



# ***Legitimate Political Rule Without a State? An Analysis of Joseph H. H. Weiler's Justification of the Legitimacy of the European Union Qua Non-statehood***

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## **Abstract**

Contributions in the normative debate on the legitimacy of the EU are frequently based on two premises: The first premise is that the principles of the democratic constitutional state represent the normative ideal of political rule in the nation-state, but cannot justify the legitimacy of the EU. Consequently, it is claimed that “there is an urgent need to re-set the standards by which we assess the legitimacy of European integration and of the institutions which guide the process” (Majone). This implies a second premise, namely, that the validity of the norms to which “our” assessment of the legitimacy of political rule refers, could be “re-set” via an academic consensus. The paper seeks to counter both of these assumptions, which are assumptions about the structure of the interpretive pattern regarding the legitimacy of political rule. It claims to show an internal contradiction in the type of normative justification that aims to overcome a “touch of stateness” (Shaw and Wiener) by explaining the EU’s legitimacy with its assumed non-statal character. To this aim, it presents a detailed hermeneutical analysis of one example of this type, Joseph H. H. Weiler’s normative justification of the EU. Weiler explains the legitimacy of the EU with its non-statal constitutional architecture embodying a principle of “constitutional tolerance”. However, the analysis reveals that Weiler’s justification implicitly presupposes certain features for the EU which he has rejected before as essential elements of the ideal of the democratic constitutional state: a legal citizenship, hierarchically superior European law, and the principle of popular sovereignty. The paper concludes that this can be seen as an indicator speaking against the two premises: the principles of the democratic constitutional state seem to make-up a central component of “our” understanding of legitimate political rule in the nation-state as well as in the context of the EU.

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## 1. Introduction

For some years the debate on the future design of the European Union (EU) has turned, among other issues, to the relationship between statehood and the legitimacy of political rule.<sup>1</sup> In this context, a normative debate has been established which, first and foremost, seeks to assess whether or not the political practice of the EU is to be regarded as legitimate. Based on the assumption of the EU as a novel, non-statal form of political community that replaces hierarchical government by “governance”, this normative debate (more or less explicitly) holds a premise which has been formulated most explicitly by Giandomenico Majone: “[T]here is an urgent need to re-set the standards by which we assess the legitimacy of European integration and of the institutions which guide the process” (Majone 1998: 6). The implications of this assertion are threefold: First, it alleges the existence of a concrete legitimacy crisis of the EU. Second, it presumes that the (practical) solution to this crisis is not to reform the institutional organisation of the EU according to “our” understanding of legitimate political rule. Quite contrary, it says that “our” normative ideal of legitimacy should change to meet a given institutional situation. More precisely, it is assumed that the principles of the democratic constitutional state are the core of the ideal of political rule in the nation-state, but could not justify the legitimacy of the EU (Majone 1998; Moravcsik 2002; Scharpf 1999: 16-35). Third, this suggests that the validity of the norms “our” assessment of the legitimacy of political rule refers to could be generated via an academic consensus.

The paper focuses on the second and the third implication and aims to contribute to the analysis of the structure of “our” interpretive pattern [Deutungsmuster]<sup>2</sup> of the legitimacy of political rule. It claims to show an internal contradiction in one type of normative justification of the EU that seeks to overcome a “touch of stateness” (Shaw and Wiener 1999: 2) by explaining the EU’s legitimacy with its assumed non-statal character: Although the ideal of the democratic constitutional-state is explicitly rejected in those justifications, in explaining the EU’s legitimacy they implicitly take for granted what they have previously identified as essential elements of this

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<sup>1</sup> I would like to thank Erik O. Eriksen, Espen D. H. Olsen, Oliver Schmidtke and Alexander Timme for their clarifying comments.

<sup>2</sup> I use the term interpretive pattern [Deutungsmuster] in the sense explained by Oevermann (2001). It is beyond the scope of this chapter to define which political community exactly is referred to as „we“. Consequently, the exact range of the interpretive pattern encompassing the assertions mentioned above, remains unclear. However, since these assertions are related to the practice of legitimising the political rule of the EU, it is implied that this interpretive pattern is assumed to be shared by all political communities in the EU (at least).

ideal. I will illustrate such a kind of internal contradiction by analysing Joseph H. H. Weiler's assessment of the legitimacy of the EU. Weiler not only argues that the democratic constitutional state should not be considered as the ideal of legitimate European political practice. Furthermore, he justifies the European political order as legitimate by referring to the European constitutional architecture as a form of non-statal organisation. Thereby, he implicitly presupposes certain features for the EU which have been rejected before as characteristics of the ideal of the democratic constitutional state.

In my view, such a contradiction might be illuminating with regard to the discussion about democracy beyond the nation-state in a twofold sense. First, it casts doubt on a conclusion which times and again pervades the contemporary normative debate on the EU: One might question if, contrary to what is claimed explicitly, statal organisation as the *finalité* of European integration is rejected due to features ascribed to statal organisation as such or, as it seems in Weiler's case, to some form of the political ideology of nationalism. Second, and more generally, it suggests that the ideal of the democratic constitutional state remains valid as a central part of "our" interpretive pattern regarding the legitimacy of political rule, even when it comes to the assessment of the legitimacy of political rule beyond the (European) nation-states – and this contradicts the assumption that the concept of legitimate political rule can be "re-set" via consensus in academic discourse.

The following sections reconstruct Weiler's argument in order to illustrate the asserted contradiction in his justification of the EU as a non-statal political organisation. The analysis does not criticise Weiler's comprehensive (predominantly legal) work as a whole, but is exclusively concerned with those parts which entail his normative justification of the EU as a political order above the nation-states and his fundamental criticism of so-called state-centred constitutionalism (Weiler 1996; 1999, esp. part 2; 2003). A hypothesis of an internal contradiction can only be backed by a hermeneutical analysis. Accordingly, the following analysis – after a brief note on the context of Weiler's account in the academic EU-debate – refrains from referring to the EU-literature and confines itself strictly to Weiler's argumentation.

## **2. Analysis of Weiler's justification of the legitimacy of the EU qua non-statal organisation**

Before we begin with the analysis of Weiler's position, the context of his argument shall be sketched briefly. In the normative debate on what constitutes a legitimate European polity, some authors turn against a state-

centred constitutionalism that is commonly positioned as mainstream.<sup>3</sup> They hold the premise that “[t]he European Union has highlighted the inadequacies of certain key concepts of constitutional and democratic thought outside the context of relatively homogenous nation states, such as the sovereignty of the people and the link between citizenship and rights” (Bellamy and Castiglione 1996: 2). It is assumed that the academic as well as the practical-political discourse are shaped by a cognitive dominance of the concept of the state. The aim should be to overcome this “touch of stateness” (Shaw and Wiener 1999: 2):

The risk of studying European governance then lies in the continuous revival of the idea of stateness, whether that takes the form of resistance against or reform towards the establishment of statelike patterns. It lies in studying a non-state polity within the frame of stateness, with all its theoretical and methodological implications.

(Shaw and Wiener 1999: 1)

The authors maintain that this cognitive dominance of the state-concept restricts thinking about the EU’s legitimacy mainly to one question: how the political procedures that have been institutionalised in the nation-state could be transferred to the EU. According to their view, perceiving the idea of a European federal state as a desirable goal of European integration is a role which it decidedly does not benefit. Instead, state-centered constitutionalism rested on some “core articles of faith” (Weiler 1996: 105), which had been the cause for the disregard of (cultural) difference<sup>4</sup> in national democracies, and should thus not be used as a normative standard for the institutional organisation of European political rule. Those articles are, namely, the idea of popular sovereignty which together with a formal legal system forms the democratic constitutional state in which a constitution symbolises the basic consensus of the members of the political community.

Let us now turn to Weiler’s argumentation. Broadly speaking, his normative argumentation claims that first, the constitutional architecture of the EU in its current form is the source of its legitimacy because – contrary to an organisation according to the principles of state-centred constitutionalism – it displays a principle of “constitutional tolerance”; and second, that a European (federal) state as the finalité of European integration would undermine this legitimacy. More specifically, Weiler’s rejection of a European state mainly contains two assertions. Firstly, Weiler alleges the statal organisation to entail

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<sup>3</sup> Weiler refers to this state-centred constitutionalism as “classic European constitutionalism” (Weiler 1996: 121), whereas Richard Bellamy uses the term “juridical constitutionalism” (Bellamy 2001: 15) and James Tully speaks of “modern constitutionalism” (Tully 1995: chapter 3).

<sup>4</sup> This point is stressed in particular by James Tully (1995).

a potential danger, which he explains with the historical experience of the European nation-states. Thus it has to be closely examined which dangers Weiler ascribes to the nation-state and how these threats are related to the characteristics of statal organisation, i.e. the principles on which the state-centred constitutionalism is based. Weiler refers to those dangers as “excesses of the modern nation-state” (Weiler 1999: 341). Trivially, the modifier “nation” in the term “nation-state” implies a particular form of statehood, which leads to the fundamental question whether statehood, or that to which the modifier “nation” refers, is said to cause the dangers addressed (section 1). Secondly, Weiler explains the contemporary constitutional form of the EU as a non-statal construct, which embodies the principle of “constitutional tolerance” and thus averts the dangers still emanating from the European nation-states (section 2). Subsequently, it shall be shown that Weiler’s justification of the EU’s legitimacy as a non-statal political order counterbalancing the dangers of the European nation-states, implicitly takes for granted what has been rejected before as essential elements of a statal organisation (section 3). Consequently, both of Weiler’s assertions are not sustainable without contradiction: that the origin of the dangers ascribed to the European nation-states is due to statal organisation as such (sections 3.1 and 3.2); and that the legitimacy of the EU could be referred to the realisation of the principle of tolerance as a characteristic of its non-statal organisation (section 3.3).

### **3. What causes the dangers of the nation-state: statal organisation or the idea of the nation?**

How does Weiler describe the dangers that make up the “dark sides” of the nation-state? Weiler’s argument against a European state is related to his assessment of the European citizenship which was passed in 1992 (Weiler 1999: 336-343). Instead of rejecting the European citizenship as a mere PR-campaign to cover up a legitimacy deficit, or welcoming it as a step towards the building of a European nation, Weiler suggests to regard the European citizenship as the expression of a specific identity, an “ethos of Europe” (Weiler 1995: 337). Although citizenship encompasses the formal acknowledgement of membership in a political community and reflects its particular identity, it should not be confused with nationality:

Citizenship is not only about the politics of public authority. It is also about the social reality of peoplehood and the identity of the polity. Citizens constitute the demos of the polity – citizenship is frequently, though not necessarily, conflated with nationality. This, then, is the other, collective side of the citizenship coin. Demos provides another way of expressing the link between citizenship and democracy. Democracy does not exist in a vacuum. It is premised on the existence of a polity with members – the demos – by whom and for whom democratic discourse with its many

variants takes place. The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a demos. Simply put, if there is no demos, there can be no democracy. [...] A demos, a people, cannot after all be a bunch of strangers.

(ibid.: emphasis original)

Note, that this definition of citizenship asserts a relationship between democracy and citizenship, which may – but does not have to – exist in the form of an amalgamation of democracy and nationality. Nationality is thus said to be one possible kind of citizenship among others. According to this quote, it is citizenship, not nationality, which is related to democracy: Without polity there is no democracy; without demos there is no polity; without citizenship there is no demos; without collective identity there is no citizenship. Citizenship is thus a manifestation of the common identity of the members of a polity. It formally constitutes the demos by distinguishing members from non-members, and this way meets the conditions of “authority and legitimacy of a majority to compel a minority”.

Weiler continues to explain what he sees as an alternative to an identity based on nationality as the foundation of European citizenship, a “special nature – and identity! – of the European polity as encapsulated in the term ‘supranationalism’” (ibid.: 337). Regarding our question – why does Weiler reject statehood in normative terms – it is important to note that Weiler differentiates between the state and the nation in terms of promises as well as pitfalls:

In trying to explain the ways in which the [European, D. G.] Community is, or has become, supranational, most discussion over the years has tended, interestingly, to focus on its relation to the ‘state’ rather than the ‘nation’. This conflation of nation and state is not always helpful. Supranationalism relates in specific and discrete ways to nationhood and statehood. To see the relationship between supranationalism, nationhood and statehood, I propose to focus in turn on nationhood and statehood and try and explore their promise and their dangers.

(ibid.: 337-338).

According to Weiler, nationhood reflects two values: “belongingness and originality” (ibid.: 338). On the one hand, the nation is related to the feeling of belonging, like a family: “Nationhood is not an instrument to obtain belongingness, it is it” (ibid.; emphasis original). In Weiler’s view, the nation represents “a place, a social home” (ibid.). On the other hand, however, he deems the cohesiveness of the nation to be wider in scope than family ties and argues that it combines the passive activity of being recognised with the active moment of feeling loyal towards strangers who belong to the same nationality. Regarding the value of “originality” Weiler briefly explains that the nation

“with its endlessly rich specificities [is] the vehicle for realizing human potentialities in original ways” (ibid.: 339).

How does Weiler describe statehood and the relationship between the state and the nation?

It is worth remembering at the outset that national existence and even national vibrancy do not in and of themselves require statehood [...]. I would argue that in the modern notion of the European organizational nation-state, the state is to be seen principally as an instrument, the organizational framework within which the nation is to realize its potentialities. It is within the statal framework that governance, with its most important functions of securing welfare and security, is situated. The well being and integrity of the state must, thus, be secured so that these functions may be attained. This is not a meager value in itself. But to the extent that the state may claim, say, a loyalty which is more than pragmatic, it is because it is at the service of the nation with its values of belongingness and originality.

(ibid.)

This description understands the state and the nation as two independent concepts. Thus, a nation can exist without building a state and vice versa. Weiler explains this by stating that the state represents only an “organizational framework” which is impartial towards the kind of common identity a community organised as a state has. He holds that the state organises “governance, with its most important functions of securing welfare and security”, and thereby generates a “pragmatic loyalty” only. The function of statehood is not the preservation of a particular identity of the members of the political community, but to secure prosperity and safety. According to that, the state and the nation have become amalgamated in the modern nation-state, but nevertheless, promises and dangers of this constellation can be ascribed either to the form of statal organisation or to the identity of the nation: Where the state claims more than the pragmatic loyalty for itself “it is at the service of the nation with its values of belongingness and originality”.

Based on this account one would expect Weiler to assign the dangers posed by the nation-state either to the statal organisation or to the idea of the nation respectively. However, this is not the case. Rather, Weiler’s argument remains undifferentiated when he states that “boundaries become a very central feature of the nation-state” (ibid.). In this context he refers to three boundaries of the nation-state: First, “in the legal-geographical sense of separating one nation-state from another” (ibid.: 340). Opposed to this formal definition of a boundary via legal order, he claims that the two other kinds of boundaries are “internal, cognitive boundaries by which society (the nation) and individuals come to think of themselves in the world” (ibid.). Weiler describes the second boundary as an internal boundary between nation and state: “at a societal level, nationhood involves the drawing of boundaries by which the nation will



be defined and separated from others" (ibid.). Third, "at an individual level, belonging implies a boundary: you belong because others do not" (ibid.).

In the light of Weiler's explanations, it is obvious that only the first type of boundary is finally due to the statal organisation of a community. The boundary between two states is based on a formal legal order which unambiguously defines the respective members and the territorial boundaries of the states. The second and the third boundary, however, are not constituted by statal organisation. They are generated by a "sense of belonging", and thus by the specific identity of (the majority of) the respective community that organises itself as a state. According to Weiler's explanation of the difference between citizenship and nationality, such an identity is the condition and not the consequence of the organisation of a community in form of a polity, and in this case this means: as a state.

Weiler asserts that the "nation-state enterprise" (ibid.) contains a high degree of potential misuse of these boundaries. Again he does not distinguish between statal organisation and the identity of a community as a nation in this respect. Rather, he refers to the undeniable historical experience that the amalgamation of state and nation has led to "excesses of the modern nation-state" (ibid.: 341). European integration, Weiler states, has been promoted in the attempt of preventing future misuse of these boundaries. It goes without saying that this assertion can be accepted as a fact. However, to render this into a normative argument against statehood, Weiler would have to explain in what sense the misuse of the three types of boundaries can be referred to the particular characteristics of statal organisation. In this regard, it is necessary to closely scrutinise Weiler's description of the misuse of the three types of boundaries: He maintains that on the first level, misuse implied aggression against other states; on the second level, misuse means the "laziness" of a nation which confuses the boundary between nation and state and leads to a situation where "the state comes to be seen not as instrumental for individuals and society to realize their potentials but as an end in itself. [...T]he apparatus of the state becomes a substitute for a meaningful sense of belonging" (ibid.: 340); on the third, individual level, Weiler identifies the misuse of the boundary in a "move from a boundary which defines a sense of belonging to one which induces a sense of superiority [...]. A sense of collective national identity implies an other. It should not imply an inferior other" (ibid.). Note, that what is implied in such an understanding of the misuse of boundaries on all three levels, is that it is caused by a particular perception which refers to the identity of the political community organised as a state: In the first case it implies a feeling of superiority over other communities organised as states; in the second case it implies a reification of the state that confuses the state as an instrument of organisation and the nation as the manifestation of a specific

collective identity; in the third case it implies a feeling of superiority on the inside, towards the “other” who is perceived as not belonging to the national identity.

The crucial point here is that Weiler’s explanation remains vague with respect to what causes the “excesses of the modern nation-state” (ibid.: 341): Does he assume a peaceful and vital nation which is sensitive towards the issues of a pluralist society and has been affected by a statal organisation of their community in a way that causes the alleged misuse; or does he assume, on the contrary, that a xenophobic nation which is carried by the idea of homogeneity has misused the statal organisation for its purposes. However, it would be essential to explain how the state as the “organisational framework” of a political community, which makes “governance, with its most important functions of securing welfare and security”, (ibid.: 339) possible, causes the dangers that are related to the three boundaries, in order to defend Weiler’s subsequent conclusion as plausible: that we are confronted with “excesses of statism” (and not with excesses of nationalism) and therefore a European state has to be rejected: “[I]t would be more than ironic if a polity set up as a means to counter the excesses of statism ended up coming round full circle and transforming itself into a (super)state” (ibid.: 341).

In other words, Weiler alleges statal organisation to cause the excesses, without explaining in what way it causes a change in the perception of the respective political community’s identity. This assertion leads to a contradiction in terms: If Weiler conceives the dangers of the nation-state as caused by the statal organisation of the nation, he would claim that, on the one hand, the nation as “vehicle for realizing human potentialities in original ways” (ibid.: 339) makes use of statal organisation as an instrument “to realize its potentialities” (ibid.) and, on the other, that statal organisation was at the same time the reason why these “human potentialities” could not evolve.

Weiler does not state explicitly, in what sense he considers statal organisation as the source of dangers of the nation-state. Thus, we need to trace an explanation for that indirectly, by taking his description of the salutary effect of the EU into account. So, how shall the EU polity be able to counteract these dangers? Weiler claims that the ideal of supranationality “expressed in the community project of European integration” (ibid.: 342), contributes to the alleviation of the problems with all three types of boundaries. Again, a closer look at his explanation reveals some doubts. In regard to the first boundary he claims, “[a]t the pure statal level, supranationalism replaces the ‘liberal’ premise of international society with a community one” (ibid.). Note, that supranationalism is not assumed to represent a specific constitutional architecture of the EU, i.e. a certain form of organisation of a political

community that differs from statal organisation. Instead, supranationalism is referred to as a change of identity of the nation-state communities in the EU. An exchange of a premise means a cognitive change of opinion, in this context an altered perception of the international environment of a nation-state. Weiler proceeds by explaining that “[c]rucially, the community idea is not meant to eliminate the national state but to create a regime which seeks to tame the national interest with a new discipline” (ibid.). However, a cognitive change from the perception of the environment as “international society” to “the community idea”, can only “tame” or “discipline” the actions of a nation-state if this cognitive change takes place within the respective community, organised as a nation-state, itself. Supranationalism as “community idea” thus implies that the perception held by the nation-state communities, to see other European states as predominantly self-interested actors, is replaced by a consciousness that is shared by all actors involved. Namely, that the ruthless pursuit of selfish national interests is inappropriate with respect to the other members of the new European community. In other words, Weiler assumes that in addition to the national consciousness of each nation-state, a new consciousness of the EU has evolved: a consciousness of a community that shares a common interest in the mediation of interests between its members. It remains unclear though, in what way a European statal organisation would affect this identity of a new European community as a community beyond the level of the nation-states.

With regard to the second and third boundary of the nation-state, Weiler notes that the European “supranational project” in fact recognises nationality as a reference of a political community that generates external differentiation and internal identity,

[b]ut, crucially, nationality is not the thing in itself – it is its expression, an artifact. It is a highly stylized artifact, with an entire apparatus of norms and habits; above all it is not a spontaneous expression of that which it signifies but a code of what it is meant to give expression to, frequently even translated into legal constructs. Nationality is inextricably linked to citizenship, citizenship not simply as the code for group identity, but also as a package of legal rights and duties, and of social attitudes. (ibid.)

In other words, Weiler emphasises that nationality should not be confused with the sense of community, but merely is “its expression, an artifact”. He underlines that nationality is a fixed code, translated into a legal framework and hence not a “spontaneous expression”. It is here that Weiler sees the connection between nationality and citizenship: nationality exists only as a particular kind of citizenship, that means here as a specific identity of a political community which is expressed in a legal order containing particular “legal rights and duties”. Finally, it is this specific relationship of a national

identity codified in a formal legal order which Weiler supposes as the source of danger in the nation-state: "Supranationalism does not seek to negate as such the interplay of differentiation and commonality, of inclusion and exclusion and their potential value. But it is a challenge to the codified expressions in nationality" (ibid.). However, this assertion still leaves open whether it is statehood or national identity that is assumed to be the actual source of danger. Again, there are two possible interpretations. Either Weiler detects a quality in the specific character of a collective identity as a national identity, which by means of codification into a positive legal frame becomes related to the power to coerce and involves undesirable consequences. In that case, the source of danger would be inherent in a specific concept of a community as a nation and not be related to the legal codification of a community rendering it into a state. There would be no dangers if a different kind of collective identity prevailed, on the legal codification of which the state was based. Alternatively, if Weiler alleges the characteristics of legal codification, as an essential element of statal organisation, to be the cause of the aforementioned dangers, then it would make no difference what kind of identity a community had. Through the process of formalisation as such the unwanted effects identified by Weiler would emerge. In order to circumvent the undesired qualities of a political community, one would have to renounce a statal organisation, which means here: to dispense with the legal codification of a common identity altogether.

#### **4. "Constitutional tolerance" instead of statehood**

Weiler seems to argue along the lines of the second interpretation when he assesses the European polity as legitimate because its non-statal constitutional architecture incorporates a principle of "constitutional tolerance". He identifies a European "constitutional Sonderweg" in the structure of the European polity. "Architecturally, the combination of a 'confederal' institutional arrangement and a 'federal' legal arrangement seemed for a time to mark Europe's Sonderweg - its special way and identity" (Weiler 2003: 10; emphasis original).<sup>5</sup> This way, he notes, the organisation of the European political order is not in line with the order of a democratic constitutional state:

European constitutional discipline does not enjoy the same kind of authority as may be found in federal states where federalism is rooted in a classic constitutional order. It is a constitution without some of the classic conditions of constitutionalism. There is a hierarchy of norms: Community norms trump conflicting Member State norms. But this hierarchy is not rooted in a hierarchy of normative authority or in a hierarchy

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<sup>5</sup> The following page numbers refer to Weiler (2003).

of real power. Indeed, European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power. (ibid.: 9)

According to Weiler, the contemporary European political practice “not only contradicts an orderly understanding of legal hierarchy but also compromises deep values enshrined in the national constitution as well as a collective identity which is tied up with these values. Indeed, it is to challenge the idea of constitution itself” (ibid.: 16). He argues, this structure of the European polity without a constitution can claim legitimacy in so far as its explicit non-state character establishes a counterweight by which the dangers related to the nation-state are absorbed. The EU can fulfill a counterbalancing role, because instead of representing the principles of a constitutional state it incorporates “one of Europe’s most important constitutional innovations, the Principle of Constitutional Tolerance” (ibid.: 18). This principle which is manifested in the Treaties as the aim of an “ever closer union among the peoples of Europe”, is understood to justify the structure of the European polity: “a federal type of constitutional discipline which, however, is not rooted in a statist-type constitution” (ibid.: 21). In opposition to the situation within a democratic constitutional state, the “constitutional actors in the Member State accept European constitutional discipline not because [...] they are subordinate to a higher sovereignty” (ibid.) represented by the common will of a demos. Instead they voluntarily comply with European legal norms:

They accept it as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe, to a norm which is the aggregate expression of others wills, other political identities, other political communities. (ibid.)

Weiler uses a theological imagery of the liberating power of renouncing earthly wants by submission to a transcendental authority, for substantiating his claim that the voluntary (that means here, not prescribed by a constitution) subordination to the political will of others is crucial for the legitimacy of the EU.

The French or the Italians or the Germans are told: in the name of the peoples of Europe, you are invited to obey. [...] When acceptance and subordination are voluntary, and repeatedly so, they constitute an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance. (ibid.)

The following sections try to demonstrate that Weiler’s justification of the EU’s legitimacy qua non-statal organisation inherently contradicts his explicit

normative rejection of European statehood. I try to show that his justification implicitly assumes those characteristics with respect to the current organisation of the EU, which he has previously rejected as elements of statal organisation: the formalisation of membership on the basis of a collective identity through citizenship (section 3.1.) incorporated in a hierarchical European legal order (section 3.2.). Furthermore, on a closer look Weiler's justification reveals a noticeable parallel with regard to what constitutes the normative authority of European law and the law in a democratic nation-state. Therefore, Weiler's substitution of the principle of popular sovereignty for the principle of "constitutional tolerance" as source of the EU's-legitimacy becomes questionable (section 3.3.).

## 5. Inconsistencies in Weiler's justification

As illustrated above, according to Weiler, statal organisation has to be rejected because it means the recourse to positive law in order to define the external and internal boundaries of a political community that considers itself a nation. He holds that two kinds of processes are suppressed by the formal codification of a previous national identity: the political self-determination of groups or individuals with alternative identities who cannot recognise themselves in the codified national identity; and the continuous self-determination of the political community, the absence of which leads to a confusion of nation and state. In other words, Weiler's explanation implies the assumption that the illegitimacy of the nation-state is grounded on the fact that it opposes the political autonomy of its members in an inappropriate way. Regarding the internal boundaries of the nation-state, Weiler claims that the supranationalism of the EU counteracts these effects in a way that

[a]t intergroup level, then, it pushes for cultural differences to express themselves in their authentic, spontaneous form, rather than the codified statal legal forms. At the intragroup level it attempts to strip the false consciousness which nationalism may create instead of belongingness derived from a non-formal sense of sharedness.

(Weiler 1999: 342-343)

In explaining this salutary effect of the EU, Weiler's implicitly presumes the organisation of the EU to entail three features previously ascribed to state-centered constitutionalism.

### 5.1. Citizenship

If, as Weiler asserts, the legitimacy of the European polity is due to its ability to contain the dangers related to statal organisation, one of its functions would have to be to maintain the political autonomy of the members of the nation-

states against the impact of legally codified national identities. However, to carry out this function it could not make use of the instrument of statal organisation in the way described by Weiler. Yet, this is precisely what he presumes to be a matter of fact, when he claims to “give normative meaning to the citizenship clause in Maastricht and Amsterdam” (Weiler: 1999: 344)<sup>6</sup> by explaining why the European citizenship should be seen as desirable.

Let us recollect: Weiler understands citizenship “not simply as the code for group identity, but also as a package of legal rights and duties, and of social attitudes” (ibid.: 342). Not only the “sense of belonging”, but its codification in the form of citizenship establishes a political community: “Citizens constitute the demos of the polity” (ibid.: 337; emphasis original). According to Weiler’s explanation, citizenship can represent many kinds of collective identity (that is why citizenship could not necessarily be equated with nationality). Nevertheless this representation always has to be translated into legal rights, which, among other things, is necessary to clearly identify the members of a political community and this way constitutes the demos of a polity. In other words, Weiler holds that every citizenship is the formal codification of a group identity, however this identity may be characterized. Hence, if Weiler considered the existence of citizenship per se as a source of danger and at the same time justifies EU-citizenship as normatively desirable, his argumentation would imply that one evil (the nation-state) is just replaced with another (the EU). The only way out of this contradiction would be to identify the source of potential misuse in the content of what is codified: A particular perception of the idea of the nation and not the statal organisation would then have to be assumed to be ambivalent in normative terms.

Indeed, Weiler’s interpretation of the citizenship clause in the treaty of Maastricht and Amsterdam implicitly argues in the latter a way. He regards the European citizenship clause as a step away from (ethno-)nationalism and not from statal organisation, and thus it should be understood as

the very conceptual decoupling of nationality from citizenship and as the conception of a polity the demos of which, its membership, is understood in the first place in civic and political rather than ethno-cultural terms. On this view, the Union belongs to, is composed of, citizens who by definition do not share the same nationality. The substance of membership (and thus of the demos) is in a commitment to the shared values of the Union as expressed in its constituent documents, a commitment, *inter alia*, to the duties and rights of a civic society covering discrete areas of public life, a commitment to membership in a polity which privileges exactly the opposites of nationalism – those human features which transcend the differences of organic ethno-culturalism

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<sup>6</sup> The following page numbers refer to Weiler (1999).

(*ibid.*: 344; emphasis original).

Here, Weiler implies that a certain perception of common identity comprises the source of danger of the nation-state: In “ethno-cultural terms” the commonality represented by a nation-state identity lies in a shared “nationality” instead of shared values, and privileges nationalism. Note, that Weiler does not see this danger being neutralised in the EU qua a non-statal organisation, but by a European common identity which is represented in the European citizenship clause and consists of a different “substance”. He assumes a difference in kind between what is perceived as the substance of the collective identity of the nation-states and of the collective identity of the EU. However, in conceptual terms it is difficult to see how Weiler’s description of European citizenship differs from those features of citizenship he assumes as constitutive for statal organisation: In his view, supranationalism is an expression of a European common identity that has grown over time and is the “civic and political” “substance of membership” (in the form of “shared values”), which makes up the “Union demos”. These alleged features are exactly those, which according to Weiler represent the affective side of legal citizenship rights, which alone can define “membership in a polity”, and that is: a demos.

## 5.2. Hierarchical legal order

Weiler argues that the European political order is an instrument for defending the political autonomy of the members of nation-states against legally codified national identities. According to Weiler, this instrument is not directed against all national identities but only against those that are not authentic: “Supranationalism on our view favors national culture when, indeed, it is authentic, internalized, a true part of identity” (Weiler 1999: 343)<sup>7</sup>. He holds that in addition to the option of remaining in the reference framework of the nation-state, the individual obtains the chance to turn against it: “Supranationalism assumes a new, additional meaning which refers not to the relations among nations but to the viability of the individual to rise above his or her national closet” (*ibid.*: 343). For our purposes it is crucial to look at the way Weiler conceives the EU to accomplish this: Because the EU is a

supranational construct with its free-movement provisions which do not allow exclusion through statal means of other national cultural influences and with its strict prohibition on nationality/citizenship-based discrimination, national differentiation cannot rest so easily on the artificial boundaries provided by the state

(*ibid.*: 342).

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<sup>7</sup> The following page numbers refer to Weiler (1999).



Thus, according to Weiler, European legal norms, the freedoms of the single market and non-discrimination, constitute the instrument for the European citizens to defend their autonomy against improper regulations of the nation-states.

Note, that Weiler's emphasis on the voluntariness of subordination, which he holds against the assertion of a European legal order with coercive power, stands in contrast to what he implicitly assumes here as regards the application and enforcement of European law. He turns against his hypothesis that an internalised principle of tolerance motivates the compliance with European legal norms. This becomes clear when one considers the implicit precondition for the desirable quality Weiler ascribes to supranationalism, in this case represented by the legal norms of the freedoms of the Single Market and non-discrimination: this desirable quality of the EU would not exist if citizens could not count on a due process. In other words, the European political order must allow the individual citizen to expect that he actually can take legal actions against his own national legal order in case the latter does not comply with European law, and that the European legal decisions are implemented. The contingency that would prevail if compliance with European legal norms were based only on the internalisation of the moral principle of tolerance, would render the effect Weiler presupposes impossible: that in case of conflicting alternative identities European legal instruments could be used against the constraints of legally codified national identities. Regardless of the question whether or not the implementation of European law is carried out by a central European executive: Weiler's hypothesis that a European polity counteracts the nation-state restrictions on individual self-determination logically presupposes European law that is hierarchically superior to national law and can be expected to be enforced. Consequently, against his explicit assertions regarding the role of the principle of tolerance and in addition to the formal codification of membership, Weiler's justification of the EU's legitimacy implicitly presumes a second characteristic of statal organisation, namely a hierarchically superior European law: The EU is assumed to have a competence "to enact norms which create rights and obligations both for its Member States and their nationals, norms which are often directly effective and which are constitutionally supreme" (ibid.: 336).

### **5.3. Tolerance or popular sovereignty as legitimising principle of the European political order?**

Against this background, Weiler's argument that the legitimacy of the European polity rests upon the embodiment of the principle of tolerance in its constitutional architecture, is not sustainable without contradiction. Weiler identifies a principle of "constitutional tolerance" as the foundation of the

EU's legitimacy as a heterarchical, non-statal political order. This tolerance, he states, becomes visible in the fact that the "constitutional actors - the Union itself, the Member States and state organs, European citizens" (Weiler 2003: 8)<sup>8</sup> are driven by a "constitutional discipline" - although the constitutional architecture of the EU differs fundamentally from the political order of the member-states as regards the question of sovereignty. Whereas in the member-states "the formal sovereignty and authority of the people coming together as a constituent power is greater than any other expression of sovereignty within the polity" (ibid.: 8), such an authority is missing in the EU. Instead, the "constitutional discipline" is related to the "very willingness to accept a binding discipline which is rooted in and derives from a community of others" (ibid.: 21). This constitutional discipline exists, he notes, "when acceptance and subordination are voluntary" (ibid.: 21).

Note, that a precondition for being tolerant is to have the opportunity to be intolerant. If, as Weiler asserts, tolerance consists of the voluntary submission to the political will of others, this presumes that one could choose not to subordinate but to contradict and to refuse to the act of submission. If this opportunity was missing, we would be dealing with an oppressive relationship and with a powerless instead of a tolerant actor. Consequently, an act of voluntary submission presupposes an autonomous actor, who is in a position to freely decide whether or not to accept the will of others as binding. This raises the question in what way such a relationship of "constitutional tolerance", as Weiler identifies in the European political order, can be assumed with respect to a legal order. In the context of our discussion, it is obvious to take two basic aspects into account: the role of such a principle of tolerance with regard to the dimension of the application and enforcement of European law on the one hand, and the dimension of the generation of European law on the other.

As shown above, Weiler cannot assume a relationship of tolerance with regard to the application and enforcement of European legal norms without contradicting himself. If Weiler's reference to the principle of tolerance was directed at the application and enforcement of European law, he would claim that the impact of European law as an instrument against national law was dependent on the tolerance of the "constitutional actors", i. e. "the Union itself, the Member States and state organs, European citizens" (ibid.: 8). But then European law would be superfluous as European citizens would depend on the tolerance of the governments of the member-states - including their own government - in order to effectively use European law against the constraints of national law. Either it is the case that a national government is intolerant,

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<sup>8</sup> The following page numbers refer to Weiler (2003).

then the application of national law could not be prevented by European legal norms. Or, the respective national government is tolerant, then there is no autonomy-problem to be solved by European law.

If, on the other hand, a relationship of tolerance is assumed regarding the process of the generation of European law, this implies that autonomous actors must have the opportunity to contradict the will of others before the law is established. This way, Weiler would assert that the legitimacy of European law draws on the fact that in the process of its generation all “constitutional actors” subordinate themselves voluntarily to the political will of the respective others. It would be implied that all “constitutional actors” also had the choice not to subordinate themselves to the political will of the respective others. But in this case it remains unclear, in what way the normative authority of European legal norms would be different from the normative authority Weiler ascribes to the legal norms of a political community organised by the principles of state-centered constitutionalism. In both cases, a legal norm would gain its normative authority from the collectively held assumption that all those who are concerned by this legal norm have had an equal say in the process of its generation and thus can accept it as a communal decision, notwithstanding whether or not it represents the respective political will of the individual.

In fact, Weiler’s explanation indicates that he assumes the normative authority of the principle of tolerance to unfold in the dimension of European law-making, more precisely, in the organisation of a European will-formation. In this regard, the following passage is instructive:

In political terms, this Principle of Tolerance finds a remarkable expression in the political organization of the [European, D. G.] Community, which defies the normal premise of constitutionalism. Normally in a democracy, we demand democratic discipline, that is, accepting the authority of the majority over the minority only within a polity which understands itself as being constituted of one people, however defined. A majority demanding obedience from a minority, which does not regard itself as belonging to the same people, is usually regarded as subjugation. This is even more so in relation to constitutional discipline

(*ibid.*: 20)

Here, Weiler presumes the following: The democratic organisation of will-formation, in which a minority accepts the will of the majority, represents the “normal premise of constitutionalism”. A group of individuals accepts the subordination to the will of others as being justified. This voluntary subordination requires that the minority considers itself as part of a totality that comprises the majority and forms “one people, however defined”. In other words, there has to be a consciousness that the minority and the majority

form some kind of community. This is a precondition for the results of the law-making process to be accepted by everyone as legitimate, although there might be dissent from a minority. Only if the minority regards itself as part of a totality – “the people” – it does not perceive the “majority demanding obedience” as a source of oppression.

It is noteworthy, however, that these features of a “democratic discipline” in the law-making process of a democratic constitutional state, could be described with precisely the formulation Weiler has used to explain the principle of tolerance: In the case of the minority considering itself a part of the larger community, it regards its acceptance of the majority decision as an “autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by [the state, D. G.], to a norm which is the aggregate expression of others wills” (ibid.: 21).

Taking into account Weiler’s previous assertion that there is an identity-change in the European political communities represented by the member-states (supranationalism as a “community idea”), the kind of normative authority he identifies in the dimension of European law-making is analogous to the one at the member-state level. The assumption that the EU forms a political community, in other words, “one people, however defined” is confirmed when he states that

[...] yet, in the [European, D. G.] Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to accept being bound by precepts articulated not by ‘my people’ but by a community composed of distinct political communities: a people, if you wish, of others. I compromise my self-determination in this fashion as an expression of this kind of internal – towards myself – and external – towards others – tolerance

(ibid.)

“A people of others” might have a different kind of bonds (values instead of the idea of an ethnic relationship) and might as well be composed of different well-integrated (national) groups of individuals (like a federation) – nevertheless, it is still assumed to form “one people, however defined”, where the minority accepts majority-decisions because it recognises itself as being part of one and the same European political community.

The important point here is, if Weiler sees such a relationship of tolerance to be present in the law-making process of the EU, he implies a structural analogy to the tension between the individual and the community which is present in the legitimation of political rule in the democratic constitutional state. In the latter, individual members accept the results of the communal

process of law-making – despite the fact that the outcome might be at odds with their own particular interest – not only because they recognise themselves being part of the same political community, but because they recognise themselves having – like all other members – an equal say in the process of law-making.

Thus, and finally, Weiler's explanation of the normative authority ascribed to a principle of tolerance embodied in the European constitutional architecture leads to the following conclusion: Either a relationship of tolerance is assumed to prevail as regards the coercive power of European law. Then Weiler's assumption about the salutary effect of European law would be contradicted. Or a relationship of tolerance is assumed to prevail as regards the process of European law-making, which is indicated by Weiler's explanation. In this case, the justification of the EU's legitimacy entails a third aspect analogous to the normative authority represented by the idea of the democratic constitutional state: The normative authority of European law is implicitly said to rest on a process of law-making, in which all "constitutional actors – the Union itself, the Member States and state organs, European citizens" have the opportunity to say "no" to a proposed regulation. In other words, what is implied is the principle of equal democratic participation in the European law-making process. Weiler's description of a relationship of tolerance would be analogous to the relationship of tension between individual and communal self-determination in the member-state democracies. According to the idea of the democratic constitutional state, this latter tension makes up one essential feature of the concept of popular sovereignty, realised through the legal institutionalisation of a democratic law-making process (cf. Krieger 1988).

## **6. Legitimation of the European Union beyond the normative ideal of the democratic constitutional state?**

It goes without saying that the EU hardly meets the principles entailed in the idea of the democratic constitutional state. But this has not been the matter under discussion in this article. Instead, it is concerned with the question, whether Weiler's justification of the EU's legitimacy represents a new type of legitimising political rule that avoids reference to the "core articles of faith" (Weiler 1996: 105) of state-centered constitutionalism. In this regard the paper has shown that Weiler's argumentation entails a contradiction between what he explicitly claims and what he implicitly presumes to substantiate that claim: Although he explicitly claims to turn his back on the concept of democratic legitimacy linked to the paradigm of state-centred constitutionalism, i.e. the ideal of the democratic constitutional state, he implicitly presumes three central elements of this ideal: a legal citizenship, determining membership in a

European political community; the enforcement of a hierarchically superior European law; and a structure of the European law-making process that parallels the principle of popular sovereignty embodied in the legal organisation of the democratic law-making process in a democratic constitutional state.

What conclusions might be drawn from the analysis of Weiler's justification? Such an analysis can neither claim to shed light on the structural and functional characteristics of the European polity, nor does it aim at a normative assessment of the present EU. Rather, it claims to contribute to the "reconstruction of the structure of social belief-systems and justification practices" (Peters 2000: 290, own translation)<sup>9</sup>, in this case the interpretive pattern [Deutungsmuster] which operates in the contemporary practice of legitimising political rule. The postulate of an "urgent need to re-set the standards by which we assess the legitimacy of European integration and of the institutions which guide the process" (Majone 1998: 6), implies two assumptions regarding this particular interpretive pattern: First, it implies that the validity of those norms "we"<sup>10</sup> refer to in judging the legitimacy of political rule could be established by an academic consensus. Second, it implies that the principles of the democratic constitutional state, which justify legitimate political rule in the European nation-states, are not valid with regard to the EU. Taking both assumptions as given, a notable part of the normative debate on the legitimacy of the EU argues for the substitution of the concept of the democratic constitutional state as normative ideal of the political practice in the EU. However, in my view, the results of the exemplary analysis of one type of justification in this normative debate – Weiler's argument for the legitimacy of the EU as a non-state entity – give reason to counter the two premises.

a) At first, the analysis suggests that the normative rejection of statal organisation in the context of the EU might be due to an erroneous equation of the concept of the state/statal-organisation and the ideology of nationalism. The analysis has shown that Weiler, against his explicit assertion, does not justify the normative disqualification of European statehood with reference to features of statal organisation, but with reference to dangers lying in a specific type of common identity. Finally, he does not explain the idea of a state as the source of danger of the nation-state. Rather, he describes a misuse of the state (as an instrument of organising a political community) by a (majority within a) political community that has internalised the idea of a

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<sup>9</sup> org.: „Rekonstruktion der Struktur sozialer Überzeugungssysteme und Rechtfertigungspraktiken“

<sup>10</sup> "We" means here, the members of the political communities that form the EU (cf. fn. 2).

homogenous and uniform nation as the source of the dark sides of the nation-state. Taken this into account, it might be justified to turn the criticism of a “touch of stateness” against Weiler: In his rejection of statehood as the finalité of European integration, he tends to use the terms state, nation-state and nation (or nationalism, respectively) as synonyms, instead of clearly distinguishing between them. In doing so, the relationship state and nation actually entered in the historical development of the modern nation-state, is implicitly asserted to be a conceptual relationship.

Contrary to that, one should differentiate between the historically concrete phenomenon of the modern nation-state and a general definition of statal organisation, that analytically separates the respective kinds of identity of the political community that is represented by a state (see for example Nullmeier 2008; compare also Zürn et al. 2004). This would allow to identify the modern nation-state as one specific “kind of state which has the monopoly of what it claims to be the legitimate use of force within a demarcated territory and seeks to unite the people subject to its rule by means of cultural homogenization” (Guibernau 1999: 14; my emphasis). In my view, an analysis of the European communitarisation [Vergemeinschaftungsprozess] requires a clarification of the concepts of state, nation and nationalism, which allows for understanding the process of the development of statehood as well as the nature of the identity of a political community that makes up a state, as historically variant. Regarding an analytical reconstruction of the European integration process, the empirical question whether European communitarisation shows features of a state-building process should be clearly distinguished from the question, whether it represents a process that is similar to the historical process of the development of the European nation-states. In this context, it would be useful to avoid a (mostly unspoken) equation of the terms state, nation and nation-state.<sup>11</sup>

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<sup>11</sup> A similar equation can be found frequently in the academic debate on the legitimacy of the EU. In my view, this equation also occurs in Offe und Preuss (2006), when they do not clearly differentiate between the conceptual features and specific historical forms of a demos. Initially they describe a demos in conceptual terms as “a durable and solidly self-recognizing political community” (ibid.: 186) (A). Contrary to that, their conclusion that the legitimacy of the EU could be justified if it would form a “democracy without a demos” is based on the assumption that a demos is made up by “people who [...] form one particular body of associates on the basis of their (national and other) similarities” (ibid.: 199) (B). This way, their argument becomes ambivalent: On the one hand, they share Weiler’s diagnosis that the principle of tolerance as a specifically European phenomenon had become part of the democratic culture in the EU member-states (ibid.: 195-196). In this regard, they normatively reject democracy “after the model of the nation state” (ibid.: 197-198) for the EU because of the multi-nationality of the latter. On the other hand, they not only assume that the legitimacy of the EU “cannot be anything other than democratic in nature” (ibid.: 185). Furthermore, they claim that European integration has generated an “entirely new

b) More generally, the analysis presented in this article contradicts the premise that the ideal of the democratic constitutional state is invalid with regard to European political rule, or respectively, that it could be “re-set” by an academic consensus. Contrary to this, the analysis has exemplified that Weiler’s justification, which explicitly asserts the rejection of the democratic constitutional state as the normative ideal of legitimate European political rule, implicitly assumes the validity of central elements of this ideal. Whereas Weiler alleges statal organisation as being part of the legitimation of political rule in the member-states, his justification seeks to explain why a statal organisation as such would undermine the legitimacy of the EU. By justifying the EU’s legitimacy qua non-statal organisation, however, he implicitly presumes structural characteristics of political order (legally codified citizenship, hierarchically superior legal order, popular sovereignty), which in the framework of state-centred constitutionalism have been identified as essential elements of the democratic constitutional state.

Notwithstanding, one could object that contradictions are not an unusual phenomenon and that one should not jump to conclusions from that. However, one should consider that what we are confronted with here is a judgement on the legitimacy of political rule and that means, a component of the object of analysis: the practice of legitimising political rule. Such a justification always claims validity by itself. Accordingly, the contradictions that have been identified between the level of what is explicitly claimed (the legitimacy of a non-statal European order) and the implicit assumptions that

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construction of the ‘we’ in the field of political action” (ibid.: 200) and that the EU, in addition to a European solidarity, requires a “post-national collective agency” (ibid.: 199) for a legitimate (i. e. in this context: a democratic) organisation. They conclude that under these conditions the EU could be described as a “democracy without a demos” (ibid.). However, this conclusion is only plausible if “demos” is understood as a body of associates on the basis of national similarities (B). According to their conceptual assumptions about a demos in (A), Offe und Preuß’s model of a legitimate organisation of the EU cannot be said to be a “democracy without a demos”: a model of the EU as a European political community that considers itself as a “we”, feels solidarity and uses a central political authority to produce collectively binding decisions, presumes the existence of a European demos as a “durable and solidly self-recognizing political community”. Seen in this light, the term “democracy without a demos” becomes doubtful. If one considers the formation of statehood and of a common identity as a historically variant process, it is even plausible to see Offe und Preuß’s description of the (actual resp. desirable) course of the (future) European integration as a process of state-building – even though it was not a process analogous to the historical process of European nation-building (in this regard, the essay of Laitin (1997) is instructive). From a similar perspective, Fossum (2004) interprets what Weiler refers to as „constitutional tolerance“ as a possibly preliminary result of a European communitarisation process, which remains open for future developments (including the possibility of the development of a European constitutional state).



are made in the course of the justification (the presumption of several characteristics of statal organisation of the EU) call for an explanation.

Against this background, it would be unparsimonious to assume such an internal contradiction as contingent as long as there are explanations for this phenomenon that have not been devaluated up until now. The perseverance with which the validity of the ideal of the democratic constitutional state breaks through – against what has been explicitly asserted – in the analysed legitimacy-judgement on the EU, in my view corresponds to a hypothesis Habermas presents in his book “Between Facts and Norms” (1997). His main hypothesis concerns the structure of the interpretive pattern regarding the legitimacy of political rule in modern political communities. By way of a “history of theory with a systematic intent” (Habermas 1995: 140), Habermas explains the ideal of the democratic constitutional state as an essential element of the normative self-conception of modern societies. He relates this to the hypothesis that attempts to justify the legitimacy of political rule in opposition to this ideal evoke cognitive dissonances between this self-conception – which might be seen as an unreflecting deep structure of the collective consciousness of a modern democratic community – and revisionist attempts of self-description.<sup>12</sup> Likewise, the discrepancy between Weiler’s explicit claim, aiming at justification, and the implicit assumptions underlying his argumentation could be regarded as such a cognitive dissonance.<sup>13</sup>

This might justify the hypothesis that the practice of legitimising political rule in modern political communities, also in regard to political rule beyond the contemporary European nation-states, is based on the normative ideal of the democratic constitutional state (even though this might not be reflected). It goes without saying that this hypothesis will have to be confirmed by prospective empirical analyses which examine the practice of legitimising European political rule by means of reconstruction, before the general conclusion could claim to be valid: that in modern democratic communities

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<sup>12</sup> I have tried to show elsewhere (Gaus 2008) that Habermas’ discourse theory of the democratic constitutional state represents such a hypothesis on the structure of the modern self-conception with regard to the legitimacy of political rule, that remains to be confirmed by empirical analysis.

<sup>13</sup> The relationship presumed here between a collective consciousness and the individual practice of justification corresponds to Oevermann’s definition of interpretive patterns [Deutungsmuster]: „Interpretive patterns are thus cognitive formations. The scope of their validity is coextensive with the concrete historical practice of communitarisations as collectivities of whole persons and the basis of their validity is rooted in the performing practice of these communitarisations. But they operate concretely in the practice of individual subjects and reproduce this way the affiliation of these individuals to their milieu (Oevermann 2001: 12, own translation). Also compare Searle’s seminal remarks on the structure and mode of action of „institutional facts“ (Searle 1995, esp. ch. 1-5) in this context.

the assumption of statal organisation presents an essential element of the structure of the collective interpretive pattern regarding the legitimacy of political rule – and, consequently, that the concepts of legitimacy, democracy and state can not easily be decoupled.

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