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**Between Democracy and Nationality:**
*Citizenship Policies in the Lisbon Ruling*

Patricia Mindus* & Marco Goldoni**

**ABSTRACT***

When the German constitutional court expressed itself in the Lisbon ruling, on the 30th of June 2009, the famous German newspaper *Der Bild* published the corrosive headline ‘the end of federalism’. The aim of this paper is to present and discuss the arguments of the Court concerning (1) the nature of the EU as a confederation (*Staatenverbund*), (2) the illegitimacy of further development towards a federal state (*Staatsverband*) and (3) the determination of the EU’s ‘core competences’, in order to shed light on why, within the EU, the relationship between federalism and democracy appears to be so tense. The point is that the claim that the EU cannot legitimately become a federation without calling for the constituent power of the German people (§228) is grounded in a circular logic that ultimately depends on the definition of citizenship adopted. Two connected issues will thus be deepened. On one hand, we look at the problem of jurisdictional competence attribution, the ‘*ultra vires*’ and ‘domaine réservé’ doctrines. In particular, the adoption of criteria for determining the state’s core competences on the basis of the principle of essentiality (*Wesentlichkeitstheorie*) will be assessed. On the other hand, the focus is on the theory of democracy that the German constitutional court embraces, according to which ‘the democratic legitimacy derives from the interconnection between the action of European governmental entities and the parliaments of the Member states’.

When the German Federal Constitutional Court (hereafter: FCC) expressed itself in its Lisbon ruling, on the 30th of June 2009,¹ the German media brooded on the corrosive idea that the Court had declared ‘the end of federalism’. In the wording of the famous newspaper *Der Bild*, ‘the judge’s decision buries a dream (...), that of the "Federal State of Europe"', where one day the Member States will sink to the level of provinces with greater or lesser degrees of influence’.² This 421-paragraph legal document responding to four direct complaints of infringement of the constitution (*Verfassungsbeschwerden*) and two disputes

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* Associate Professor, Philosophy Department, University of Uppsala (Sweden) and Research Fellow at the Department of Political Studies, University of Turin (Italy).
** Research Fellow, Centre for Law and Cosmopolitan Values, University of Antwerp. The research for this paper has been generously funded by the FWO (Research Foundation Flanders).

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¹ Bundesverfassungsgericht 2 Be 2/08, 30/06/09. In English: [https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bye000208en.html](https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bye000208en.html). All quotations are from the Court’s website translation.
between federal organs (*Organstreitverfahren*) – basically, the claimant was the social-Christian MP Peter Gauweiler and some other 53 members of the *Bundestag* belonging to Oskar Lafontaine’s *Die Linke* – is by no means the object of any simple interpretation. Almost unanimously, with only one dissenting opinion, it did nonetheless pave the way for the ratification of the Lisbon Treaty after a series of legislative measures\(^3\) and it also had its say on the otherwise mostly academically debated issue of the nature of the European Union.

The aim of this paper is to present and discuss the arguments of the Court concerning the nature of the EU, in order to shed light on why, within the EU, the relationship between federalism and democracy appears to be so tense. The point is that the claim that the EU cannot legitimately become a federation without calling for the constituent power of the German people (§228) is grounded in a circular logic that ultimately depends on the definition of citizenry. Indeed, the citizenship policies adopted reflect on the way the “people” are defined and this, in turn, has an effect on the constitutional relationship between democracy and federalism. The first section of the paper focuses on what the FCC’s decision on the Lisbon Treaty affirms as far as the nature and legitimacy of the EU is concerned, and concerning the relationship between the EU and Member States (hereafter: MSs).\(^4\) We shall then turn the focus to the definition of citizenship and the determination of “the German people”, seemingly the key concept for understanding the way in which the Court aims to bridge its understanding of democracy and federalism.

### 1. A Disquisition on the Nature of a Hybrid

Given the great weight and influence of the FCC all over Europe and especially in Central and Eastern Europe, the Lisbon ruling, just as its predecessor on Maastricht, was destined to become highly influential. It is of particular interest to understand the way in which such an institutional actor conceives the still harshly debated legal and political nature of the Union.

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\(^3\) In Germany, the ratification of the Lisbon Treaty was suspended until the passing of four cover statutes that declared expressly the powers of co-decision of the Parliament, giving the latter institution a control power over norms enacted by the EU Commission.

The following statements may be distinguished in the judgement, each one deserving a few words: (i) the nature of the EU is an association of states or a confederation (Staatenverbund); (ii) such a construct may not evolve towards a federal state (Staatsverband) without the German people having their say on the issue; because of (iii) the non-democratic character of the Parliament in Strasbourg, lacking representativeness (§260); (iv) the decision on who is entitled to decide (an issue known as Kompetenz-Kompetenz) cannot legitimately be yielded and therefore the solution must lie in the previously unacknowledged principle of enumerated powers, depriving the doctrine of implied powers of scope (§ 233). This clearly leads to the difficult task of rendering explicit the core competences, or, in the wording of a commentator, the ‘inalienable sovereign powers’.5 What is of particular interest here are the criteria that the Court singles out for determining the ‘domaine réservé’, because they are, as we shall see, linked to a specific (a quite typically German) way of understanding the ‘people’ through the citizenship policies it presupposes. This is, in turn, the element in the Court’s line of reasoning that is not susceptible of arousing much consensus throughout the EU, much less so in the EU15, yet perhaps more in the Accession 12 countries. Let us look at each of these five points separately.

2. EU as a Confederation (Staatenverbund)

Politically speaking, it has been clear for quite some time that the key concepts from the historical and modernist experience of the Nation State blur our understanding of the regional cooperation project in Europe, seemingly unable to grasp the specificities of the current institutional evolution. Without even mentioning the complexities of the decision-making process that Jacques Delors once called the ‘inter-institutional triangle’ of the European ‘Nation-State federation’, it is sufficient to say that the Union is no ‘State’ entity based on such constitutive elements as sovereignty, people and territory; the EU lacks monopoly of physical force, it depends heavily on the enforcement policies in the MSs, its own bureaucracy remaining negligible compared to that of MSs. Any understanding of such an association must be understood, at least partially, in non state- and sovereignty-focused terms.6

6 For a theory of the nature of the Federation distinct from the State and the Empire, see O. Beaud, Théorie de la federation (Paris: Puf, 2009). On the European Union as a federation, see R. Schütze, From Dual to Cooperative Federalism (Oxford: Oxford University Press, 2009). For a constitutional theory that tries to reconcile the
For a long time, Germany had framed this post-state arrangement as something heading in a (proto-)federal direction. It should be stressed that, differently from many other MSs constitutions, the Basic Law (Grundgesetz) has an intrinsic pro-European attitude (Europarechtsfreundlichkeit): the very preamble of the Basic Law is written in a very integration-committed spirit – ‘moved by the purpose to serve world peace as an equal part in a unified Europe’ – and, during the drafting of the constitution, Carlo Schmid – who had played a significant role in the Herrenchiemse Convention, as well as in the Parliamentary Council (Parlamentarischer Rat), a predecessor of the West-German Bundestag – insisted, back in 1948, on the circumstance that ‘the German People… are resolved to step out of the phase of the nation state and move beyond to a supranational phase’.7 In 2009, the phrasing of the Lisbon ruling was fairly different: the FCC now speaks of ‘an EU which is designed as an association of sovereign national states… The concept of association [Verbund8] covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the MS alone in which the peoples of their MS, i.e., the citizens of the States, remain the subjects of democratic legislation’ (§ 229). In other words, now, the federalist undertones are gone and unsurprisingly, the dualist readings of international law – no matter how debatable on a doctrinal level – predominate. In this sense the Court adheres to its reasoning in earlier judgements (e.g. the so-called Solange saga9 and the Maastricht case) and defines the nature of the Union as a mere ‘association of states’.10

The MSs hence continue to be the ‘Masters of the Treaties’ (Herren der Verträge) (§235) and may recede from the association on the basis of the principle ‘of reversible self-commitment’ (§233, 299, 329, 330). It is worth mentioning that the exit issue – vexata questio for many years that often led scholars to cynical recollections of the North American Civil

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8 Staatenverbund is a neologism coined in the Maastricht Decision by Paul Kirchhof, usually translated into association, which is actually closer to “(Staaten-)Verein”. In Jorge Luther’s translation of the Lisbon Decision for the Italian Constitutional Court, he stresses that Verbund is commonly used for certain local associations (as in “Verkehrsverbund”), while philologically “Staatenverbund” is a false friend of “confederation” or “federation”. Therefore it seems reasonable to conclude that the neologism stands for a third way between the (con)federalist approach and an international association for a common purpose (Zweckverband). The union or “association” of States recalls Jellinek’s Staatenverbindungen.
War precedent – has found a new settlement in the recession clause in art. 48 § 5 TEU, according to which ‘if, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council’. In fact, in the Declarations annexed to the final act, a very original solution is put forward, since a form of super cooperation rafforçée may take place among the four-fifths that had no problem ratifying, leaving reluctant MSs behind or allowing such MSs to basically drop-out.

One problem with the principle of reversible self-commitment that the Court stresses has to do with the hybrid nature of the EU. The right to recess seems hard to combine both with dualist international law-readings and with liberal constitutionalist approaches because, on one hand – from the international perspective – no one challenges that pacta sunt servanda only as far as rebus sic stantibus and, on the other hand, no country with a liberal constitution has a recession clause: such a clause can be found in such legal systems as those in the Chinese Republic (1931), the USSR, Burma (1977) and Ethiopia (1991) but, generally speaking, ‘the constitutionalization of a recession clause belongs to an authoritarian state setting and, in particular, to a context where control over the police makes the clause impracticable’.

Leaving aside this specific regulation – introduced to nuance the majority rule applied to the revision of the Treaties in the first draft of the Constitutional Treaty – it seems that for the judges in Karlsruhe ‘the Basic Law does not grant the German state bodies powers to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (Kompetenz-Kompetenz)’ (§ 233). Now, this is declared not in relation to a mere economic integration, but also in relation to a political integration (§399): ‘In the Lisbon decision, the FCC no longer distinguishes between economic and political integration. This marks a change in the reasoning developed in the Maastricht decision (...). By contrast, in the Lisbon decision, the FCC noted that the participation of Germany in the development of the European Union comprises, apart from the formation of economic and monetary union, political union’.

If it is admitted that the integration process is no longer just a matter of economic cooperation, but implies a general political authority, impacting on social systems and fundamental rights, the question naturally arises concerning the federalist outlook. Before a legal arrangement that is systematized through principles such as the principle of supremacy, direct effect and so forth – doubtlessly similar to those of many federal systems – and with a ‘constitutional’ jurisprudence marked by its extensive and driving thrust ever since *Van Gend en Loos*, it seems that the legal order has strong supranational features and is definitely able to impact profoundly on domestic structures, as for instance following the *Tanja Kreil* case from 2000. Contrarily to the Maastricht case where ‘the German Court set itself the role of “gatekeeper” with respect to jurisdictions, deciding case by case what is *ultra vires* for EU actions, [w]ith the Lisbon case, it asserts absolute immutability of certain parts of the Basic Law with respect to EU law’. What is remarkable is that it does so on the basis of a specific view of democratic legitimacy and citizenship.

3. No Federalism without the Consent of the German People

There are absolute limits prescribed by the German Basic Law to further transfer of sovereignty quotas to the EU. The Court considers that there is a risk that the German constitutional identity might be violated even by secondary EU legislation and therefore, by referring to the Basic Law’s ‘eternity clause’, it holds that no more sovereignty transfers can be made even with a 2/3 majority in Parliament. If further quota transfers are to take place, another constitution must regulate them since the current framework has reached the limit of ‘uneasiness’ with the EU. Simply put, the Court’s argument is that the EU cannot legitimately become a federation without mobilizing the constituent power of “the German people”:

Even a far-reaching process of independence of political rule for the European Union, brought about by granting it steadily increased competences and by gradually overcoming existing unanimity requirements or prevailing rules of state equality, from the perspective of German constitutional law, can only occur as a result of the freedom of action of the self-determined people. (§233)

In particular, the introduction of the citizenship of the Union does not permit the conclusion that a federal system has been founded (…) After the realisation of the principle of the sovereignty of the people in Europe, only the peoples of the Member States can avail themselves of their

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13 Suffice to say that the EU law principle of direct effect can be said to correspond to the principle in the U.S. System known as the *law of the land*; the U.S. Constitution also includes an equivalent of the principle of supremacy.
14 Case C-26/62 (1963) ECR 1.
respective constituent powers and of the sovereignty of the state. Without the expressly declared will of the peoples, the elected bodies are not competent to create a new subject of legitimisation, or to de-legitimise the existing ones, in the constitutional areas of their states. (§347)

Apparently the ‘United States of Europe’ is not what the German people set out to create, making all federation-building unconstitutional. With a will-theory tainted expression reminiscent of Jhering, the Court recognizes that «a will that aims at founding a State cannot be ascertained» (§ 277). Therefore, it is affirmed that:

The Basic Law does not grant the bodies acting on behalf of Germany powers to abandon the right to self-determination of the German people in the form of Germany’s sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to the new subject of legitimisation that goes with it, this step is reserved to the directly declared will of the German people alone (§228)

More specifically, the claim of the Court is that the EU may not become a federation because the Basic Law does not give the representatives of the German people in the Parliament (i.e. MPs) the faculty to adhere to any federal state since only German citizens may decide to do so. It seems, however, that this train of thought is flawed because it amounts to circular reasoning. As the Bundestag MPs may enact citizenship laws, the same MPs are entitled to define who may legitimately decide to enter a federation. In a nutshell, if we do not assume that the citizens are a group that would persist independently of the policies developed by the Bundestag – in an unprecedented essentialist reading – then we have to admit that the same institution is simultaneously prohibited from deciding on an issue and entitled to decide who should decide on that issue. In a nutshell, the Basic Law then only states that those who are entitled to adhere to a federal state are those who are entitled to do so. We shall come back to this point later on but, for the time being, let us pursue the line of reasoning that the Court follows.

According to the judges, the MPs in the German Parliament may not enter a federation, or give their approval of any body with competences overriding domestic arrangements. But perhaps that would not in itself prevent the creation of a federal union. In fact, an alternative

argumentation might be that the citizens of Germany, even if they cannot enter a federation through their representatives in Berlin, might be able to do so through their representatives in Strasbourg. The FCC excludes any such possibility on the grounds of the undemocratic features of the institutional arrangement in the EU. Particularly, it revolves around the flawed representativeness of the Strasbourg assembly.

4. The ‘Citizens’ Cannot Enter a Federation Because of the Undemocratic Nature of the EU Parliament

On this point, Christoph Schönberger is perfectly right to stress that the Court embarked on a journey that led to ‘a ringing indictment of the EU’. The utmost reason for the unconstitutional character of further sovereignty quota transfers is the undemocratic structure of the EU institutional design. In particular, the Court’s understanding of the decision-making process focuses on the EU parliament in Strasbourg.

Indisputably, however, the Lisbon Treaty – in a process of gradual empowerment that has been in progress since the late Seventies – strengthens the European Parliament: while trimmed down to 751 members, the Strasbourg assembly saw its powers expand in some forty fields, including budgetary matters (art. 310 TFEU), qualified majority being extended to new areas as well as the co-decision procedure being heightened to ordinary decision-making procedure in areas such as the CAP and JFS (Justice, Freedom and Security), even though a large range of exceptions to co-decision still persist (in areas such as taxes with art. 113 TFEU, social security policies and social protection of workers with art. 153 TFEU).

The European Parliament is, thus, reinforced through practices such as the assent procedure requiring the Council to obtain the European Parliament’s assent before certain important decisions are taken in areas where the ordinary legislative procedure does not apply. This is the case when applying the ‘flexibility clause’. The Lisbon Treaty also gives the European Parliament an important role in the revision of the Treaties since the Council may establish that the “extent of the modifications” requires an IGC only with the assent of the European Parliament (art. 48 TEU). Despite the fact that it does not have the political initiative, it has undoubtedly gained power and many commentators point to its ability to block proposals in

\[20\] See art. 294 TEU.
collaboration with half of the national parliaments. Another important novelty that it is crucial to insist on here is the wording of art. 14 TEU: the European Parliament no longer represents ‘the peoples of the MSs’ but rather ‘the citizens of the Union’. This choice is not nominalistic, as the Italian showdown over the last seat in the European Parliament clearly demonstrated.

According to the FCC, the European Parliament is (and perhaps more surprisingly, will remain) a supra-national institution that – no matter what art. 14 TEU actually states – represents the peoples, and not the citizens. It is important to understand that the German Court – differently from the European Parliament – does not understand “citizenship” in any post-national fashion (i.e. as those living in the EU for instance) and is strongly attached, as we shall see, to its traditional equivalence between nationality (Nationalität) and citizenship (Staatsangehörigkeit). Post-nationalism is thus not what the issue is mainly about. Rather, the dispute concerns the principle of equal voting. According to the Karlsruhe justices, the Strasbourg assembly represents first and foremost the “peoples” since this institution has a built-in mechanism for allowing over-representation of the people of small states, just like – we might add – any second chamber of federal systems.

The Court claims that the European Parliament is undemocratic because it does not respect the basic democratic principle of one man, one vote. This is the pivotal idea of the German judges for setting a threshold for ‘democracy’. If we adopt such a (debatable) measure for ‘democracy’, indeed, the European Parliament does not meet the standard.

In fact, art. 14.2 TEU establishes a decreasing representation of the citizens with two limits: no country can have less than 6 MPs and none may enjoy more than 96 representatives. This clearly means that the principle of one citizen equals one vote is not respected, since the European Parliament balances the parameter of citizen representation.

22 In the early warning procedure, the national parliaments monitor the application of subsidiarity in the ordinary legislative procedure (Prot. 1 & 2 e art. 12 TEU) and if they hold the EU to encroach on state competences an opinion is issued even before a legislative draft may appear on the agenda of the Council. If the Commission does not better motivate the choice, and if 50% of the national parliaments criticize the draft legislation, the Commission – turning around the burden of proof – has to motivate its position and the EP and the Council have to examine the compatibility of the draft legislation with the subsidiarity principle; after this, a simple majority in the EP and 55% of the votes in the Council can block the draft (Prot. 2, art. 7 § 3). On this procedure see, recently, P. Kiiver, ‘The Early-Warning System for the Principle of Subsidiarity: The National Parliament as a Conseil d’Etat for Europe’, European Law Review 36 (2011): 98.

23 During the 2007 IGC, Italy did not approve the new composition of the European Parliament. The proposal voted by the European Parliament would have left Italy with 72 seats compared to 73 for the UK, 74 for France (that had historically had the same weight as Italy). The proposal had used a formula based on resident population rather than ‘citizenship’ (i.e. nationality). This dispute led to Declaration 4 attributing the extra seat to Italy and to Declaration 57 on the definition of citizenship.

24 This is particularly clear in the case of the US. See the criticism of the US Senate by S. Levinson, Our Undemocratic Constitution (Oxford: Oxford University Press, 2006): 49-62.
with that of the representation of the ‘peoples of Europe’, namely the MSs. The FCC concludes that the principle of equality voting is violated: it is being sacrificed in the name of the representation of the ‘peoples’.

Most observers point out that normally a second chamber is provided for in federal systems that do represent states; this proposal, however, was rejected in the process that led to the Lisbon Treaty. In §286, the Court therefore claims the following:

In federal states, such marked imbalances [between representation of States and representation of citizens] are, as a general rule, only tolerated for the second chamber existing beside Parliament (...). They are, however, not accepted in the representative body of the people (...). The elaboration of the right to vote in the European Union need, however, not be a contradiction to Article 10.1 TEU Lisbon, pursuant to which the functioning of the Union shall be founded on representative democracy; for the democracies of the Member States with their majorities and decisions on political direction are represented on the level of the European institutions in the Council and indeed in the Parliament. Consequently, this representation of the Member States only indirectly represents the distribution of power in the Member States. This is a decisive reason for the fact that it would be perceived as insufficient if a small Member State were represented in the European Parliament for instance by only one Member of Parliament if the principle of electoral equality were taken more strongly into account. The states affected argue that otherwise it would no longer be possible to reflect national majority situations in a representative manner on a European level. Already due to this consideration, it is not the European people that are represented within the meaning of Article 10.1 TEU Lisbon, but the peoples of Europe organised in their states.

It seems that the Court, on one hand, by claiming that the European Parliament does not represent the citizens but only the peoples of Europe, undercuts any development towards a full representation of the “population” of the EU (which was the underlying idea of the EP proposal in 2007, i.e., that even third country nationals would indirectly enjoy some representation as “residents” even though deprived of “nationality”) and, on the other hand, the FCC’s line of argumentation focuses (unilaterally) on the principle one man, one vote as being the fundamental principle of democratic government. Both of these assumptions are debatable but let us start with the second assumption, that is, there is no democracy where the equality of voting principle is not guaranteed.

In democratic theory the equality of voting principle is a crucial component of democratic rule.25 Presuming it reasonable for judges to leave the theory to the theorists, it must be pointed out that many so-called “real democracies” are nonetheless equipped with several kinds of mechanisms of ‘democracy protection’ that, to various extents, falsify the equality principle. Such mechanisms and institutions result in forms of representation that are not

‘pure’: the equality principle clearly has its wings cut. Such protective measures are also included in Germany’s democracy. For instance, Germany’s legal order does not allow for the political representation of certain political movements (the ban on undemocratic/unconstitutional parties in art. 21 § 2 of the Basic Law) and it only permits the transformation of votes into seats of those votes that have exceeded a certain percentage of plaudits since, in the Bundestag, there is no representation of those forces or parties that lie under the 5% threshold. Both the 5% restrictive clause and the ban of parties are typical examples of ‘protective measures’, or if you prefer, ‘distortion mechanisms’. Many more could be listed. The bottom line is that it is far from self-evident that Germany would pass the test that the Court sets out.

Moreover, it is not clear why, at the EU level, art.14.2 TEU could not be considered as a form of protective clause, not far from the kind included in the institutional arrangements of many of the States that are members of the EU. One could claim, for instance, that it limits the exclusion of minority political forces from smaller MSs, whose voice capacity would otherwise be strongly jeopardized, entailing imperfection in the representative’s system. On such a reading, it actually boosts pluralism in the assembly. It is true that this results in a system in which ‘the weight of the vote of a citizen from a Member State with a low number of inhabitants may be about twelve times the weight of the vote of a citizen from a Member State with a high number of inhabitants’ (§ 284). However, such a ‘flawed’ arrangement is the result of a compromise that was reached in intergovernmental proceedings in order to better reflect the hybrid nature of the EU: ‘the principle of regressive proportionality stands between the principle under international law of the equality of the States and the State principle of electoral equality’, implying that since the second chamber for state representation was rejected, the remaining representative chamber – the European Parliament – has to reflect both kinds of electoral equality: that of the states (or peoples of Europe) and that of the citizens, i.e. the double source of legitimacy in the EU context.

On a different yet interconnected level, it is also possible to claim that the single issue-focus of the Court led to the very uneasy position that democracy would be somehow incompatible, or at least sit uneasily, with federal constitutional arrangements. Of course, since Germany is a federal state, its Bundesrat is clearly a reflection of state equality and not voters’ equality, making small states (Länder) over-represented in comparison to, say,

Bavaria. Likewise, this could be said for any federal second chamber institution, such as the US Senate where Vermont equals California.

The FCC reaches the conclusion that the democratic deficit in the EU is irremediable because, in the current state of affairs, the individual vote of each EU citizen does not have the same weight in the elections of the European Parliament. This sounds a little captious with regard to the lack of concern for the fact that we continue to vote with around twenty different electoral systems for the European Parliament, or the fact that no sanction has been put in place against double ballot casting for the same poll electing the MEPs.

More surprisingly, however, is that the Court rejects the idea that it would be a step in the right direction to make a country's weight in the European Parliament depend on the size of the population instead of making it depend on the number of people holding a MS' nationality. The court does so, on the basis of a prima facie unsound argument, which brings to mind the argumentation of Italy in the intergovernmental negotiations over the vacant seat in the European Parliament in 2007. In effect, the FCC does not acknowledge another yet fundamental principle of democratic government, i.e., the principle of affectedness. The Court argues that the true threshold of democracy is the principle of equality voting between citizens (i.e., nationals) while being blind to the gap between nationals-that-have-the-right-to-vote and population-subjected-to-the-legal-system.27

Admittedly, the European Union takes up again the classical principle under international law of the equality of states – one state, one vote – with the approach of the Treaty of Lisbon. The new corrective element of the majority of the population, however, adds another subject of assignment, which consists of the peoples of the Member States of the Union, while making reference not to the citizens of the Union as the subjects of political rule, but to the inhabitants of the Member States as the expression of the strength of representation of the representative of the respective Member State in the Council. In the future, a numerical majority of the people living in the European Union is intended to be behind a decision of the Council. Admittedly, this weighting, which depends on the number of inhabitants, counteracts excessive federalisation, without, however, complying with the democratic precept of electoral equality. As regards electoral equality and the mechanism of direct parliamentary representation, the democratic legitimisation of political rule is also in party democracies based on the category of the individual’s act of voting and not assessed according to the quantity of those affected (§ 292, italics added)

This view seems to bottom out in a peculiar theory of democracy where the principle of one man, one vote trumps the principle of affectedness,28 making the boundaries of the

suffrage coincide with those of the ‘nation’. A key tenet of democratic theory, the affectedness requirement means that all those affected by a political decision should have a say in its making and those who are not affected should have no say. Even though the principle seems fairly straightforward, it gives rise to many concerns, both in practice and in theory.  

Within the EU – and this has been stressed many times – the principle has weighty consequences:

although the law, as it currently stands, has halted with the grant of voting rights to EU citizens in local and EP elections, the logic of the affectedness principle does not of course stop there. Instead, it argues for the similar granting of voting rights to resident third country nationals in local and EP elections and also for the granting of voting rights to foreign EU citizens and resident TCNs in national elections (...). If the principle of affectedness is used, as it has been above, to argue for the extension of voting rights to resident aliens, the question is whether it requires them to be granted full, nationality-based citizenship status. 

Clearly the Court does not go down this road and we should keep in mind that the reason why Germany in particular seems to be so attached to the traditional view focusing on the equality principle, turning a blind eye to the affectedness principle, depends on its particular constitutional setting. In fact, art. 38.1 of the Basic Law confers equal voting rights (only) upon all Germans and this article belongs to the so-called ‘eternity clauses’, i.e., norms that sanction the non-modifiability of the Basic Law, making this regulation non-amendable on the basis of art. 79.3 (Identitätskontrolle). Remarkably, the official English translation clearly speaks of attributing voting rights to “all persons” but the German jurisprudence has stated that this implies just ‘Germans’.

This punto dolens had already been discussed by the FCC in two decisions from 1990 concerning the Länder of Hamburg and Schleswig Holstein, when the Court established that conferring franchise to non-Germans is simply unconstitutional. The Court then claimed: ‘The people of the state [Staatsvolk], from which the state power in the Federal Republic emanates, under the German constitution, is formed by German nationals and those who have

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30 C. Hilson, EU citizenship, supra n. 28, 58-59.

an equivalent status according to Article 116 paragraph 1 of the Basic Law. Thus, according to the constitution, the right to vote, conceived as the principal means for exercising popular sovereignty, presupposes the quality of being German32.

However, the reasoning of the Court in the Nineties left the possibility open for the MPs in Parliament to amend the Nationality Act in order to bridge the legitimacy gap. As Kay Hailbronner writes, the court stated that ‘the concept of democracy laid down in the Basic Law does not permit a disassociation of political rights from the concept of nationality. Nationality therefore is the legal prerequisite for the acquisition of political rights, legitimising the exercising of all power in the Federal Republic of Germany. The Court, however, also stated that the only possible approach to solving the gap between permanent population and democratic participation lies in changing the nationality law’.33 Now, this door is closing since the citizenship policy area is subtracted from what is seen as the kleptomaniac competence extension of the EU. With the judgment on the Lisbon Treaty the fundamental source of (German) legitimacy is reaffirmed: the people of the State (Das Staatsvolk).

5. The domaine réservé Doctrine

In avoiding too much discussion of the German electorate, what the Court does is to claim that the issue of who has jurisdiction (Kompetenz-Kompetenz) cannot legitimately be given away and therefore the solution must lie in the previously unacknowledged principle of enumerated powers. Basically, this amounts to declaring the end of the doctrine of implied powers (see § 233). This, in turn, leads to the difficult task of rendering explicit the core competences: ‘For the first time, and in contrast to previous judgments [Maastricht] and the recent ruling on the constitutionality of the Czech Constitutional Court, the FCC undertook to specify core state functions’.34 This amounts to an unprecedented attempt because, until now, the Constitutional Courts had preferred rather vague formulas, such as the French Conseil constitutionnel’s ‘conditions essentielles pour l’exercice de la souveraineté’.35 For the judges in Karlsruhe, the core competences of the state need to be fleshed out, and no more sovereignty quotas can – as long as the Basic Law is valid and as long as the EU does not come up with better democratic settlements – be lawfully transferred to Brussels.

34 A. Steinbach, The Lisbon Judgment, supra n. 5, 368.
Such core competences include a wide range of areas, listed in § 252, including:

(1) Decisions on substantive and formal criminal law: the FCC is particularly hostile towards supra-nationalizing some fields such as criminal law; measures such as EUROJUST, the Schengen caselaw, the European arrest warrant, the Prüm Convention for fighting terrorism transnationally and the European Criminal Records Information System limit the way in which states define crimes. For the Court, ‘the decision on punishable behaviour (...) is to a particular extent left to the democratic decision-making process’ (§ 253).

(2) Dispositions of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior. Clearly, the political stakes of having German troupes on EU missions without parliamentary consent is looming in the background.

(3) Fundamental fiscal decisions on public revenue and public expenditure, with the latter being particularly motivated, inter alia, by social-policy considerations. This puts an end to discussions on eventual EU taxation, as much as it seems to move in the direction of those who want Germany to defend the ‘social market economy’-model.36

(4) Decisions on the shaping of circumstances of life in a social state, as well as decisions which are culturally of particular importance, for instance with regard to family law, the school and education system and dealing with religious communities, and – last but not least – citizenship policies.

One aspect of the problem of the core competences has to do with how they are determined. Following Kokott’s reading,37 there seems to be two different criteria that are used to determine what is core and what is not.

The first criteria is the essentiality principle (Wesentlichkeitstheorie): a German doctrine from the late Seventies affirms that in all aspects touching upon ‘essentials’ of individual freedom and equality, the legislative power has to take adequate measures and cannot leave such issues to the discretion of the administration. It has been stressed that in the Lisbon judgment the Court extends this principle to the sphere of external relations: ‘Applying the

36 For a discussion and framing of this aspect, see A. Fischer-Lescano, Ch. Joerges, A. Wonka (eds), The German Constitutional Court’s Lisbon Ruling. Legal and Political-science perspectives, ZERP Zentrum WP 2010/1, available at: http://www.mpifg.de/people/mh/paper/ZERP%20Discussion%20Paper%201.2010.pdf  It should also be stressed that the Court excludes coining money from the sovereign competences of the nation-State: E.O. Eriksen, J.E. Fossum, ‘Bringing European Democracy Back In – Or How to Read the German Constitutional Court’s Lisbon Treaty Ruling’, European Law Journal 17 (2011): 153. The authors also claim there is no substantive argument behind the list made by the Court. For a reading of the political consequences of the ruling, see P.-C. Müller-Graff, ‘Das Lissabon-Urteil: Implikationen für die Europapolitik’, Aus Politik und Zeitgeschichte 18 (2010): 22–29.
37 J. Kokott, From 1949 to 2009, supra n. 7, 99.
essentiality principle, the FCC finds that an unacceptable structural democratic deficit would occur if the legislative competences, which are essential for democratic self-determination, were exercised mainly on the level of the Union.\(^3^8\) In other words, an internal doctrinal principle is used to limit the competences of the Union. Like many other German doctrinal inventions, it is not improbable that this criterion of determining core competences might meet with the favour of other European States.\(^3^9\)

However, not all applications of this doctrinal instrument are likely to be approved by other MSs. For instance, while the essentiality principle might justify the reservation of policy areas to MSs (e.g. armed forces, taxes, welfare), this principle does not seem to offer any plausible explanation as to why citizenship policy ought to remain exclusively national. In effect, it is possible to claim that the criteria of access to citizenship do have “essential consequences on liberty and equality” only if one postulates that fundamental rights are reserved for the citizens (and restricted for non-national residents). Therefore, within an outlook respectful of fundamental rights, it is hard to sustain that the legislation concerning who is supposed to be considered a “citizen” has such effects that it might render EU harmonization illegitimate \textit{per se}. If this argument is valid, this leaves – at least as far as explaining the inclusion of citizenship policy on the \textit{domaine réservé} list is concerned – the Court with only one other criterion for justifying the inclusion of citizenship policy on the list of \textit{off limits} subject matters: that criterion is ethno-cultural and is not likely to meet a wide consent around the EU.

The second criterion is ethno-cultural homogeneity, underpinning a public opinion-focused democracy ideal. The Court argues that:

\begin{quote}
Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens’ circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by their fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament (§ 249, italics added).
\end{quote}

For example, for the FCC, the communitarian dimension impacts particularly on the decisions that are made concerning the school and education system, family law, language,

\(^{3^8}\) A. Steinbach, \textit{The Lisbon Judgement}, supra n. 5, 381.

\(^{3^9}\) For instance, it is likely that such a criterion might meet with the approval of the Italian legal order: when the government holds a European statute to be involved with important political, economic, social matters, it can use the retention or “riserva parlamentare”: see E. Castorina, ‘Le “dimensioni” della rappresentanza politica (crisi della sovranità nazionale e nuovi percorsi istituzionali)’, \textit{Teoria del diritto e dello stato}, 2 (2005): 279. Hence national parliaments are often construed as an external limit to EU law-making in ‘essential’ matters.
part of the provisions governing the media, and the status of churches and religious and ideological communities. Therefore, the Court states the following in § 260:

The activities of the European Union in these areas that are already perceivable intervene in society on a level that is the primary responsibility of the Member States and their component parts. The manner in which curricula and the content of education and, for instance, the structure of a multi-track school system are organised, are fundamental policy decisions which bear a strong connection to the cultural roots and values of every state. Like the law on family relations, decisions on issues of language and the integration of the transcendental into public life, the manner in which schools and education are organised particularly affects grown convictions and concepts of values which are rooted in specific historical traditions and experiences (...) democratic self-determination especially depends on the possibility of realising oneself in one’s own cultural area (§260, italics added).

To soften the communitarian accents, however, the Court argues that (1) for a functioning democracy, the existence of a viable public opinion is crucial; (2) that such a public opinion exists in Germany; that (3) the differences as regards culture, language, and history in the EU explain why no such public opinion exists (yet?) on an EU level.

Democracy not only means respecting formal principles of organisation and not only a cooperative involvement of interest groups. Democracy first and foremost lives on, and in, a viable public opinion that concentrates on central acts of determination of political direction and the periodic allocation of highest-ranking political offices in the competition of government and opposition. Only this public opinion makes visible the alternatives for elections and other votes and continually calls them to mind also as regards decisions relating to individual issues so that they may remain continuously present and effective in the political opinion-formation of the people via the parties, which are open to participation for all citizens, and in the public space of information (§ 250, italics added).

In a nutshell, in the EU there is no serious dialectics between government and opposition and, since it does not seem to depend on the absence of cross-national parties, it must be due to the lack of public opinion, ultimately caused – and here the Grimm v. Weiler dispute from the Nineties resonates ⁴⁰ – by the non-existence of a demos: ‘It cannot be overlooked, however, that the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification which are related to the nation-state, language, history and culture’ (§ 251, italics added).

Armin Steinbach is right to wonder whether ‘the FCC’s reference to the heterogeneous cultural community can serve as a legitimate criterion to delimit the openness to integration (...)’. It is unclear what degree of common ground in cultural terms has to exist in order to

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accept the notion of a European political community’. It is thus on the grounds of this debatable ethno-cultural criterion that the Court ultimately rules on who are those entitled to express themselves on future EU integration: ‘The federal constitutional court thereby obliges the democratic legislature to channel and limit the effects of supra-nationalisation (...). The peoples of the MS, not the people of the European Union as a whole, are the legitimising basis for the enforcement of Community law’. At the end of the day, the Court prohibits any strictly federal development because of its own view of democratic legitimacy that presupposes the maintenance of the national sovereignty, particularly in determining those nationals who are entitled to eventually choose such a federal future. No European federal and democratic settlement can thus satisfy the prerequisites of the sovereignty of the German nation.

6. Conception of Citizenship

What then undercuts any development towards a full representation of the ‘population’ of the EU, leading up to both a federal and democratic arrangement, depends on the logic of defining citizenship as an expression of the national community, where only Germans are subject to democratic lawmaking as stakeholders in the political public contributing to public opinion. The Court pursues this nationality-focused reading of the ‘political public’ that rejects the possibility of using EU citizenship for political representation purposes:

The democratic fundamental rule of the equality of opportunities of success (‘one man, one vote’) only applies within a people (...), even if the citizenship of the Union is particularly emphasised now (§279). After the ratification of the Treaty of Lisbon, the Federal Republic of Germany will continue to have a state people. The concept of the ‘citizen of the Union’, which has been more strongly elaborated in Union law, is exclusively founded on Treaty law. The citizenship of the Union is solely derived from the will of the Member States and does not constitute a people of the Union, which would be competent to exercise self-determination as a legal entity giving itself a constitution (§346).

The Court denies EU citizens the possibility of forming a ‘body politic’ even when it comes to the newly introduced citizenship initiative (art. 11 § 4 TEU): ‘the use of the term “citizens of the Union” in connection with the European Parliament (Article 14.2(1) sentence 1 TEU Lisbon) and the decisive role of the citizens of the Union in the European citizens’ initiative (Article 11.4 TEU Lisbon) do not intend to create an independent personal

41 A. Steinbach, The Lisbon Judgement, supra n. 5, quotes on 375 and 388.
42 J. Kokott, The Basic Law at 60, supra n. 7, , 100.
subject of legitimisation on the European level’ (§ 349). In other words, for the Court, the derivative nature of EU citizenship prevails over eventual dual citizenship outlooks and thereby the justices deny that national and EU citizenship are entangled in what has been called the distinctive ‘inter-citizenship’ of any re spublica composita.43

It can be claimed, however, that the citizenship initiative introduced by the Treaty of Lisbon was framed specifically for giving voice to cross-national political concerns on the basis of a political conception of EU citizenship: the Regulation of the EU Parliament and the Council on the Citizens’ Initiative (2010), for instance, emblematically fixes the threshold at 0.2 % of the population and, moreover, there would have been no point in setting different thresholds for different countries if the petition names were to stand merely for national interests rather than a cross-national opinion.

Nationality, in the eyes of the Karlsruhe Court, is the limit of the civic rights in the Union: ‘Also in view of the elaboration of the rights of the citizens of the Union, the German state people retains its existence as long as the citizenship of the Union does not replace the citizenships of the Member States or is superimposed on it. The derived status of the citizenship of the Union and the safeguarding of the national citizenship are the boundary of the development of the civic rights of the Union’ (§350).

Notwithstanding its recognizing that ‘the Court of Justice of the European Communities, in particular, has for some years now understood the citizenship of the Union as the nucleus of a European solidarity (…) this line of case-law stands for the attempt of founding a European social identity by promoting the participation of the citizens of the Union in the respective social systems of the Member States’ (§ 395), and despite the blatant fact that many MSs now grant franchise to non-nationals, for the FCC, nationality is a valid ground for ‘differentiation’ in matters of political and social rights: ‘Possibilities to differentiate on account of nationality continue to exist in the Member States. In the Member States, the right to vote and stand for election for the respective bodies of representation above the local level remains to be reserved to the Member State’s own citizens, just as the duty to show financial solidarity between Member States in the form of social benefits paid to citizens of the Union remains restricted’ (§350).

The resistance to denationalisation of citizenship in Germany has long been an issue, even though Germany is among the EU countries that witnessed the strongest liberalizing thrust in

43 Cf. O. Beaud, Théorie de la fédération, supra n. 6, 222.
naturalization regimes during the past three decades. This liberalizing change has provoked a restrictive backlash making emigration to and naturalisation in Germany quite difficult.

In particular, Germany does not permit so-called ‘double ius soli’, i.e., the principle allowing children born in Germany (third generation) from people born in Germany (second generation) to obtain citizenship independently from their permit of stay: ‘Given how many second- and third-generation immigrants live in Germany, this restriction effectively prevents the acquisition of German citizenship for approximately 60 percent of the children born in Germany [from non-German parents].’ This is so after the introduction of the new citizenship provision (art. 4) pursuant to which ius soli is recognized only for those children that have at least one parent with a legal residence status for 8 consecutive years prior to the child’s birth or an unrestricted permit of stay at least 3 years prior to the birth of the child.

Moreover, Germany prohibits dual citizenship, requiring naturalized persons to renounce their previous nationality (there are however some exceptions to this rule, e.g., for Iranians or Afghans, because their states of origin either do not allow renunciation or demand exorbitant sums for it). The renunciation requirement has made naturalization difficult, especially for Turks whose country of origin threatens them with property sequestration, defence on inheritance, denial of burial rights and so forth. Nonetheless, dual citizenship is tolerated for the ethnic Germans (Aussiedler). In other words, in the democracy that the FCC praises, ‘the law’s acceptance of dual citizenship for ethnic-Germans and its steadfast opposition to dual citizenship for non-ethnic German immigrants is “blatant hypocrisy”’.

Since Germany’s citizenship policy is so tough, its naturalisation rate so low, and its naturalisation laws and civic integration requirements so demanding, it is worth asking whether the strict equation between (political) citizenship and (legal) nationality – upheld by the Court, first in Maastricht and now in the Lisbon judgment – as grounds for stigmatizing

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46 We would like to thank an anonymous reviewer for having pushed us to clarify this passage.
47 Ibid., 141.
48 The so-called naturalization rate equals the number of acquisitions of citizenship as a percentage of the whole population of resident aliens, based on Eurostat data; the naturalisation rate in Germany is currently 2.5%.
the EU’s flawed democratic legitimacy is an outlook that can be shared by other, non-German EU citizens, let alone third country nationals. As we have seen, the Court has elaborated doctrinal instruments that might prove acceptable to others (e.g., the essentiality principle). However, it holds on to other ways of limiting future harmonization in the EU, both with respect to the areas (such as citizenship policies) and to the criterion of determination (a common linguistic, cultural and political past) that it is not likely to arouse sympathies around the Union. This is of crucial importance for the perception of the FCC’s authority: when the constitutional court in Europe’s most populous country says that EU democratic standards are to be assessed on the one man one vote principle, but that they shall continue to decide autonomously who that ‘man’ is, some might think that perhaps democratizing the Union, after all, is no big priority.