good are continuously balanced.

1. Already the set-up of processes must provide for diversity accommodation but as well for an overarching legitimacy. The process can however only accomplished this function by consensus-driven democracy and not by majoritarian democracy. The procedure must not (and cannot) be completely value-neutral but must include diversity accommodation as a guiding value.

2. The procedure must guarantee the balancing of interests. Similar to the Swiss constitutional democracy the constitution must provide for a procedure of a basically unlimited decision-making and rule-setting process in order to be able to (re)balance continuously different interests. According to its function the Constitution does not so much limit political power but sets a procedure for political rule.

The new model of democracy could therefore be coined as consensus-driven procedure for continuous decision- and rule making.

1169 See Fleiner-Gerster 1995b, 59-61: When in a majoritarian democracy the majority is defined in ethnic terms the ethnic minorities will be the perpetual loser. When the minority feels that it has no chance to succeed with its political demands it will not feel represented by the state and will not identify with the state.

1170 Rosenfeld allows some substantive norms in procedural democracy as long as these norms are widely accepted: see Rosenfeld 1998a, 122. The value of diversity could guide as substantive norm the procedure without violating the principles of procedural democracy.

1171 See Basta 1995, 3, 14.

1172 In the case of the secession of the Jura from the Canton of Berne neither the Federal nor the Cantonal Constitution provided for a procedure for secession. Through constitutional amendment of the Constitution of Berne a procedure for the secession could be established.

1173 This model of democracy will still need checks and balances.
IV. Conclusions

In order to transform the classic nation-states into nation-states that adhere to normative diversity substantial redefinitions would have to take place. The nation would have to be redefined so as to encompass different groups. In the nation-state these groups have to receive relevance on the constituted as well as on the state-building level so that their different understandings of the good are equally relevant. The state would have to be reconstituted to redefine the constituent power. Institutions would have to be redefined so as to balance the different interests in accordance with the aim of diversity while achieving an overarching legitimacy.

These redefinitions would completely change the American, French, and German concepts of the nation-state. Such far going redefinitions of values, institutions, and processes is probably not feasible.

Germany, France, and the United States should therefore not or only in a very limited way serve as models for countries that want to realize normative diversity. These three nation-states have little or nothing to offer to cultural groups who shall receive political relevance.

Normative diversity must not lead to the conclusion that something like ethnic federalism or an ethnification of politics should be introduced\(^\text{1174}\). Though culture can receive political relevance this relevance shall be democratically mediated. There must always be a counterbalancing overall legitimacy and a minimal consensus. The people must agree to solve issues peacefully through communication with respect to the needs of all individuals and groups\(^\text{1175}\). This will only be possible based on negotiation and compromise.

\(^\text{1174}\) The disintegration of Yugoslavia shows the danger of federalism where the federal units are drawn as homelands for different ethnic groups. When the political institutions do not foresee a procedure that accepts only compromises politics will become power politics between different ethnic groups. In Switzerland there is not just one federal unit e.g. for the German speaking community but several so that hardly ever all German speaking cantons will vote unanimously. The aim is to have always changing minorities and majorities.

\(^\text{1175}\) See J.P. MüLLER 1999, 44-45:
Supranational organizations will be confronted with similar issues as multicultural countries. The closer the integration the more pressing it will be to find procedures and institutions that take different cultural traditions into account. For instance the nation-states that form the European Union have strong identities and a long tradition of political relevance of their nations. A European Union that wants to overcome diversity so as to form a homogeneous European people will probably face sooner or later resistance. The European Union should try to adopt policies that accommodate diversity and should content itself with a limited political consensus of the European population. Switzerland managed to create a composed or multi-layered nation and realized most aspects of normative diversity. Switzerland cannot serve as a model but can give some ideas about how a consensus-driven procedure for continuous decision and rule making can be achieved.

For comments on the European Union see Fleiner 1999, 413-15: He criticizes the homogenizing tendency of the European Union and the tendency to presuppose common European values.
CONCLUSIONS: INTEGRATED DIVERSITY

This analysis wanted to show in how far normative diversity and the nation-state principle can be combined. In the introduction to this analysis it was stated ambitiously and carefully at the same time that “a concept of the nation-state that realizes normative diversity could give some ideas on how to manage the peaceful living together of different self-conscious cultural groups within a common state”\(^{1177}\).

The above stated purpose of the analysis had as assumption that the modern nation-state even as democratic state cannot integrate diversity and that modernity has to be complemented with postmodernity in order to integrate multicultural societies.

In order to have a basis for analyzing, the terms ‘state’, ‘nation’, and ‘nation-state’ were regarded. Afterwards three different modern nation-states (the American, the French, and the German) were examined. Based on an empirical analysis, the underlying nation-state concepts could be developed. An analysis of the respective approaches concerning diversity showed inherent limits of all three nation-state concepts in respect to the integration of diversity. The case of Switzerland served as the empirical counter-example because it could prove that nation-building need not be opposed to diversity accommodation. Afterwards based on a combination of the nation-state principle with the postmodern theory of normative diversity a definition of a nation-state that realizes normative diversity could be established.

In the form of conclusions the assumption that modernity cannot integrate multicultural societies and that modernity has to be complemented with postmodernity to integrate diversity shall be re-probed.

In § 17 the aim of an integrated multicultural society will be restated. In § 18 and § 19 the logic of modernity resp. of postmodernity will be

\(^{1177}\) See above at § 1.
regarded. Finally in § 20 it will be argued that postmodernity must complement modernity for the integration of multicultural societies.
§ 17. Aim: Integration of Multicultural Societies

In order to re-probe the assumptions the aim of an integrated multicultural society shall be restated.

**Aim:** Different self-conscious cultural groups live together peacefully within a common state.

The aim already shows the understanding of an integrated multicultural society:

- *Self-conscious cultural groups* are groups who are conscious of their culture and therewith of their difference, are sensitized for their group specific needs and interests, and want them recognized and realized. They want self-determination.
- Though they want self-determination the different groups *live together peacefully*. This necessitates that the groups respect the self-determination of other groups and pursue their interests with non-violent (political) means.
- The groups live in a *common state*. They experience the state as their state. They do not question the legitimacy of the state nor the boundaries of the state. The state enables the self-determination of all groups.

As it will be shown even the democratic modern state is not able to achieve this integration of different self-conscious groups\textsuperscript{1178}.

\textsuperscript{1178} Cf. PREUSS 1998, 128: “Erstrebt die liberal-pluralistische Gesellschaft ihren Zusammenhalt auf der Grundlage der durch Recht garantierten Gleichheit ihrer Mitglieder, so besteht das Ideal der Integration einer multikulturellen Gesellschaft in der wechselseitigen Anerkennung ihrer Mitglieder in ihrer jeweiligen Besonderheit und Andersartigkeit.”
§ 18. The Logic of Modernity

Thesis 1 According to the logic of modernity self-conscious cultural groups will lead to the disintegration of the nation-state even when the state accords them equal (democratic) rights.

Modernity aimed at integration based on the notion that only homogeneity or a common identity could lead to political (democratic) consensus\textsuperscript{1179}. According to the logic of modernity each nation should have one state and each state one nation. Very often this logic was paired with the demand that each culture should have one state or each state one culture. This led to two different nation-state concepts. In one concept one cultural group created a cultural nation-state\textsuperscript{1180} in the other the state created a national culture\textsuperscript{1181}. In both concepts the nation was associated with a specific and distinct culture and this culture was the basis of or guarantee for identity. Identity of the members of the distinct nation was taken as underpinning for the equality of all members and their equal (political) rights as individuals. Equal political rights of individuals promised the expression of the distinct identity, promised self-determination of the individual and of the nation.

Hardly any nation-state achieved however identity of the whole population. The reaction to difference in a modern democratic nation-state can be assumed identity and therewith equality as individual or recognized difference and therewith inequality in rights\textsuperscript{1182}. Assumed

\textsuperscript{1179} See above at § 1, § 5 I., § 6.
\textsuperscript{1180} Germany.
\textsuperscript{1181} France.
\textsuperscript{1182} In many cases those that were defined as different had even unequal rights. Because this analysis is limited to the democratic state the effect of unequal rights will not be regarded. Inequality in rights expresses the notion that those
identity and recognized difference lead to imperfect self-determination of the individual because equal political rights do not lead to the expression of the individual’s difference. Assumed identity and recognized difference do not lead to the self-determination of the cultural group because equal political rights do not express distinct cultural identity.

A third concept of the nation-state disassociated the state from culture and political rights from cultural expression. Identity was based on universal or formal equality in the state. Formal equality did not assume identity and did not pay relevance to difference. Equal political rights expressed individual identity and individual self-determination disassociated from group identity and group self-determination.

In order to maximize individual and group self-determination the cultural group will try to achieve a state in which based on the identity of the individual and of the group equal political rights promise the expression of individual and cultural identity.

Most probably the new state will not be able to achieve identity of the whole population. The democratic state can react in three different ways. It can assume identity, recognize inequality in rights, or accept formal equality. All three approaches will not be satisfactory for other self-conscious cultural groups who might want to maximize their individual and group self-determination by forming an own state.

Paradox 1: It is the paradox of modernity that the quest for integration will lead to disintegration. The quest for self-determination of different groups will lead to an atomization of states into ever-smaller units.

who are different are recognized to be so but still receive equal rights. France normally assumed identity (normative homogeneity), democratic Germany adopted inequality in rights. Croatia is a further example for the notion of inequality in rights. The example of Israel showed however that ethnic nations can adopt as well the policy of assumed identity in respect to the members of the nation.

This is at least conceptually the case in the United States. The empirical analysis could however show that the disassociation between culture and politics was not successful. In this case those who do not belong to the dominant culture will have to cope with assumed identity or inequality of rights.
§ 19. The Logic of Postmodernity

Thesis 2: According to the logic of postmodernity the assertion of difference can lead to the integration of difference.

Postmodernity is the counter-reaction to modernity. Postmodernity does not aim at integration and identity. The postmodern state promotes diversity. In different words, the postmodern state relies on normative diversity\textsuperscript{1184}.

According to the \textit{logic of postmodernity} the state does not rely on the idea that there should be ‘one culture one state’ or ‘one state one culture’ nor the disassociation of culture and state. Therewith the postmodern state does not assume identity or recognize inequality in rights, or accept formal equality. It accepts and expects difference and promotes equality in rights as attributive and distributive differentiating equality instead of equal rights\textsuperscript{1185}.

Equality in rights leads to self-determination of the individual because it allows the expression of distinctness. Equality in rights leads to the self-determination of the cultural group because equality in rights allows the expression of distinct cultural identity. Equality in rights expresses individual identity and individual self-determination associated with group identity and group self-determination. The state can therefore realize the self-determination of the cultural group and of others.

\textbf{Paradox 2:} Paradoxically the assertion of difference can lead to integration based on the self-determination of multiple groups.

\textsuperscript{1184} See above at § 13, § 16.
\textsuperscript{1185} See above at § 16 III.
§ 20. Modern Postmodernity

Postmodernity promises to integrate. The integrative force of postmodernity is however limited or even neutralized by its universality.

**Thesis 3:** Postmodernity has to be complemented with modernity.

**Thesis 3a:** According to the logic of postmodernity universal difference leads to individualism and disintegration.

Postmodernity promotes difference. Difference within the state leads to the recognition of different groups and promotion of group identities. Difference within the cultural groups leads to the recognition of different sub-groups and the promotion of sub-group identities. Difference of the individual has to lead to the recognition of the individual and the promotion of individual identity. In its last consequence the assertion of universal difference, similar to the assertion of universal equality, leads to individualism. Individual difference becomes the basis for equality.

Universal difference cannot integrate multicultural societies because it does not express identity but only difference. Individual difference cannot define the group. Group difference cannot define the state. Individual difference and group difference cannot give reasons for a common state.

**Thesis 3b:** When postmodernity is complemented with identity or in different words with modernity, the inherent limit of postmodernity can be alleviated.

The introduction of modernity can prevent individualization through universal difference because modernity defines identity. It needs identity to define the group and to explain the common state. The

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1186 See above at § 8 I.2.A., the difficulties of the United States with defining the size of the nation and the remarks concerning ethnic federalism. Difference must be paired with common identity to define group and state.
group can only be perceived when the group has a distinct identity. The state can only be perceived as common state of all groups when the groups have a common and therewith national identity. Integration can be achieved when group identity includes national identity and national identity encompasses distinct group identities.

Through the combination of modernity and postmodernity or in different words of identity and normative diversity the basis for the integration of distinct self-conscious cultural groups within a common state can be achieved. Normative diversity creates the basis for difference, modernity for identity. Modern Postmodernity establishes integrated diversity.

_Thesis 3c:_ **Postmodernity is limited by modernity.**

The introduction of modernity has however as well a limiting effect. Identity and difference are the two sides of the same coin. Modernity defines identity. Consequently modernity defines as well that some differences are irrelevant. Therefore modernity limits normative diversity because it negates the relevance of some diversity. The discord about criteria to define identity and difference can again have disintegrating effects. Modern postmodernity is therefore not completely able to avoid the paradox of modernity.

_Paradox 3:_ **Only when identity is recognized difference can be asserted. Therefore normative diversity needs identity. In different words postmodernity needs modernity to integrate diversity. Modernity however limits postmodernity because identity negates difference.**

Modernity asserts identity. Postmodernity asserts difference. Modern Postmodernity is the only way to integrate a multicultural society because it can assert identity and difference. Assertions about identity and difference can however as well jeopardize modern-postmodern integration. This is the final paradox that cannot be completely solved.
Normative diversity will have to serve as guideline for the recognition of relevant diversity but modernity will have to limit normative diversity in order to enable identity\textsuperscript{1187}.

\textsuperscript{1187} The case of Switzerland shows this very limit of normative diversity in the nation-state. Not all diversity is accommodated but only diversity that is generally accepted as relevant. Nation identity limits normative diversity to given diversity.