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Global Migration—Immigration—Multiethnicity: Challenges to the Concept of the Nation-State

JOST DELBRÜCK*

Professor Delbrück begins his article by briefly discussing the history and development of the nation-state, and then examines how changes in the political and social environment, often international and cross-cultural in nature, have altered the traditional notion of the nation-state. He argues that the modern form of the State should be based on the concept of the "Open Republic," rather than on that of the traditional closed, self-centered, and self-reliant nation-state. Professor Delbrück demands that his concept of an "Open Republic" first be grounded in the form of a republican State—a constitutional government involving the democratic participation of all citizens and a "marketplace of ideas." He focuses on a republic geared in nature and character toward an "openness" to accepting and assimilating citizens of different ethnic, religious, or cultural backgrounds, with equal rights for those diverse citizens. He concludes that such an "Open Republic" is suited to preserving a national public interest, while at the same time meeting the global challenges of the present and future.

I. INTRODUCTION

Presently, we can observe a growing concern about the future of the traditional concept of the nation-state. Politicians are becoming concerned about a serious loss of State authority and power, both externally and internally. Indeed, there are indications that could suggest that the nation-state, the universally realized form of political organization of societies (people), may become obsolete. The first development that may justify doubt as to the persistence of the State concerns the diminishing relevance of State power and authority. With regard to the external dimension of Statehood, one may well ask whether the concept of the State is still

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adequate and viable in an era of regional institutional integration and globalization of most of the essential fields of State responsibility.¹ Instead, globalization² may well require new concepts or blueprints of political organization.

Internally, a second development affecting the traditional concept of the State concerns the notion of the “permanent” population as the second of the three elements forming a State (a defined territory, a permanent population, and an effective government).³ Except in the traditional immigration countries, the “permanent population,” or the State people-nation (“Staatsvolk”), of most of the European States has been defined in an ethnically or culturally homogeneous way.⁴ With the change of many European nations into de facto immigration countries,⁵ the traditional understanding of what constitutes the “nation” or the “State people” is no longer tenable. The question is, can a nation as a human substrate of Statehood be molded and integrated apart from common ethnicity, language, history, and culture? If not, that is, if a State in order to remain a State proper must depend on such integrating principles, would not the traditional

1. Concerns of this kind motivated a number of private individuals in Germany to bring the law approving Germany's adherence to the Maastricht Treaty of 1992 before the German Constitutional Court. The Court upheld the law but indicated that any further transfers of sovereign powers to the European Union would need the consent of the German *pouvoir constituant* (i.e., the people), which means that further transfers of essential sovereign powers could not be effected by simple constitutional amendment. For the English translation of the decision of the Constitutional Court of Oct. 12, 1993, see Germany: Federal Constitutional Court Decision Concerning the Maastricht Treaty, Oct. 12, 1993, 33 I.L.M. 388 (1994).

2. Globalization means the denationalization of politics, markets, and law, and even in some instances the transfer of State powers to supranational institutions (which are not and will not become proper States). On “globalization,” see Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 10-11 (1993).

3. See Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. I, 49 Stat. 3097, 3100, 165 L.N.T.S. 21, 25.

4. In the case of Germany, this ethnically informed notion of the State people has been emphasized by the German Constitutional Court in a decision holding as unconstitutional some state laws extending to alien citizens from European Community (EC) countries the right to vote in municipal elections. *Entscheidungen des Bundesverfassungsgerichts* (Constitutional Court Reporter) 83 BVerfGE 37, 50-59.

5. There is a voluminous literature on the migration-immigration issue. For the German perspective, see DEUTSCHE IM AUSLAND—FREMDE IN DEUTSCHLAND: MIGRATION IN GESCHICHTE UND GEGENWÄRT (Klaus J. Bade ed., 1992); A. Mühlum, *Armutswanderung, Asyl und Abwehrverhalten. Globale und nationale Dilemmata*, B7 AUS POLITIK UND ZEITGESCHICHTE—BEILAGE ZUR WOCHENZEITUNG DAS PARLAMENT 3 (1993) (with further references).

concept of the State be anachronistic or outmoded in view of the de facto growing heterogeneity of the populations of the existing State entities?

The first part of this paper will address the history of the concept of the nation-state, particularly the concept of the State nation ("Staatsvolk"). It will be shown that the concept of the nation, as coined in the course of the French Revolution, developed in two distinct ways—the ethnically oriented way (see Herder's notions of the "Volk" and the "Volksgeist"⁶) and the politically and culturally oriented way (see the French notion of the "grande nation" and the U.S. notion of the multiethnic "political nation").

The second part of this paper will address the changing political and social environment that seriously challenges the State's ability to sustain its traditional status and self-understanding. This paper will argue that the State as the dominant form of political organization and the accepted object of identification of peoples is *not* obsolete. When considering State theory, however, one has to rethink constitutive elements of the traditional concept of the State.⁷ The form of future States should be based on the concept of the "Open Republic," as distinct from the "closed," self-centered, and self-reliant nation-state.

The third part of this paper will address the concept of the "Open Republic,"⁸ in particular how it relates to the historical republican paradigm, and whether that is still valid or can or should be adjusted to modern conditions of political society. This part will also address the question as to whether the "Open Republic" can mold an "open" nation or State people that will be integrated under or around a modernized "republican idea," yet at the same time will be diversified ethnically, culturally, religiously, or on the basis of other similar criteria.

6. For a summary of Herder, Schelling, and Fichte's impact on European, and specifically, German, political thought with regard to the concept of the nation ("Volksbegriff"), see Gerhard Besier, *Volk* (3. Zum Volksbegriff im Rationalismus des 17. Jahrhunderts bis zum Imperialismus der Wilhelminischen Ära), in 2 EVANGELISCHES STAATSLIXIKON 3894-97 (Roman Herzog et al. eds., 3d ed. 1987).

7. For an intriguing analysis of the changing role of the sovereign State in the international system and its impact on international law, see Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447 (1993).

8. As to the notion of the "Open Republic," see DIETER OBERNDÖRFER, *DIE OFFENE REPUBLIK: ZUR ZUKUNFT DEUTSCHLANDS UND EUROPAS* (1991); Dieter Oberndörfer, *Politik für eine offene Republik: Die ideologischen, politischen und sozialen Herausforderungen einer multikulturellen Einwanderungsgesellschaft*, in *DAS MANIFEST DER 60—DEUTSCHLAND UND DIE EINWANDERUNG* 133 (Klaus J. Bade ed., 1994).

The fourth and final part of this paper will show that the "Open Republic" could, in principle, achieve the goal of providing an integrated State on the basis of "equal citizenship" and community, as well as individual freedom and diversity. The "Open Republic" thus constituted, from the perspective of political integration of the citizenry, would be capable of accommodating "others" within its realm and making them "belonging,"⁹ which is essential in view of persistent global migration. The "Open Republic" would be structurally able to participate constructively in the emerging global order and the international communication community because it would not be fettered by the parochial, inward-directed perceptions of the traditional nation-state. It could focus on the international "public interest" without losing its integrating capacity because it would not be narrowly preoccupied with the national interest in the first place.

II. HISTORICAL NOTES ON THE CONCEPT OF THE NATION OR STATE PEOPLE

The modern territorial State has undergone various changes in types and appearances. The early formative period of the territorial State was characterized by its monarchical leadership, which was the focal point of Statehood as expressed by the absolutist formula "*l'état c'est moi*."¹⁰ The next stage of development of the territorial State saw the gradual differentiation and separation of the institutions of government from the monarch as a person. This development is graphically described by the formula allegedly uttered by Frederic II of Prussia, who considered himself "the first servant of his State."¹¹ In the wake of the French Revolution, the "nation" as the sovereign bearer of State power became the focus of State theory. This theory attempts to explain the nature of the territorial State which, in the nineteenth century, came to perfection as the dominant form of political organization of peoples living permanently in a defined territory.

9. See KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

10. The "*l'état c'est moi*" statement is ascribed to the French absolutist monarch Louis XIV (1638-1715); see OTTO KIMMINICH, *DEUTSCHE VERFASSUNGSGESCHICHTE* 247 (2d ed. 1987).

11. See *id.* The Prussian King's phrase is cited by Immanuel Kant in his famous essay "On Perpetual Peace," see Immanuel Kant, *Zum Ewigen Frieden. Erster Definitivartikel zum Ewigen Frieden*, in 11 *SCHRIFTEN ZUR ANTHROPOLOGIE, GESCHICHTSPHILOSOPHIE, POLITIK UND PÄDAGOGIK, WERKAUSGABE* 195, 207 (Wilhelm Weischedel ed., 1977).

The then-current perception of the nation was expressed in Article 3 of the *Déclaration des Droits de l'Homme et du Citoyen* of 1789.¹²

One may wonder why the French revolutionaries chose the term "nation" to signify the bearer of the sovereign power of the young French Republic. The term does not seem to square well with the revolutionaries' belief in universal human rights and rights of citizens as presented in the *Déclaration*. The notion of the human person and the *citoyen* as the subject of universal human rights is derived from the philosophy of the Enlightenment. This notion belongs to the concept of the Kantian Republic, which internally is focused on the lawfully constituted society and the protection of human rights, and which externally is aimed at a World Order of Republican States.¹³ From this perspective, "citizenry," as the lawfully constituted society, would have clearly been the more appropriate term¹⁴ to signify the bearer of State power. The revolutionaries' choice of the term "nation" for this purpose was, however, not accidental. Rather, it is a recognition of the fact that the "nation" was not only the concept of universal human rights as developed by the Enlightenment, which led to the notion of the nation and the modernizing territorial State; but also that the ideas of the French Revolution were perceived as the specific "mission" of the French nation. These ideas gave the French nation a distinct power politics momentum and integrated the French people into the French State Nation.¹⁵ This missionary self-perception of the French nation provided an overwhelming thrust in the Napoleonic wars. It also inspired the other European States in their resistance against the onslaught of the French armies. The idea of national unity organized in the territorial nation-state became the leading paradigm of the emerging international system. However, it became subject to different interpretations and ways of political implementation.

12. See *Déclaration des Droits de l'Homme et du Citoyen*, in LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN ET LA JURISPRUDENCE 249 (Colloque des 25 et 26 mai 1989 au Conseil Constitutionnel 1989).

13. See Kant, *supra* note 11, at 204.

14. In calling the term "citizenry" more "appropriate," this author opts for an understanding of "citizenry" that is informed by the notion of a "moderated government" in contrast to the "volonté générale" oriented understanding of Jean-Jacques Rousseau. See Donald L. Horowitz, *Immigration and Group Relations in France and America*, in IMMIGRANTS IN TWO DEMOCRACIES: FRENCH AND AMERICAN EXPERIENCES 3, 7-18 (Donald L. Horowitz & Gérard Noiriel eds., 1992).

15. See 1 FELIX ERMACORA, ALLGEMEINE STAATSLHRE 61 (1970).

In Germany, then still divided into thirty-nine different sovereign territorial entities, the national ambitions of the bourgeoisie were frustrated by the decision of the Congress of Vienna not to establish a German nation-state. The German Federation (Deutscher Bund) of 1815 was a federation of sovereign States mostly committed to the goal of restoring the old monarchical order, albeit in a slightly modified version. Thus, there was no politically viable way of adopting the French model of nation-building on the level of a united Germany. However, the national dream had a strong influence on German thinking. This influence took two different courses, which eventually merged towards the end of the nineteenth century when German unity ultimately came about. On the one hand, under the influence of the Romantic movement, the frustrated national ambitions turned to building a backward-oriented national myth of German glory from the times of the Germanic tribes onward.¹⁶ On the other hand, in view of the lack of politically real nation-building, the idea of the nation was combined with that of the "Volk" (i.e., the German people), and thereby acquired a distinct ethnic meaning. This ethnic orientation is still virulent in the German Nationality Act¹⁷ and in Article 116 Basic Law,¹⁸ although Germany has never had a completely ethnically homogeneous population.¹⁹ The Nationality Act still adheres to the principle of acquiring nationality by birth. The Basic Law defines as Germans those people who do not have German nationality but who are of "German stock" and have taken domicile in Germany after 1945.

While the German example of an ethnic perception of the concept of nation²⁰ is particularly instructive, not the least because the teachings of

16. OBERNDÖRFER, *DIE OFFENE REPUBLIK*, *supra* note 8, at 30, speaks of an artificial, fictitious continuity between the allegedly [Germanic] roots of the "nation" in a far distant past and the new nation-state of 1871, which in actual history has never existed.

17. See Reichs- und Staatsangehörigkeitsgesetz von 1913 (originally published in 1913 Reichsgesetzblatt [RGBl.] 85), amended by 1993 BGBI. I 1062 (June 30, 1993); see also *infra* pp. 55-56.

18. Article 116 of the Basic Law of the Federal Republic of Germany defines German nationals as persons who either possess German citizenship or who have been admitted to the territory of the German Reich as a refugee or expellee of German stock as of December 31, 1937. GG art. 116.

19. Ethnic homogeneity—as expressed in the slogan "Germany to the Germans"—is a myth as well. It is the product of an ethnonationalist integration ideology of a belated nation ("verspätete Nation"). On the notion of the "verspätete Nation," see HELMUT PLESSNER, *DIE VERSPÄTETE NATION* (1962).

20. On the question of the German understanding of the concept of nation from a similar perspective, see Jürgen Habermas, *Anerkennungskämpfe im demokratischen Rechtsstaat*, in *MULTIKULTURALISMUS UND DIE POLITIK DER ANERKENNUNG* 147, 190 (Charles Taylor ed., 1992).

German philosophers like Herder, Fichte, and Schelling had a major impact on the shaping of ethnonationalism in general, Germany is not the only country where ethnonationalism took root. It is deeply entrenched in the minds of many European people, particularly in central, eastern, and southeastern Europe. The political upheaval in the former Soviet Union and in the former Yugoslavia is predominantly due to ethnonationalist and/or religious divisions. On the other hand, the growing political cooperation between Russia and the Serbs in Bosnia-Herzegovina is based on historically strong ethnic bonds between the two Slavic peoples. Even the Scandinavian countries, albeit in a milder form, have adhered to the ethnically informed principle of nationality by birth.

In contrast to ethnicity, another interpretation of the meaning of the concept of nation is exemplified by the development of political thinking in France and the United States. In France, where the concept of the nation emerged as a powerful political idea of historical dimension, the ethnic orientation of the term "nation" never did dominate French thinking. Although the French nation in many ways perceived itself as exclusive and imperial, it defined itself in political and cultural terms.²¹ This understanding of the nation, together with the colonial ties to overseas countries and peoples, led to an acceptance of people of different ethnic, religious, and cultural backgrounds as members of the French nation. Thus, there was little or no room left for a narrow, ethnically homogeneous perception of the French State Nation. This is clearly reflected in the French nationality laws, which widely accepted the territorial or *jus soli* principle for the acquisition of French nationality alongside the birth or *jus sanguinis* principle.²²

The formation of the U.S. nation-state has been different, of course, from that of the European nations. The United States was created by immigrants from various European countries, not by one nation or people. Furthermore, the founding of the new independent American State preceded the French Revolution. Thus, like the French Revolution, the political

21. ERMACORA, *supra* note 15, at 60. The enforcement of this concept of a politically and culturally defined nation led, however, to the repression of ethnic minorities who only today are beginning to articulate themselves in France rather forcefully. See Francesco Capotorti, *Minderheiten*, in *HANDBUCH DER VEREINTEN NATIONEN* 598 (Rüdiger Wolfrum ed., 1991); see also Horowitz, *supra* note 14, at 18-25.

22. On the French law of nationality and its recent development see Stephan Hobe, *Law of Asylum—A Solution to the Migration Problem?* 36 *GERMAN Y.B. INT'L L.* 72 (1994).

philosophy of the new State—at least to a substantial part—was based on the philosophy of the European political thinkers of the Enlightenment. Yet, the American State developed and kept its own identity.²³ This is also true of the perception of the notions of “people” and “nation” despite considerable confusion in the choice of terms denoting the notions of “people” and “nation” that characterized U.S. political (State) theory through the nineteenth and into the early twentieth century. With all due caution one may say that “people,” as used in the preamble of the United States Constitution, denoted the State people or the “body politic” (i.e., the community of citizens). “Nation,” on the other hand, was used in the English tradition to signify the empiric human substrate of the United States.²⁴ However, with the final territorial consolidation of the United States through the incorporation of the western territories to the Union,²⁵ the term “the American nation” became accepted as signifying the “body politic” or State people.

The question then arose as to what the criteria or guiding concepts were to determine the integration of the nation. Unanimous answers to this question have not been given so far. Rather, the history of the formation of the United States and its nation has been marked by sharp—and at times even violent (for example, the Civil War)—disputes over the “right” answer to the question of who was to form part of the nation and which criteria were to be used. Religious, ethnic, and racial criteria for distinguishing between the citizens “belonging to the American nation” and the “others” marked the way of the United States into Statehood.²⁶ However, the primary direction of this way was determined by the great principles enshrined in the Declaration of Independence of 1776 and the Constitution of 1787: freedom and equality. There was at all times a full consensus among those citizens already “belonging” to the nation concerning these highest values and their constitutionally binding nature. With the help of the courts, and ultimately the Supreme Court, this consensus made it

23. With regard to the differences in French and U.S. political thinking see Horowitz, *supra* note 14, at 7-10.

24. See WESTEL WILLOUGHBY, AN EXAMINATION OF THE NATURE OF THE STATE 9-12 (1928). Willoughby presents an interesting and erudite discussion of the European-German and the U.S. terminology.

25. As to the final consolidation of the United States as a “State” from a State theory point of view, see HERBERT KRÜGER, ALLGEMEINE STAATSLEHRE 7 (1966).

26. For a fascinating discussion of the struggle over this issue see KARST, *supra* note 9.

possible, time and again, to overcome exclusions of existing minorities from the national community.²⁷ Furthermore, the Fourteenth Amendment made it clear that all citizens of the several states are at the same time citizens of the Union (national citizenship). The principle of equality was also reaffirmed through the "equal protection clause." Implementation of the Fourteenth Amendment by the courts led to the enunciation of the normative principle of equal participation of all citizens in the political, economic, social, and cultural life of U.S. society ("equal citizenship"). This principle became the determinative factor in shaping the American Nation.²⁸

"Equal citizenship" as an empirical concept certainly does not describe U.S. social reality.²⁹ But, as a normative concept it forms the core of the U.S. self-perception. "Equal citizenship," not ethnic belonging, constitutes the credo of U.S. "civic culture." It is based not only on tolerance of religious and cultural diversity, individual freedom and responsibility, but also on assimilation or integration into the citizenry. Responsible citizenship requires the acceptance and socialization of these highest constitutional values.

III. THE CONCEPT OF THE NATION AND THE NATION-STATE UNDER CHALLENGE

Whether ethnically oriented or not, the concept of the nation-state, and particularly the concept of the nation or State people as described before, faces serious challenges due to a dramatically changed political, economic, and social environment. First, a great number of States are strongly involved in globalizing major fields of traditional State activity. Such fields as markets, law, and politics have become denationalized, in that they are no longer under the sovereign control of the States concerned.³⁰ This phenomenon has two implications. On the one hand, the direct legitimation of State activities through the domestic democratic process becomes indirect at best, since political decisions of major importance are taken outside the domestic constitutional setting. On the other hand, globalization not only means the denationalization of the political decision-making process, but it

27. *See id.* at 179-84, 192-96.

28. *See id.* at 54, 173-216.

29. *Id.* at 181.

30. *See Delbrück, supra note 2, passim.*

also means that global decisionmaking aims at serving the “public interest” of the world community, not at satisfying a narrowly (traditionally) defined “national interest” which, in turn, can (although not necessarily must) lead to a further alienation between the citizenry and the government of the State concerned.³¹ If the present trend toward globalization of major fields of traditional State activity persists—and there are strong indications that it will, or even must, persist in view of the emerging global threat scenarios (environment, security, and migration)³²—then the traditional concept of the nation-state must be reconsidered in at least two respects. First, the legitimacy of the State, which traditionally rests on the promotion of the self-defined “national interest,” must be based on a different ground of legitimation. In other words, the in-group oriented traditional concept of “national interest” has to yield to a concept of an “enlightened self-interest” that is open to the demands of a “global public interest.” Next, the forms of democratic participation must be extended to the supranational level to give greater legitimacy to the process of global decisionmaking.³³

Second, the traditional nation-state, and particularly the concept of the nation, are being seriously challenged by a worldwide process of migration.³⁴ Millions of people are on the move. Some have been driven out of their home countries because of violent ethnonationalist conflicts that result in utter destruction, famine, and gross violations of the most basic human rights, while others have been deprived of their most basic means of subsistence due to natural disasters or the exhaustion of their country’s natural resources.³⁵ These people—either to be categorized as “refugees” in the terms of the Geneva Refugee Convention of 1951,³⁶ or as displaced persons or “economic refugees”—are seeking refuge in the more well-to-do countries. They have become immigrants of a new kind. Some come with

31. Concerns of this kind were voiced in the Maastricht Treaty Case before the German Constitutional Court, see *supra* note 1, *passim*.

32. See Delbrück, *supra* note 2, 14-19.

33. See Hobe, *supra* note 22, at 84.

34. For a detailed discussion of these types of challenges to the nation-state, see Aristide R. Zolberg, *Changing Sovereignty Games and International Migration*, 2 *IND. J. GLOBAL LEGAL STUD.* 153 (1994).

35. For a summary of the present day migration trends, see Jeffrey S. Passel & Michael Fix, *U.S. Immigration in a Global Context: Past, Present, and Future*, 2 *IND. J. GLOBAL LEGAL STUD.* 5 (1994).

36. See Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

the middle or long-term intent to return to their home countries. Others come without any hope of ever returning home; they will become permanent residents in the State of refuge. This poses the inevitable question: will they remain aliens in their State of residence or will the principle of "equal citizenship" apply to them? There are sad indications that "equal citizenship" is not on the political agenda of most, if not all, States that are exposed to the effects of global migration.

The ethnic perception of the German nation or State people has been recently challenged by two major changes in the political environment of Germany. On the one hand, the close integration of the Member States within the European Union (EU) increasingly forces Germany to extend civil and political rights, such as the right to vote in municipal elections, to citizens of other EU Member States.³⁷ On the other hand, Germany has become a de facto immigration country. Official statements to the contrary notwithstanding, out of the approximately 6.5 million aliens (8% of Germany's total population), a large number (conservative estimates are 25-30%) will remain permanently in Germany. In fact, some 80,000 children have alien parents, quite a few of whom have reached adult age, have passed through the German school system, and are even well socialized into the German life-style.³⁸ Yet, considerable parts of the public—although not the majority—are strongly opposed to Germany's becoming an immigration country and extending "equal citizenship" to the immigrants. Right-wing parties are feeding on the anti-alien sentiment. The liberal right to asylum guaranteed by the Basic Law has been severely curtailed.³⁹

37. While the European Community Treaty (E.C.T.) guaranteed to the citizens of the EC Member States the freedoms of movement, establishment, and services, the Maastricht Treaty on European Union added Union citizenship (art. B para. 3 and art. 8 E.C.T.), the right to vote in municipal government elections, and the right to participate in European Parliamentary elections in the country of residence (art. 8b E.C.T.). English text of the Maastricht Treaty in 31 I.L.M. 247.

38. See Klaus Dicke, *Ausländer*, in HANDBUCH ZUR DEUTSCHEN EINHEIT 19 (Werner Weidenfeld & Karl-Rudolf Korte eds., 1993). Figures on the numbers of aliens in Germany differ: while the numbers given by the Federal Bureau of Statistics (Statistisches Bundesamt) for 1992 show 5.8 million aliens in the united Germany, the unofficial number for 1993 is 6.8 million, as compared to the figure of approximately 6.5 million given in the text. On immigration in Germany, see Klaus J. Bade, *Tabu Migration: Belastungen und Herausforderungen in Deutschland*, in DAS MANIFEST DER 60, *supra* note 8, at 66-85.

39. The Basic Law upholds the right, in principle, to asylum for everyone. By constitutional amendment of June 28, 1993, however, the new article 16a was introduced into the Basic Law and adds restrictions to the right to asylum by excluding from the enjoyment of this right all people who come into Germany from another European Union country or from a third State that recognizes the Geneva Refugee Convention. See, e.g., [European] Convention on the Protection of Human Rights, Nov. 4,

France, although less affected by immigration in recent years than Germany,⁴⁰ has questioned the traditional liberal perception of the nation as well. Under strong pressure from the right-wing Le Pen movement, immigration has been severely restricted and the nationality laws have been revised to the effect that the *jus soli* principle—a cornerstone of the non-ethnic understanding of the concept of the French nation—has been considerably watered down.⁴¹

A similar reconsideration of immigration policies has emerged in the United States. Although immigration has always been subject to close government control, the status of the U.S. as an immigration country has never been challenged in principle.⁴² Yet, in view of the types of immigrants who are pouring into the country, new questions are being asked, the most startling one being whether “the boat is full”⁴³—a question that is light years away from the earlier self-perception as an immigration country. The rising new mood has had political effects. The right to asylum has been handled more restrictively in recent years, as in the case of the Haitian boat people.⁴⁴ The identity of the U.S. nation has been questioned in view of the influx of hundreds of thousands of legal and illegal immigrants from diverse cultural backgrounds. The notion of

1950, 213 U.N.T.S. 221 (granting of asylum is related to the “safe haven” principle).

40. The number of aliens living in France in 1970-1971 was 2.6 million, as compared to 3 million in Germany. In 1993 these numbers were 3.6 million in France and 6.5-6.8 million in Germany—an increase by less than 50% in the French case, but by more than 100% in the German case. See Rainer Münz, *Rahmenbezug II: Bevölkerung und Wanderung in Europa*, in *DAS MANIFEST DER 60*, *supra* note 8, at 102, 115; see also Hobe, *supra* note 22, at 60.

41. See Guy de Lusignan, *Global Migration and European Integration*, 2 *IND. J. GLOBAL LEGAL STUD.* 179, 185 (1994); Hobe, *supra* note 22, at 72.

42. See Passel, *supra* note 35; see also John A. Scanlan, *A View from the U.S.—Social, Economic, and Legal Change, the Persistence of the State, and Immigration Policy in the Coming Century*, 2 *IND. J. GLOBAL LEGAL STUD.* 79 (1994).

43. See *Refugee Issues to be Focus*, *STAR TRIB.* (Minneapolis), Feb. 29, 1992, at 2E (announcing a forum in Minneapolis entitled, “Is the Boat Full?”); see also Frank D. Bean, *Immigration Combatants Overlook the New Reality*, *HOUSTON CHRON.*, Aug. 29, 1993, at 1 (Outlook); Arthur C. Helton, *Closing the Golden Door: Anti-Immigration Laws*, 256 *THE NATION* 428 (1993); James Kelly, *Closing the Golden Door*, *TIME*, May 18, 1981, at 24; Maria Puente, *Immigration 'Issue of the 90s'*, *USA TODAY*, Sept. 30, 1993, at 10A. Passel & Fix, *supra* note 35, have shown that the concerns with regard to negative impacts of continued high level immigration on the economy, particularly the job market, and on government spending are actually unfounded. But a sense of a failing U.S. immigration policy seems to persist in the public—a similar phenomenon can be observed in Germany, where anti-alien feelings run high in view of a seemingly out-of-hand influx of aliens. Tightened control of the borders and restrictive asylum policies have considerably reduced the public outrage.

44. Art Pine, *New Policy Cited as Exodus of Haitians Abates*, *L.A. TIMES*, July 10, 1994, at A1; *Gray Admits Race Affects Haiti Policy*, *BALTIMORE SUN*, July 11, 1994, at 3A.

“Überfremdung”—common coin in Europe—seems to have become a marketable notion in the United States as well.⁴⁵

If these observations lead to the conclusion that the traditional notion of an ethnically and culturally integrated homogeneous nation is no longer viable in view of the worldwide migration, then the question becomes whether this notion of the nation-state has become obsolete as well. This obsolescence appears to be inevitable unless we can offer a concept of the nation-state that does not depend on the traditional perception of the concept of the nation. This concept must allow for the State to remain an integrated community of citizens who find identification and shelter within it, but which must also accommodate a culturally and ethnically diverse citizenry. European nations have a long way to go towards this concept of an “Open Republic,” as does the United States—at least in real terms.

IV. THE “OPEN REPUBLIC”—A VIABLE ALTERNATIVE TO THE TRADITIONAL NATION-STATE?

A. *The Concept of the “Open Republic” v. The Concept of the “Nation-State”: The Present Debate*

The concept of the “Open Republic” aims at an effective form of political organization of societies. Its integrating strength comes from its commitment to freedom, equality, brother-sisterhood, the recognition of human dignity, and from its commitment to “government by the people” and “government of the people by law” within the “Confederation of Republican States.”⁴⁶

Critics of such a concept argue that it simply amounts to what one may call “constitutional patriotism” or an abstract intellectual construct of “world citizenship” in disguise.⁴⁷ The true and forceful State—so goes the

45. “Überfremdung” translates as the “fear of over-foreignization.” *Germany: Ambassador, Symbol and Scold*, THE ECONOMIST, Sept. 18, 1993, at 53. See, e.g., Bob Dart, *Groundswell Rising Against Illegal Aliens*, ATLANTA J. & CONST., Aug. 19, 1993, at A8; Suzanne Espinosa and Benjamin Pimentel, *Anger at Immigration Overflow*, S.F. CHRON., Aug. 27, 1993, at A1; Tony Freemantle, *Anti-Immigration Sentiment Rises*, HOUSTON CHRON., July 4, 1993, at A1; Paul Glastris, *Immigration Crackdown*, U.S. NEWS & WORLD REP., June 21, 1993, at 34.

46. See Kant, *supra* note 11, at 208.

47. For a rather conspicuous and bad example, see Helmut Wagner, “*Verfassungspatriotismus*” als negativer Nationalismus, in 44 AUBENPOLITIK 243 (1993); cf. Habermas, *supra* note 20, at 193 (for a critical view of this neo-nationalist line of thinking).

argument—must be based on strong ethnonational, cultural, and/or religious ties. The failures of multiethnic State constructs in the past (Austro-Hungary, the Soviet Union, Yugoslavia) are cited as examples.⁴⁸ The rising tide of ethnonationalist movements is held to be strong evidence that the natural bonds of ethnic, cultural, or religious kinship are the true driving forces of history. These critics overlook that the nation-state they envisage is a rather recent phenomenon.⁴⁹ Thus, history will not come to an end if the traditional nation-state gives way to other forms of political organization of societies. More importantly, the critics overlook the close connection between the demand for the “Open Republic” and the irreversibly growing recognition of universal human rights and fundamental freedoms.⁵⁰ This is a much stronger challenge, which cuts at the roots of the traditional, exclusive, and in-group oriented nation-state. If there is any future for the State as the form of political organization of societies, it is the “Open Republic” that possesses the problem-solving capacity needed in the globalizing political environment of the closing of the twentieth century and the beginning of the twenty-first. In the following sections, the concept of the “Open Republic” will be set out in more detail and critically appraised.

Apart from signifying a non-monarchical form of government, the term “republic” has been the subject of widely differing interpretations. However, beginning from antiquity, the term “republic” has been related to the idea of the “good State” or “good government.”⁵¹ In determining the

48. Wagner, *supra* note 47; Benjamin Barber, *Global Democracy or Global Law: Which Comes First?*, 1 IND. J. GLOBAL LEGAL STUD. 119, 123 (1993).

49. The modern territorial State emerged in a prolonged process from the crumbling medieval order and was legally recognized in the Westphalian Peace Treaties of 1648. See GEORG DAHM ET AL., *VÖLKERRECHT* 4 (2d ed. 1989). The territorial State as a *nation-state* is an even younger phenomenon dating back to the French Revolution of 1789 and its aftermath.

50. See Klaus Dicke, *Die der Person innewohnende Würde und die Frage der Universalität der Menschenrechte*, in *WÜRDE UND RECHT DES MENSCHEN* 161, 161-82 (Heiner Bielefeldt et al. eds., 1992); Jost Delbrück, *Universalisierung des Menschenrechtsschutzes: Aspekte der Begründung und Durchsetzbarkeit*, in *WELTORDNUNG ODER CHAOS?* 511 (A. Zunker ed., 1993).

51. MARCUS TULLIUS CICERO, *DE RE PUBLICA, DE LEGIBUS* 64 (E.H. Warmington ed., 1928). “Est igitur, inquit Africanus, res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.” (“Well, then, a commonwealth is the property of a people. But a people is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good.”) *Id.* For a discussion of the notion of the “republic,” see generally Josef Isensee, *Republik—Sinnpotential eines Begriffs*, 36 JURISTENZEITUNG 1 (1981); 1 KLAUS STERN, *DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND* 575 (1989).

meaning of the “republican idea” or “republicanism,” the works of the writers of the Enlightenment have been particularly important. They greatly influenced the Founding Fathers of the United States and have a continuing impact on U.S. political theory.⁵²

However, differences as to the “true” interpretation of the “republican idea” and, thus, of the understanding of the U.S. Constitution, have developed, particularly in the recent past.⁵³ A comprehensive overview of this debate cannot be given at this point. Suffice it to say that two major schools of thought have confronted each other. Considering the origin of the modern “republican idea” from the time of the Enlightenment, each in its own way has led to rather narrow interpretations of the “republican idea.”⁵⁴

On the one hand, republicanism is often charged with rigidifying the political system by dogmatizing the republican notions of the Founding Fathers as the expression of the inalienable and unchangeable “republican idea.” This one-sided fixation on State ideology as the integrating force of the nation is seen as leading to an authoritarian attitude vis-à-vis dissenting minorities. On the other hand, representatives of the “original intent” approach charge their critics with hanging onto a liberalist destruction of the substantive content of republicanism, promoting an individualistic fragmentation of the community of citizens, and ultimately taking a relativist stance towards the highest, “original” constitutional values.⁵⁵

52. Recent historical research has corrected earlier assumptions that John Locke was the exclusive, or at least dominant, authority followed by the Founding Fathers. Besides a variety of religious influences, a broad spectrum of “republican thought” entered U.S. constitutional deliberations. See Richard H. Fallon, Jr., *Commentary: What is Republicanism, and is it Worth Reviving?*, 102 HARV. L. REV. 1695 (1988-89) (with rich references to earlier and recent literature on the subject); see also J.G.A. POCOCK, *THE MACCHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

53. See Fallon, *supra* note 52; Kathym Abrams, *Law's Republicanism*, 97 YALE L.J. 1591 (1988); Richard A. Epstein, *Modern Republicanism—Or The Flight From Substance*, 97 YALE L.J. 1633 (1988); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

54. See Michelman, *supra* note 53, *passim*; see also Fallon, *supra* note 52, *passim* (critiquing Professor Michelman's interpretation of the “republican idea”).

55. This debate closely resembles the “liberalism—communitarianism” debate as documented in *MULTIKULTURALISMUS UND DIE POLITIK DER ANERKENNUNG*, *supra* note 20, with commentary by Jürgen Habermas added to the German edition of the book. See also *KOMMUNITARISMUS: EINE DEBATTE ÜBER DIE MORALISCHEN GRUNDLAGEN MODERNER GESELLSCHAFTEN* (Axel Honneth ed., 1993). Within the framework of this debate, compare MICHAEL WALZER, *SPHERES OF JUSTICE* (1983) (taking a rather restrictive view on the questions of alien citizens) with Joseph H. Carens, *Aliens and Citizens: The Case*

Most recently, however, some authors have criticized the polarization of interpretations of republicanism as tending to obscure and even distort the basic elements of the “republican idea.” These authors call for a return to the constitutive elements of republicanism (i.e., the “government by the people” and the “government of the people by law” or the “government of laws not men”) and its liberal values. But, at the same time, this return to the core elements of republicanism must be accompanied by a thorough reflection on these elements in light of the conditions of modern societies.⁵⁶ Without subscribing to everything uttered in the specific U.S. debate, the result of a reflection on the constitutive elements of what a republican State in our time ought to be basically resembles the notion of the “Open Republic” as it is put forth in this paper.

B. The “Open Republic”—Concept and Structure

The first of the undisputed elements of the republican State is constitutional government, “government by law not men” (*Rechts- und Verfassungsstaatlichkeit*), the Kantian notion of the lawfully constituted society that is the sole guarantee of individual freedom.⁵⁷ The constitution and the laws set limits on the political majority and thus prevent it from becoming tyrannical.

The second element is democratic participation of all citizens in the government, particularly in constitution-making and law-making, producing a “government by the people.” However, at least on the level of the *pouvoir constituant*, there is a tension between the principles of democracy and constitutional government: if the citizenry, the people, is taken as sovereign, the question arises as to how this sovereignty is compatible with the principle of “government of laws not men.” The citizenry, as *pouvoir constituant*, is not free from the temptation to abuse this power.⁵⁸ If one wants to avoid such abuse of power through the use of constitutional

for Open Borders, 49 REV. POL. 251 (1987) (critiquing Walzer’s position from a more liberal standpoint).

56. A lead figure in this respect is Professor Michelman. See Michelman, *supra* note 53; Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 24-36 (1986). With regard to the freedom-securing dimension of the “republic,” Michelman rightly refers himself to Kant, see 8 KANT, METAPHYSIK DER SITTEN, WERKAUSGABE 462 (Wilhelm Weischedel ed., 1977).

57. See KANT, *supra* note 56.

58. See Michelman, *supra* note 53, at 1501.

restraints, the question, then, is where the constitution draws the legitimation to attach such restraints to the sovereign people. Constitutional judicial review by an independent third branch of government does not solve the problem because—the sovereignty argument brought to its logical end—this third branch of government is at the disposition of the sovereign will of the people as well. If the judiciary were not at the disposition of the sovereign people, it would, in fact (or rather in law), not be sovereign. The judiciary would be an external authority whose legitimacy could not be drawn from the consent of the people in cases of conflict. The State practice of modern constitutional democracies is replete with examples of this dilemma.⁵⁹ There is no logically sound solution to the tension between constitutional government and popular sovereignty. The most convincing, pragmatic approach is to *assume* that in drafting the constitution the sovereign *pouvoir constituant* accepted a permanent self-restraint on its sovereignty in the sense that it is forbidden for the sovereign to abuse its powers. This self-restraint, in turn, gives constitutional judicial review its legitimacy as the protector of the constitution.

Exactly at this point, the conflict that underlies the U.S. debate over “true” republicanism comes into play. For, even if one accepts the assumption of self-restraint by the *pouvoir constituant*, the question of its legitimizing effect over the course of time arises. In other words, the question is how an interpretation of the substantive meaning of the self-imposed restraints on the sovereign people is possible that still respects changing social conditions in a given State. Indeed, the resulting understanding of the constitution may become authoritarian or intolerant of changing value orientations once accepted restraints are identified with the “original intent.” This result would be incompatible with the republican idea of “government by the people” or with the idea of self-determination of a self-conscious citizenry under the conditions of modern society. In a time of rapid social change, the “republic” must prove itself as adaptable, as “open.”

59. An illustrative example of this tension between the limitations of the constitutions and the legislative branches of government in the United States and in Germany is that of the constitutionally protected right to privacy or a woman's right to individual self-determination with regard to abortion, on the one hand, and, on the other hand, the constitutionally protected right to life of the embryo, protection of which traditionally has been seen to be the duty of the State—a notion that presently does not seem to be shared by a majority of the people of the two nations.

At this point the third element of republicanism comes into play: the notion of the “marketplace of ideas.”⁶⁰ The liberal republic is designed to serve as a forum for an open and public discourse. Such discourse operates as, at the least, an indirect instrument of social change within the given constitutional framework and, in this sense, exercises a function of constitutional policymaking and, ultimately, of molding the constitution itself.⁶¹ However, open and public discourse can only have this effect if it allows for the articulation of the diverse opinions within the society, including those of minorities. Only then can the discourse truly exercise its integrating force for all groups of society.⁶²

At this juncture, we may return to the core of the preceding considerations—the character and perception of the nation, and the State people of the “Open Republic.” Based on the observations set out in the preceding paragraph, one must conclude that every person who is ready to accept the basic principles of republican government can be a citizen of the “Open Republic.” The “Open Republic,” in order to achieve “openness,” must commit itself to “equal citizenship” for all people. Ethnic, racial, and religious criteria cannot determine who may be a citizen of the “Open Republic.” “Openness” to accepting citizens of different ethnic, religious, or cultural backgrounds and to giving them equal rights is a constitutive element of the “Open Republic.” This requires us to accept the fourth element of republicanism: *tolerance, respect for others being different*, and the readiness of each person to let herself or himself be enriched in her or his own personal development by the social diversity around her or him. Furthermore, the fourth element of republicanism demands integration of the diverse ethnic, racial, religious, and cultural entities of a given society into one “nation,” and this means *assimilation* to a certain degree. Habermas, in his recent contribution to this debate, has suggested that the level of political socialization, that is, assimilation,⁶³ and integration into one nation

60. See Klaus Dicke, “The Market Place of Ideas” und der Menschenrechtliche Gehalt der Meinungsfreiheit, in MEINUNGSFREIHEIT—GRUNDGEDANKEN UND GESCHICHTE IN EUROPA UND USA 65, 65-64 (Johannes Schwartländer & Dietmar Willoweit eds., 1986). Fallon overlooks the fact that the topos of the marketplace of ideas and the law-creating force of the political discourse find firm ground in the “republican idea.” Fallon, *supra* note 52, at 1727 (critiquing Professor Michelman’s theory).

61. See Michelman, *supra* note 53, at 1513, 1531-37.

62. See KARST, *supra* note 9, at 31. With regard to this conceptualization of an integration of the people by the political discourse, see Habermas, *supra* note 20, *passim*; Habermas, *Staatsbürgerschaft und nationale Identifikation*, in FAKTIZITÄT UND GELTUNG 632 (Habermas ed., 1992).

63. “Assimilation” in this context means that the protection of cultural and religious identity

has to be separated from the level of protection of ethnicity or other identifying criteria of groups of people.⁶⁴ In other words, the "Open Republic" demands that we learn and exercise republican virtues to develop the "civic culture" and, under its shelter or umbrella, to respect diversity at the same time—*e pluribus unum!*⁶⁵ The "Open Republic" thus appears to be not a static form of government but rather a continuous demanding task for modern civilizing societies—a "konkrete Utopie" (a concrete Utopian scheme) promoted by an effective but constitutionally restrained government.

V. THE "OPEN REPUBLIC" AND THE GLOBAL CHALLENGES OF THE FUTURE

The second part of this paper has outlined a number of the challenges that confront the State as the dominant form of political organization of societies today.⁶⁶ It also has contended that the State as such will not become obsolete, but that major aspects of the traditional (ethno-) national State will have to be reconsidered. One of these major aspects concerns the notion of the "State people" (nation), which has to undergo far-reaching changes or adaptations. The citizenry has to learn to accept diversity, which means that the concept of the integrated body politic must be restricted to the level of constitutional values and political decision-making. On the sublevel of group identities, cultural, as well as religious diversity and multiethnicity must be respected. Another major aspect concerns the State, the "Open Republic," which must make internal openness effective on the international and global level. This means that, in order to live up to the standard of unity in diversity, the "Open Republic" must work constructively within the "Federation of Republican States." The "Open Republic" is structurally and conceptually able to achieve this because of its very "openness."

must find its limits where it leads to the fragmentation or even segregation of the political community of citizens (i.e., the republican nation). In other words, "assimilation," or rather political socialization, is legitimate as far as it is necessary to assure the development of a civic culture as the integrating force of the nation of the "Open Republic." See Habermas, *supra* note 20, at 184; see also KARST, *supra* note 9, at 31.

64. See Habermas, *supra* note 20, at 177.

65. See KARST, *supra* note 9, at 181.

66. See *supra* part II.

The concrete conclusions that can be drawn from this summary of the character and structure of the “Open Republic” can be described as follows:

- The “Open Republic” is capable of defining a national “public interest”—which is not selfishly restricted to immediate concerns of the given State and nation—without fear of losing legitimacy on the part of the citizenry.
- The “Open Republic” is committed to and capable of carrying out its obligations within the community of States in meeting global challenges in the fields of economic and social development, migration, the environment, and the maintenance of peace and security. Commitments of national resources can be defined according to the needs of the public interest of the community of States, which involves a commitment to institutional and global cooperation and a rejection of unilateralism.
- The “Open Republic,” in order to fulfill these obligations internally and externally, must and can be a strong State, but one guided by the rule of law and constitutional principles; in other words, a *res publica* heeding the “*bonum commune*” (the public good or the “common weal”) internally and externally.

Today’s leading political class—practitioners, theorists, and educators—has been challenged by the younger generation in recent years with regard to the older generation’s lack of a grand vision that could entice young people to commit themselves to moving from the traditional and culturally limited nation-state to a diverse and integrated “Open Republic.” The “Open Republic,” if taken seriously as described, could constitute such a grand vision if people—both young and old—were willing to recognize the challenge posed by the concept of the “Open Republic”: to secure equal citizenship for all and thereby to honor human dignity, which is the basis of any humane and civil society.