

# The Euro and the European Demos: A Reconstitution

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## Abstract

The introduction of a single currency within most of the EU is an event with great practical and symbolic effect. For those hoping for the creation of a European state, these symbols and effects portend a move towards greater union, one step closer to federation. For others, the euro portends a forced amalgamation of incompatible parts, a regression to a time within Europe before the passions of self-determination forged the current political map of Europe. This article examines two of the great criticisms of closer union: the first, that there is no singular people to be united within one 'state'; the second, that whatever the merits of union, the movement toward amalgamation is involuntary; union will not be a sovereign act of the people, but rather the culmination of a manipulation by powerful unseen actors within Europe to which people otherwise might be indifferent or opposed.

With respect to the first, the article posits that a European demos exists, that is, Europe is constituted as an amalgamation of related groups which together form an organic community sufficient for state formation. What has prevented recognition of the existence of this community has been the now tradition bound refusal to look realistically at community beyond current national borders. But Europe is at last moving towards common socio-cultural agreement on the level of *Volk* generality within which the communal elements of a state are to be found, one which includes continent, nation and tribe. The creation of a European Union began a process of changing common agreement about that place from the post-Reformation nation state to a larger geography.

With respect to the second criticism, the article considers the effect of the 'conspiracies of the elites' theories on the integration debate. The essence of the second criticism is dependent on a successful deployment of culturally apocryphal and significant patterns of demonizing change or explaining events. These patterns, used effectively to destroy or marginalize ethnic, racial, social and religious minorities, have been resurrected to demonize both the process of constituting Europe as a meta-demos, and the acknowledgment of a living vitality of a European *Volk*. The arguments about the EU's democratic deficit fall within this error by suggesting that union is illegitimate and inauthentic—an involuntary and artificial construct of anti-democratic elites.

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'A subject is whatever constitutes itself.'<sup>1</sup>

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It has become clear to most observers that the idea of monetary union was initially 'economic and monetary. The result was likely to have political implications as a common monetary policy implies a degree of integration between Member States higher than had ever been experimented before in the EEC.'<sup>2</sup> The economic ramifications of monetary union are clear enough. The political ramifications became clearer with the approach of the implementation of the single currency. On the eve of monetary integration, the European Council announced a constitutional convention.<sup>3</sup> As that convention now struggles to determine an appropriate *form* of governance for the EU, Europe struggles with an even more fundamental question: is there enough in common between the national communities of Europe to legitimately support a single polis.<sup>4</sup>

It therefore comes as no surprise that, as a manifestation of the economic integration at hand and as a symbol of the political integration to come, the introduction of a single currency within most of the European Union has been greeted with a certain amount of regret and mistrust on both sides of the Atlantic.<sup>5</sup> Common among the lamentations is that the abstractness of the common currency is symptomatic of the cultural blandness and attenuation of democracy that will follow in the wake of this currency of 'windows, gateways and bridges.'<sup>6</sup> Resort to the language of 'abstractness' serves as a proxy

<sup>1</sup> J-F Lyotard, 'The Earth Had no Roads to Begin With,' in *Postmodern Fables* (1993) (G. Van Den Abbeele, trans., 1997) 103, at 104.

<sup>2</sup> J. D. de la Rochère, *EMU: Constitutional Aspects and External Representation*, (1999-2000) 19 *YEL* 427, at 428.

<sup>3</sup> The announcement provided that:

'In order to pave the way for the next Intergovernmental Conference as broadly and openly as possible, the European Council has decided to convene a Convention composed of the main parties involved in the debate on the future of the Union. In the light of the foregoing, it will be the task of that Convention to consider the key issues arising for the Union's future development and try to identify the various possible responses. . . . The European Council has appointed Mr V. Giscard d'Estaing as Chairman of the Convention and Mr G. Amato and Mr J.L. Dehaene as Vice-Chairmen.'

Laeken Declaration, *Laeken Declaration—the Future of the European Union*, SN 273/01 Press Release: Laeken—Brussels (15/12/2001), available at: <http://ue.eu.int/Newsroom/loadDoc.asp?max=1&bid=76&did=68758&grp=4056&lang=1/>.

<sup>4</sup> Aristotle reminds us that 'even if persons so situated should come to one place, and every one should live in his own house as in his native city, and there should be alliances subsisting between each party to mutually assist and prevent any injury being done to the other, still they would not be admitted to be a city by those who think correctly, if they preserved the same customs when they were together as when they were separate.' Aristotle in W. Ellis (trans.), *Politics* (1912) Book III, ch. IX, at 83.

<sup>5</sup> The English press have been at the forefront of the host of European lamenters. See, e.g., Janet Bush, 'The Euro School of Thought that is Definitely Wrong', *The Times* (London), 5 January 1999. The *London Daily Telegraph* has also been at the forefront of this effort from time to time. See, e.g., n. 20 *infra*. The influential conservative commentator of the popular press, George Will serves as an example of this sort of reaction on the Americans. See George Will, 'Selling Their Cultures for a Handful of Euros', *Washington Post*, 30 December 2001 at B-7.

<sup>6</sup> George Will, *supra* n. 5 at B-7 (using the aesthetics of the new currency as a metaphor for all the failings of the attempt to unify Europe). Of course, Mr. Will's statement is overblown, perhaps

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1 for a general uneasiness about what is seen by some as an irresistible  
2 inevitability of closer political union of a still indeterminate kind which  
3 presages a consolidation of Europe in every respect. *E pluribus unem*<sup>7</sup> holds  
4 terror for a segment of Europe; it promises Eden for another.<sup>8</sup>

5 Those gripped by dread at the coming amalgamation have been willing  
6 enough to acknowledge the inevitability of some sort of joining of Europe;<sup>9</sup>  
7 they might even concede that the very structure of the EU posits a more or less  
8 close association;<sup>10</sup> this association, however close, they might accept *de*  
9 *facto*, *sub silentio*.<sup>11</sup> But coupling *de jure* in the form of nation, federation, or  
10 consolidation—these are transformations that may not speak their names;  
11 these are the unwanted ends towards which the very limited union they are

12  
13 for dramatic effect. Though in a more humble place than it used to be, the coinage of the euro pro-  
14 vides a space, like that provided on American Quarters for the last several years, for the Member  
15 States to express themselves. 'Every euro coin will carry a common European face. On the obverse,  
16 each Member State will decorate the coins with their own motifs.' Euro Essentials—Coins, Notes,  
17 available at [http://europa.eu.int/euro/html/rubrique-cadre5.html?pag=rubrique-europa5.html|](http://europa.eu.int/euro/html/rubrique-cadre5.html?pag=rubrique-europa5.html|lang=5|rubrique=261|chap=18/)  
lang=5|rubrique=261|chap=18/ (accessed 25 February 2002).

18 <sup>7</sup> 'From out of many, one' is an expression close to the hearts of American nationalists who, out  
19 of a union of semi-sovereign former colonies, have constructed a nation integrated in its economy  
20 and tied by a common language, though increasingly religiously and racially diverse. This notion  
21 clouds the perspective of the American popular press in significant ways. The usual analysis starts  
22 with the acceptance of the premise that one should not expect European integration to lead to a  
23 'United States of Europe, with a central government that dominates economic affairs'.  
24 'Constitution Could Spur Europe's Economy', *The Wall Street Journal*, 11 February 2002 at A1. But  
25 inevitably, the analysis judges alternatives and the possibility of success from out of the American  
26 experience. *See id.* (Success is gauged by efficiency and control at the highest level of governmen-  
27 tal organization—with minimization of authority of Member States to block and maximization of  
28 EU institutions to act.)

29 <sup>8</sup> This fear or promise is grounded either on the inevitability of union, whatever its form (see,  
30 e.g., D. Rossa Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European*  
31 *Community* (1997), or on the political form that this union will take (see, e.g., G. F. Mancini,  
32 'Europe: The Case for Statehood' (1998) 4 Eur. L.J. 29 (federation along classic lines),  
33 N. McCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*  
34 (1999); J. H. H. Weiler, *The Constitution of Europe: Do the New Clothes Have an Emperor? and Other*  
35 *Essays on European Integration* (1999); L. C. Backer, 'The Extra-National State: American  
36 Confederate Federalism and the European Union', (2001) 7 Colum. J. Eur. L. 173 (sui generis forms  
37 of political organization). One, after all, can conceive of unification as the smothering of all differ-  
38 ence. Alternatively, one can approach the construction of the political systems of a more inte-  
39 grated EU as the construction of an amalgamated community based on a set of commonality from  
40 which political union is possible, while supporting subsystems of communal organization oper-  
41 ating within tolerable levels of difference. This last characterization implicates the autopoietic  
42 approach to understanding human collective systems. Autopoiesis refers to systems, and particu-  
43 lar legal and social systems, which produce and reproduce their own elements by the interaction  
44 of their elements. See Gunther Tuebner, 'Introduction to Autopoietic Law', in G. Tuebner (ed.),  
45 *Autopoietic Law: A New Approach to Law and Society* (1987) 1, 3. For a general discussion, see, e.g.,  
Nikolas Luhmann, 'Law as a Social System' (1989) 83 Nw. U. L. Rev. 136.

<sup>9</sup> I note, but ignore in this essay, the question of the geographic limits of Europe. Europe is  
larger than the current frontiers of the EU, but perhaps smaller than the continent. For a discus-  
sion, see, e.g., J. G. A. Pocock, 'Deconstructing Europe', in P. Gowan and P. Anderson (eds.), *The*  
*Question of Europe* (1997) 297.

<sup>10</sup> See, e.g., U. di Fabio, 'A European Charter: Towards a Constitution for a Union' (2001) 7  
Colum. J. Eur. L. 159.

<sup>11</sup> For an interesting analysis, see, e.g., Y. Devuyt, 'The European Union's Constitutional Order?  
Between Community Method and Ad Hoc Compromise' (2000) 18 Berkeley J. Int'l L. 1.

willing to concede is hurtling. Thus, even as they concede association, and profit thereby, they can ascribe the slide into consolidation to anti-democratic forces. These anti-democratic forces work behind the scenes to subvert the social and cultural organization that has characterized our modern Europe of many tribes,<sup>12</sup> which has resisted unification politically since the fall of the Western half of the Roman Empire and spiritually since the Protestant schism of the 16th century.<sup>13</sup> Those resisting the unification of Europe thus ground their opposition on their characterization of the process of unification as illegitimate<sup>14</sup> and the resulting nation as inauthentic.<sup>15</sup>

Hiding behind these suggestions and lamentations are two socio-political postulates that are worth exploring. The first of these, *Grundgedenke*,<sup>16</sup> most forcefully expressed in the early 1990s by the German Federal Constitutional Court in *Bonner*,<sup>17</sup> declares that the march to federation is doomed to failure for lack of a *Volk*<sup>18</sup> to unite.<sup>19</sup> 'European democracy implies a European

<sup>12</sup> I use the term here anthropologically, and with irony, both to elevate its association with the peoples of Africa and to denigrate that which has formed into the nations of Europe. For a discussion of tribalism and the nation state, see, e.g., T. M. Franck, 'Postmodern Tribalism and the Right to Secession', in G. Brohm, R. Lefebvre and M. Zieck (eds.), *Peoples and Minorities in International Law* (1993) 3–27; A-M. Slaughter, 'Pushing the Limits of the Liberal Peace: Ethnic Conflict and the "Ideal Polity"' in D. Wippman (ed.), *International Law and Ethnic Conflict* (1998) 128.

<sup>13</sup> For a classic statement of the position in the context of the development of international law, see A. D. McNair (ed.), *L. Oppenheim, International Law: A Treatise* (4th ed., 1928) Vol. 1 at 63–66.

<sup>14</sup> See, e.g., S. K. M. Laitinen-Rawana, 'Creating a Unified Europe: Maastricht and Beyond' (1994) 28 *International Law* 973 ('Increasing participation on all fronts in the Community may indeed slow down progress, but will create more satisfied constituents. Increased participation will create a unified Europe that fully supports any progress made—slow as it may be. Those who insist on fast integration may ultimately destroy any hope of a unified Europe.' *ibid.*, at 976).

<sup>15</sup> This is the essence of the German Federal Constitutional Court's decision in *Bonner v. The European Union Treaty* [1994] 1 CMLR 57 (by the German Federal Constitutional Court). For an interesting perspective from the Irish diaspora, see, e.g., S. A. Low, Comments: 'Europe Threatens the Sovereignty of the Republic of Ireland: Freedom of Information and the Right to Life' (2001) 15 *Emory Int'l L. Rev.* 175.

<sup>16</sup> A foundational idea, like the idea that all proceeds from God, works in the background to shape the way in which arguments are formulated and logic deployed to advance one position or another.

<sup>17</sup> *Bonner*, *supra* n. 15 ('The Federal Republic of Germany, therefore, even after the Union Treaty comes into force, will remain a member of a federation of states, the common authority of which is derived from the Member States and can only have binding effects within the German sovereign sphere by virtue of the German instruction that its law be applied.' *ibid.*, at 55).

<sup>18</sup> Since the 20th century this word has become difficult to translate. By 1939, for example, English commentators were able to explain that the term, originally used to refer to the warriors and servants of a prince, was expanded to refer eventually to the people, in the sense of the English term 'common folk' and later the sovereign community. By 1939, however, the term had also taken a different turn:

'*Volk* in recent years has acquired a special significance for which there is no exact equivalent in English, unless an obsolete use of the word "folk" could be revived for the purpose. *Volk* extends the conception of family to a wider plane. It denotes a body of men who are physically, and therefore spiritually, of common (or at least similar) descent, whose present subjective will to live together arises out of certain objective facts in the past (we are not at the moment concerned with the question as to whether the assumptions involved in such a conception are justified). *Volk* is now taken to include all Germans who are conscious of their descent, no matter where they may be living, since departure from the ancestral home is insufficient to set a man free from all that he has inherited as a member of his family. . . . The relation between *Volk* and

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1 demos, which does not exist. States work best when their citizens feel enough  
2 in common to accept government from each other's hands.'<sup>20</sup> In the United  
3 States, George Will nicely summarized the fear and loathing of a nation with-  
4 out a people in a recent popular press column in which he described the mon-  
5 etary union of Europe as the dress rehearsal for a more intimate union in  
6 which the varied nations and cultures of Europe are to be dissipated and  
7 replaced by *nothing* in particular—except perhaps a corporation.<sup>21</sup> This first  
8 great assumption produces a considerable pessimism about the success of  
9 creating a more conventionally institutionalized European Union—a more or  
10 less traditional federation.

11 The second of these postulates accepts that union is inevitable but  
12 illegitimate. This political amalgamation is inevitable because this union is  
13 desired by hidden manipulations of powerful elites, and it is illegitimate  
14 because this integration is forced on the people; its coming is fundamentally  
15

16 *Nation* is obscure. *Nation* was formerly used in German in the cultural sense of the word, but  
17 since the War [WWI] there has been a tendency to employ *Volk* for this purpose.'

18 Report by a Study Group of Members of the Royal Institute of International Affairs, Nationalism xix  
19 (Frank Cass & Co., Ltd., 1963) (1939). The German view is somewhat Aristotelian in its connection  
20 between family, family groupings, villages, cities and nation. See Aristotle, *supra* n. 4 Book I. Since  
21 the defeat of National Socialist ideology in 1945, and its suppression in the West, the term *Volk* has  
22 not been able to shed its association with a racist ideological system. Yet, *Volk*, folk, community,  
23 all invoke the sort of difference that, in its benign form, supports political union through an act of  
24 self-determination. Stripped of its Nazi overlay, communities are still built on notions of shared  
25 traits sufficient to support political connection as against the other.

26 <sup>19</sup> The court stated that 'the [Member] States require sufficient areas of significant responsibil-  
27 ity of their own, areas in which the people of the State concerned may develop and express itself  
28 within a process of forming political will which it legitimizes and controls, in order to give legal  
29 expression to those matters which concern that people on a relatively homogenous basis spiritu-  
30 ally, socially, and politically'. *Brunner v. The European Union Treaty* [1994] 1 CMLR 57, 89, trans-  
31 lated in Manfred Zuleeg, 'What Holds Nations Together? Cohesion and Democracy in the United  
32 States of America and in the European Union', (1997) 45 Am. J. Comp. L. 505, 510.

33 Germany, though, is playing both sides of the debate. While the German Federal Constitutional  
34 Court decries the move toward what it sees as an empty union in *Bonner*, the German government  
35 proposes the formal reconstitution of the EU as a federal republic—modeled after the German  
36 federation, of course! See, e.g., E. L. Andrews, 'Germans Offer Plan to Remake Europe Union', *New*  
37 *York Times*, 1 May 2001 at A-1.

38 <sup>20</sup> 'The Federal Juggernaut' *The Daily Telegraph* (London), 17 December 2001, available at:  
39 <http://www.telegraph.co.uk/opinion/main.jhtml?xml=%2Fopinion%2F2001%2F12%2F17%2Fd11701.xml/>  
40 (accessed 15 February 2001). There has been said to be a British perception that 'many  
41 continental Europeans would question or at least not recognise that there is a "continental  
42 European culture" which is significantly different from "British culture". Their perception would  
43 probably be that French or German or Spanish or Dutch culture is equally different. The final key  
44 point is that this issue is about perceptions, and British perception is that the U.K. is different from  
45 the rest of Europe, and that its culture needs to be protected.' J. Rand, 'British Identity and  
46 European Integration', in V. N. Koutrajou and L. A. Emerson (eds.), *The European Union and*  
47 *Britain: Debating the Challenges Ahead* (2000) 24, 30. For other, mostly British views, see, e.g.,  
48 B. von Steenberg (ed.), *The Condition of Citizenship* (1994). Demos, of course, is a term of Greek  
49 origin commentators today sometimes prefer to use to describe those people who together con-  
50 stitute an organic and coherent whole of the membership of a democratic nation. See J.H.H.  
51 Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision'  
52 (1995) 1 Euro. L. J. 21958.

53 <sup>21</sup> George Will, *supra* n. 5 at B-7. For a variety of views, some of which mimic those of Mr. Will,  
54 see M. C. Nussbaum, et al., *For Love of Country: Debating the Limits of Patriotism* (1996).

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anti-democratic.<sup>22</sup> George Will, for example, has suggested that the will of the various *Voelker* within Europe are being subverted by two small interrelated cosmopolitan elites—merchants and intellectuals.<sup>23</sup> In Europe, the postulate is sometimes articulated through the proxy principle of the ‘democratic deficit’.<sup>24</sup> Other anti-democratic villains are also identified.<sup>25</sup> This second postulate also produces pessimism. In this case, however, the pessimism arises from a conviction that a politically conventional union *will* result despite the absence of a popular will to union. Political community will result from the machinations of some small group of people working in the background of the great affairs of state and with power to surreptitiously affect great changes in the world.

The supporters of monetary union, as well as those supporting eventual closer political union, offer little by way of direct response to these postulates. Much in the rhetoric of these proponents reflects the now increasingly irrelevant arguments that initially supported the creation of the European Economic Community after the Second World War. The most vital of these arguments is based on the necessity of creating an institutional superstructure within Europe to minimize the possibility of war of the type that nearly destroyed Europe in 1914–18 and again in 1939–45.<sup>26</sup> Subordination of politics to economics is said to go far to make this institutional superstructure a

<sup>22</sup> This is not the place to discuss the political theory of democratic state organization, nor its applicability to Europe. The battle between elitist, pluralist and other theories of democratic organization are well known. Their applicability to Europe have been nicely summarized by Paul Craig. See P. Craig, ‘The Nature of the Community: Integration, Democracy, and Legitimacy’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (1999) 1, 32–42. This paper does not examine elites as understood in the elite–pluralist democracy debates. Rather, the focus is on elites as conspiratorial elements hidden from and manipulating the polity for its own ends.

<sup>23</sup> George Will, *supra* n. 5 at B-7.

<sup>24</sup> The democratic deficit of the European Union has been an extremely popular topic of commentary. Essentially, the proponents of the idea that a democratic deficit exists within the European Union speak in terms of one or more of the following deficiencies: the EU vests too much power in the executive to the detriment of parliament; the EU vests too much power in bureaucrats to the detriment of parliament; the EU transfers too much power to a central administrative complex in Brussels–Luxembourg to the detriment of Member State parliaments; the EU vests too much power in the EU Council whose operations are opaque and therefore anti-democratic; and the EU weakens the power of legitimate judicial bodies in the Member States to protect legitimate constitutional orders of the Member States. For some of the major recent collections of those mining the rich veins of this field of study, see, e.g., S. Anderson and K. Eliassen (eds.), *The European Union: How Democratic Is it?* (1996); J. Hayward (ed.), *The Crisis of Representation in Europe* (1995); F. Snyder (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (1996); D. Curtin, *Postnational Democracy, The European Union in Search of a Political Philosophy* (1997); R. Bellamy, V. Bufacchi and D. Castiglioni (eds.), *Democracy and Constitutional Culture in the European Union* (1995).

<sup>25</sup> See, e.g., K. van der Pijl, *Transnational Classes and International Relations* (1998) 121–122 (creation of networks of wealthy and influential to foster development of European identity); H. Costen, *L’Europe des banquiers* (1963) 24 (creation of organs for the integration of Europe by French and German banking groups).

<sup>26</sup> For a discussion of these ideas in historical context, see A. Zurcher, *The Struggle to Unite Europe, 1940–1958* (1958); D. Urwin, *The Community of Europe: A History of European Integration* (2nd ed., 1995).

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1 reality.<sup>27</sup> An *economic* empire is the 21st century's answer to the ferocious  
2 attempts of prior ages to create political empires.<sup>28</sup> Another argument made  
3 by proponents is grounded in economic efficiency. Optimum economic per-  
4 formance in Europe yielding the attainment of the greatest possible prosper-  
5 ity for the peoples of Europe is possible only within an integrated Europe.<sup>29</sup>  
6 The third great argument flows from the first. Only through a united Europe  
7 can the excesses of any one part be effectively contained by the others.<sup>30</sup>

8 The arguments of the proponents of monetary union, historically contextu-  
9 alized, were once sufficient to inspire the generation that had experienced the  
10 Second World War and the period of reconstruction thereafter. This was a gen-  
11 eration sure of its place and mission.<sup>31</sup> The generation that followed, born to a  
12 time of relative plenty and peace, could afford to be self indulgent in ways that

13  
14 <sup>27</sup> Desmond Dinan reminds us that:

15 'Celebration of Schuman Day and solemnization of the Schuman Plan bolster what can be  
16 called the "official history" of European integration, which depicts Monnet and Schuman as  
17 visionaries soaring above the squalor and squabbles of postwar Europe, pointing the way to the  
18 promised land of peace and prosperity along the prudent path of economic and political inte-  
19 gration.'

20 D. Dinan, *Ever Closer Union* (2nd ed. 1999) 9.

21 <sup>28</sup> As Michael Mussa, Economic Counselor and Director of Research of the International  
22 Monetary Fund in 2000, reminds us:

23 'Before the 20th century, these things often turned out quite differently. For those who were  
24 good at it, military aggression and imperialism often paid off economically. . . Spain grew rich  
25 on the new world plunder gathered up by a few hundred conquistadors early in the 16th cen-  
26 tury. Britain prospered during the 17th, 18th, and 19th centuries from its far flung empire. . . . By  
27 the end of the 20th century, all of this had changed. Except for a few bits and pieces, the empires  
28 that had existed a century before (and many for long before that) were gone. Efforts to create  
29 new empires during the 20th century—by the Germans, Italians, Japanese, and Soviets—all  
30 failed. As a consequence of this substantial change in the political organization of the world,  
there were important changes in its economic organization as well. Flows of trade, capital, and  
people that a century ago were channeled within empires now generally take place on a more  
diversified basis.'

31 M. Mussa, 'Factors Driving Global Economic Integration', presented in Jackson Hole, Wyoming at  
32 a symposium sponsored by the Federal Reserve Bank of Kansas City on 'Global Opportunities and  
33 Challenges', 25 August 2000 available at: <http://www.imf.org/external/np/speeches/2000/082500.htm/>. Indeed, it is possible to accept now the inversion of the classic formulation—'wars  
34 are economic conflicts waged by other means'. J-F. Lyotard, *Postmodern Fables* (1993) (G. Van Den  
35 Abbeele (trans. 1997), 79.

36 <sup>29</sup> This view is common in the popular press, see, e.g., R. Mauthner, 'The Persistent Odd Man  
37 Out—A More Integrated Europe, Not an Eroded Sovereignty, Is What Britain Should be Seeking',  
*Financial Times* (London), 4 December 1991, at 21.

38 <sup>30</sup> The twin horrors of fascism and Marxism continue to be the bogeymen plaguing European  
39 political dreams. An excess of ideology has been the bane of Europe since such things became  
40 popular from the time of the Enlightenment. A recent example of this principle in practice  
41 involved the reaction to the election of the Austrian Premier—Herder. See M. Ahtisaari, J. Frowein,  
42 M. Oreja, *Report [To the President of the European Council]* (8 September 2000), available at:  
43 <http://www.eumc.at/general/report-A/report-en.pdf/>; J. Kim and K. Donfried, *Controversial  
44 Government and European Diplomatic Sanctions* (CRS Rep. for Congress RL30455, 2000) 6–8; Cf.  
45 Heather Berit Freeman, Note 'Austria: the 1999 Parliamentary Elections and the European Union  
Members' Sanctions' (2002) 25 B.C. Int'l & Comp. L. Rev. 109.

<sup>31</sup> With respect to the germinal vision of European integration, see, e.g., Douglas Brinkley &  
Clifford Hackett (eds.), *Jean Monnet: The Path to European Unity* (1991) 205–208.

might horrify their elders.<sup>32</sup> What was compelling to the generation that had lived through the Second World War has become remote.<sup>33</sup> Yesterday's compulsions today serve as a historical prelude to the normative foundation-shifting realities of the 'post-modern' in Europe.<sup>34</sup> Equally important, the arguments of the proponents fail utterly to engage the points raised by the integrationist sceptics: culture matters, democracy matters, and the local matters. Even those with some responsibility for 'Europe' have finally become aware of their failure to meet their critics squarely.<sup>35</sup>

I think it is possible to meet these criticisms directly. I will attempt to make the case that there already exists the nucleus of a single demos within Europe. There exists a self-conscious 'something' to occupy the top of that normative space currently reserved to the nations and cultures of Europe. That something today may be characterized as a 'meta-culture/nation'. With time, the 'meta' will assume its rightful character as the overarching spirit of the varieties which together make up the single European *Volk*. I reject the notion, forcefully argued by Weiler, that in 'the case of Europe, we cannot presuppose

<sup>32</sup> For a compelling account of the self-indulgent rejection of the justifications for the post Second World War world order among the children of the elite in Europe, see P. Berman, *A Tale of Two Utopias: The Political Journey of the Generation of 1968* (1996) (The post-WWII generation 'felt for their elders all the contempt that otherwise they might have felt for themselves, as do-nothing heirs of heroes and martyrs.' *ibid.*, at 34).

<sup>33</sup> Scholars such as Joe Weiler and others have convincingly suggested that these arguments, so powerful when first made, began to appear remote and improbable during the late 1980s and early 1990s as the people of Europe contemplated the reforms of the Maastricht Treaty. See, e.g., J. H.H. Weiler, *Europa, fin de siglo* (1995).

<sup>34</sup> Post-modernity can be conceived as a retreat from the foundations of modernity in the West: historicity leading from imperfection and ignorance to perfection and salvation. Modernity posits progress from ignorance and instability to repose and the eternal in a straight (though not necessarily untroubled) line. Modernity is robust and certain of its place in the world. Post-modernity focuses on insecurity and uncertainty.

'The ideals of Western civilization issuing from the ancient, Christian and modern traditions are bankrupt. The cause of the bankruptcy is not in what is called historical, social, political or techno-scientific reality. . . . The West is that civilization that questions its essence as civilization. The singularity of Western civilization resides in this questioning, which in return endows it with a universal import—or so it claims.'

J-F Lyotard, 'Anima Minima', in *Postmodern Fables* (1993) (Georges Van Den Abbeele (trans. 1997), 235. For some, postmodernity has been perverted by the Left, demonized by the Right, and transmogrified into a Frankenstein of horrible proportion by intellectual opportunists outside the West. For an example of demonization, see W. R. Newell, 'Postmodern Jihad: What Osama bin Laden Learned From the Left', *The Weekly Standard*, 26 November 2001 at 26 (the author is a Canadian professor of political science and philosophy). On the perversions of the Left, see, e.g., M. Hardt and A. Negri, *Empire* (1999). On the transmogrifications of postmodernism in places where postmodernism is itself a form of oppressive and ill understood colonialism, see, e.g., P. Freire, *Pedagogy of the Oppressed* (Myra Bergman Ramos, 20th Anniv. Ed., 2000).

<sup>35</sup> The recent Laeken Declaration, *supra* n. 3 provides ample evidence of this point. After a recitation of the germinal reasons for economic union, based on the disastrous experiences of the first half of the 20th century, the document declares: 'At long last, Europe is on its way to becoming one big family, without bloodshed, a real transformation clearly calling for a different approach from fifty years ago, when six countries first took the lead.' *Ibid.* This new approach is to be based on a greater connection between European citizens and their supra-national government, especially with respect to a discussion of the form of governance appropriate to further political union.



1 demos. After all, an article of faith of European integration has been the aim of  
2 an ever closer union among the *peoples* of Europe. Demoi rather than  
3 demos.’<sup>36</sup> Ethno-nationality, on a meta-national level is as important today in  
4 forming a singular political collective as it was in the creation of the Kingdoms  
5 of Spain and France, as well as the United States. The construction of a politi-  
6 cal union is not an exercise in rationality.

7 Viewed in this manner, it follows that cultural differences at the Member  
8 State level are both caricatured and manipulated for the purpose of veiling the  
9 reality of the sub-tribalism inherent in the notion of the modern European  
10 state. Language matters, but is not dispositive. Multilingual states are not  
11 contradictions in terms. Democracy also matters, but is a reality even within  
12 the bureaucratic maze of the institutions of the EU.<sup>37</sup> Conspiracies of the vari-  
13 ous elites, a socio-political trope meant subtextually to deploy the paranoia  
14 inherent in the myth of the ‘International Jew’<sup>38</sup> and its variations, this time in  
15 the guise of merchants, politicians and intellectuals, is hardly proof of a demo-  
16 cratic deficit within the emerging European state. Lastly, and to a greater  
17 extent than could ever be conceived in post-Civil War America, the local will  
18 matter in Europe whatever the ultimate framework chosen for the emerging  
19 European federation.

20 I will first explore the three principal ways in which Europe has ‘seen’ itself—  
21 as continent, nation and tribe. I will look at the ways in which forces within  
22 Europe are engaged in a critical part of the reconstitution of Europe from con-  
23 tinent to *Volk*, leaving the ‘modern’ nation remade as a ‘post-modern’ subor-  
24 dinate. I will then consider the ‘conspiracies of the elites’ arguments currently  
25 deployed, in various guises, against the further unification of Europe, and cer-  
26 tainly against the transformation of Europe into a conventional state. These

27  
28 <sup>36</sup> J. Weiler, J. Haltern and F. Mayer, ‘European Democracy and its Critique’, in J. Hayward (ed.),  
29 *The Crisis of Representation in Europe* (1995) 5. With respect to the people versus peoples argu-  
30 ment, see *infra* n. 136–140.

31 <sup>37</sup> For the basic if grudging defence of the democratic basis of the institutions of the EU, see,  
32 P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (2nd ed., 1998) 155–161.

33 <sup>38</sup> H. Ford, Sr., *The International Jew: The World’s Foremost Problem* (reprinting a series of arti-  
34 cles appearing in the Dearborn, Michigan Independent from 22 May to 2 October 1920). The book  
35 is a compilation of a series of articles published by an organ of the Ford Motor Company in the  
36 early 1920s at the behest of Henry Ford Sr., which purported to detail the machinations of a small  
37 group of Jews who covertly manipulated the world by following the dictates of the Protocols of the  
38 Elders of Zion. The idea of an international secret society of Jews covertly controlling the world  
39 was not merely the tool of the Nazi Parties of Europe. The British who opened Palestine to Jewish  
40 immigration may have done so, to some extent, on the assumption that such a gesture was neces-  
41 sary to appease the Jewish ‘nation’ during the First World War. See T. Segev in H. Waltzman (trans.),  
42 *One Palestine, Complete: Jews and Arabs Under the British Mandate* (2000) (Britain permitted  
43 Jewish access to Israel out of a desire ‘to perform an act of biblical compassion for the Jews, [out  
44 of] their vague but deep seated belief in the great power of world Jewry, and apparently also [out  
45 of] their hope that they might be rid of them.’ *ibid.*, at 36).

46 <sup>39</sup> Pavlos Eleftheriadis, ‘The European Constitution and Cosmopolitan Ideals’ (2001) 7 *Colum.*  
47 *J. Eur. L.* 21, 31–32. I also agree with the position he seeks to defend, on the basis of his notion of  
48 cosmopolitanism, with respect to the characterization of the resulting political community of the  
49 EU, which is founded on the work of Joseph Weiler, Deidre Curtin and Neil MacCormick, each of  
50 whom has rejected the notion that the EU must conform to the traditional federal state or post-  
51 Westphalian state model.

power

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discredited

, a Czarist  
era  
fabrication.

Haim  
Waltzman,  
(trans.)

See

'conspiracies of the elite' arguments resonate deeply within the cultural substratum of Europe, evoking a pattern of cultural understanding, enlisting the forms of ancient arguments, once used effectively to destroy the Jews and to marginalize freemasons and others. Now resurrected, these arguments are used to demonize the process of constituting Europe as a meta-demos, of acknowledging the living vitality of a European *Volk*. Europe exists, it has willed itself into existence, it need now only speak its name. Like Pavlos Eleftheriadis, I believe 'we should take more seriously the insight that we should stop comparing the EU with a state. . . . We need to look at the problem from a broader perspective.'<sup>39</sup> However, I share an affinity with the affirmation of a cultural community as a political society that he rejects.<sup>40</sup>

### I. The European Demos

There is a great institutional tension within Europe on the question of demos.<sup>41</sup> At the federal level, at the level of the institutions of the European Union, Europe appears to be moving toward a single demos in fact. At the Member State level, a different reality appears to prevail. At this level, the constituent parts of Europe seem to jealously protect the separate race<sup>42</sup> of the people of each of the Member States of the EU. Confounding the issue of demos is the existence of a third set of actors: sub-national communities within Europe fiercely contesting the existence of national demos.

The federal framework fosters a recognition of the existence and development of a common European culture. Though the Treaties give the institutions of the EU relatively little direct authority in these fields, the EU has been

<sup>40</sup> I embrace insights from Johann Herder, which forms an underlying part of my analysis. See H. Adler and E. A. Menze (eds.), *On World History: An Anthology* (1997). For a brilliant account of Herder in this respect, see I. Berlin, *Vico and Herder: Two Studies in the History of Ideas* (1976) 145–216. For an excellent discussion of Herder in the context of the distortion of his vision by racists, see V. G. Curran, 'Herder and the Holocaust: A Debate about Difference and Determinism in the Context of Comparative Law', in F. C. DeCoste and B. Schwartz (eds.), *The Holocaust's Ghost: Writings on Art, Politics, Law, Education* (2000).

<sup>41</sup> 'Federalism must balance its three fundamental political elements—the centripetal force of federal "nation", the centrifugal forces of constituent "nations", and the imploding forces of sub-national Volk nations. Over the course of a history a fraction as long as that of the United States, the latest European federation has demonstrated a remarkable ability to shift the power relationships within it.' L. C. Backer, 'Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union' (1998) 12 *Emory Int'l L. Rev.* 1331, 1364.

<sup>42</sup> I use the term here the way it has been used for at least a century within Europe to mean both ethnicity and nation. See, e.g., T. Segev, *One Palestine, Complete: Jews and Arabs Under the British Mandate* (1999) (Haim Waltzman, trans., 2000) ('The British generally used the word *race* to mean "nation." *Ibid.*, at 35). The terms 'race', 'nation', 'ethnic group', and the like have been conflated and distorted in the languages of the social sciences and politics in the West. 'A "race" is supposed to be a genetic category. . . . A "nation" is supposed to be a sociopolitical category. . . . An "ethnic group" is supposed to be a cultural category.' I. Wallerstein, 'The Construction of Peoplehood: Racism, Nationalism, Ethnicity', in E. Balibar and I. Wallerstein (eds.), *Race, Nation, Class: Ambiguous Identities* (1999) 71, 77 (no common agreement on the meanings of these terms even today, *ibid.*, at 78).

Harvard Jean Monnet Working Paper, No. 4/98 (1998);

supra, n. 38

1 remarkably effective in furthering an integrationist agenda through programs  
2 of education and cultural exchange.<sup>43</sup> At a greater level of generality, the prin-  
3 ciples underlying the Four Freedoms themselves,<sup>44</sup> by creating a common  
4 economic culture, can be understood as fostering indirectly a prospective  
5 European commonality. Europe evidences its self-constitution through the  
6 institutions of the EU.

7 The framework of subsidiarity,<sup>45</sup> the particular sphere of the Member States,  
8 fosters a different set of recognitions. Here the focus is on difference: language,  
9 'national' culture, history, and historical interaction between Member  
10 States.<sup>46</sup> Each bundle of difference contributes to a magnification of difference  
11 that leads inevitably to the conclusion of a Europe constituted as multiple  
12 uncombinable demoi, rather than of a single European demos. Thus, it is com-  
13 monly assumed that what the Europeans consider their super-heterogeneity  
14 makes political union impossible—this heterogeneity acts as a bar, for exam-  
15 ple, to giving democratic effect to majority rule.<sup>47</sup> 'To the outside world,  
16 Europe may appear unified, but inside, the voices of dissent and discord are

17  
18 <sup>43</sup> Jo Shaw has well described the creation of an 'educational common market.' See J. Shaw,  
19 'From the Margins to the Centre: Education and Training Law and Policy,' in P. Craig and G. de  
20 Búrca (eds.), *The Evolution of EU Law* (1999) 555. Professor Shaw notes however, the contradiction  
21 of EU education policy, 'namely its capacity to present a large picture but simultaneously to offer  
22 only small steps in the Europeanization of policy in this field' *Ibid.*, at 589. Yet the progress toward  
23 EU preemption of the field is not necessarily related to the utility of the programs already in place  
24 to foster the mixing useful for the imprinting of a sense of commonality necessary to support  
25 political union. See also A. Moschonas, *Education and Training in the European Union* (1998)  
(institutional objectives of education policy include political legitimacy and more efficient learn-  
ing).

26 <sup>44</sup> The Four Freedoms refer, of course, to the core economic basis of the EU. The EU Treaties,  
27 the integrative enterprise, were initially based on four notions:

- 28 (1) free movement of goods, with the purpose of eliminating duties and qualitative and quan-  
29 titative restrictions on the movement of goods between the Member States (Arts. 25, 28–31,  
ex. 12, 30–37);
- 30 (2) free movement of labour, primarily directed at the rights of workers and their families to  
31 relocate at will throughout the EU (Art. 39 ex. 48);
- 32 (3) free movement of services, including the right of establishment of business enterprises  
33 (Arts. 43, 49–55, ex. 52, 59–66); and
- 34 (4) free movement of capital, including monetary union (Arts. 56–58, 119–120, ex 67–73).

35 <sup>45</sup> The principle of subsidiarity provides a limitation of the competence of the institutions of the  
36 European Union:

37 'In areas which do not fall within its exclusive competence, the Community shall take action, in  
38 accordance with the principle of subsidiarity, only if and in so far as the objectives of the pro-  
posed action cannot be sufficiently achieved by the Member States and can therefore, by reason  
of the scale or effects of the proposed action, be better achieved by the Community.'

39 EU Treaty, Art. 5. See, G. A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European  
40 Community and the United States,' (1994) 94 Colum. L. Rev. 331; A.G. Toth, 'The Principle of  
41 Subsidiarity in the Maastricht Treaty (1992) 29 Common Mkt. L. Rev. 1053.

42 <sup>46</sup> Thus, for example, Justice Grimm, of the German Federal Constitutional Court, has written that  
43 a European community does not appear to exist—there is no European public engaged in politi-  
44 cal debate because, in essence the political communities of Europe exist only within the Member  
45 States. See D. Grimm, 'Does Europe Need a Constitution?' (1995) 1 Eur. L. Rev. 282, 295.

<sup>47</sup> M. Horeth, 'No Way Out for the Beast? The Unsolved Legitimacy Problem of European  
Governance' (1999) 6 J. Eur. Pub. Pol'y 249, 255.

becoming louder.<sup>48</sup> At the political level, this has resulted in a culture of deference by Europe towards its component parts, to the Member State and their idiosyncracies.<sup>49</sup> The community of Europe has practised what this level preaches. The rush to 'recognize' the Croatian 'nation' by Germany in the early 1990s was heavily infused with this notion.<sup>50</sup>

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Yet the Member States have no monopoly on the exultation of difference for political effect. At the sub-national level, there is strong opposition to the idea that each of the Member States represents an authentic demos within Europe. Sub-national communities also use language, 'national' culture, history and historical interaction between the sub-national community and others. But, in this case, those indicia of communal difference are deployed against the Member State, in the way the Member States deploy these indicia against 'Europe.'

To speak of demos, in this context, is to indulge in farce. Arguments, perceptions, stances, are as fluid as the construction of '*Volksgeist*'.<sup>51</sup> Europe offers herself through a microscope—transforming from a singularity to a multiplicity and to an infinite array with each change in socio-cultural magnification. Outside Europe, the perspective can be quite different. These others see her as a whole who foolishly, and for the benefit of other meta-communities, continues to live the life of a political illustration of dangerous multiple personality. The construction of a political community of Europe has always centered on the creation and maintenance of a self conception of community and nation, based on communal choices respecting the appropriate level of generality at which political community can be defined. Significant difference exists between individuals, between families, between settlements, between cities, and between collections of settlements. Hair colour, facial features, body types, customs, traditions, language, religion, architecture, work habits, food preferences, clothing, etc. can exist to a greater or lesser

<sup>48</sup> S.K.M. Laitinen-Rawana, 'Creating a Unified Europe: Maastricht and Beyond' (1994) 28 Int'l Lawyer 973, 975.

<sup>49</sup> The deference, to some extent, is more formal than real. At least at the level of the EU, subsidiarity appears to be honoured more in the breach, though its praises are everywhere sung. For a discussion, see, e.g., S. Weatherill, *Law and Integration in the European Union* (1995) 170–171; *Germany v. Parliament and Council (Deposit Guarantee Schemes)*, Case C-233/94, [1997] ECR I-2405 (3 May 1997) (subsidiarity must be considered in lawmaking at the Community level, but no detailed justification required when the Community decides to act).

<sup>50</sup> 'Europe in fact remains far from solving the lack of coordination that hamstringing its policy and action in the Gulf, Bosnia, and Kosovo. Indeed, it was Germany's unilateral decision to recognize Croatia that contributed to the problems that beset Yugoslavia throughout the past decade.' B. Cash, 'European Integration: Dangers for the United States' (2000) 1 Chi. J. Int'l L. 315. See, also, T. D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (1999) 193; J. Kincaid, 'The Domestication of German Foreign Policy in the European Union' (2000) 53 SMU L. Rev. 555.

<sup>51</sup> Here in the sense of a national spirit. 'Harmonization, subsidiarity and cultural solicitude describe the variables of the matrix within which the union of Europe develops. The particular way in which a federal system is manifested, as well as the relationships between supra-national, national and local power, will be a function of the intersection of these three parameters. Within these parameters, federal systems can assume an almost unlimited number of forms, and the form of any federal system can shift depending on the relative importance of each of the parameters in every federal system.' L. C. Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union* (1998) 12 Emory Int'l L. Rev. 1331.

supra, no 41.

*Euro and the European Demos*

1 degree. At some point, some quantum of difference can serve to define com-  
2 munities as apart from each other. But the determination of that point is fluid  
3 over time.<sup>52</sup> Family, village, community, city-state, tribe, nation, civilization,  
4 each has served as the defining level of generality for political community.

5 Requirements for membership within each level of community serve both  
6 to define the boundaries of membership at every level of generality and the  
7 level of generality itself. Like the determination of the ideal level of defining a  
8 political community, the determination of qualification for membership at  
9 any of these levels of generality have been fluid as well—ethnicity, sex, social  
10 or political status (slave/free or resident/citizen), and technology has each  
11 served as a boundary marker for membership in social and political commu-  
12 nities since Europe began thinking about these things.<sup>53</sup> The creation of the  
13 community of the first Christian, then Muslim, faithful, provided another  
14 great theoretical basis for organization. The construction of a political philos-  
15 ophy of tribalism within Europe, the detritus of a need to find permanent con-  
16 sequence for the great invasions, or immigration (to use contemporary  
17 terminology to describe analogous events) of the Late Antique period provide  
18 yet another.

19 For at least a millennium, the shifting sub-communities of Europe, like  
20 those of the Muslim world, China and south Asia, have been adept at  
21 manipulating what passes for the appropriate understanding of the size and  
22 characteristics of a political community. At different points in time, for exam-  
23 ple, Catalonia, Aragon, Spain, and now the EU has been advanced as the  
24 appropriate level of communal generality for the establishment of the highest  
25 level of political community. Other states have followed similar patterns. In  
26 each, history demonstrates shifts in the level of organizational generality  
27 accepted as sufficiently 'real' to support political union as an independent  
28 political entity. The question of the European demos can be reduced most  
29 usefully to a simple study of parallels and the construction of a political  
30 effect of difference. Its change can be understood best as the successful  
31 deployment of the tools of social discipline,<sup>54</sup> to change communal  
32

33 <sup>52</sup> Cf. B. Schwartz and S. Waywood, 'A Model Declaration on the Right of Succession' (1998) 11  
34 N.Y. Int'l L. Rev. 1.

35 <sup>53</sup> Aristotle provided the great starting point for considerations of community and rules for  
36 membership within them. See, e.g. Aristotle, *supra* n. 4 (technology as a limitation on control,  
37 Book VII, ch. 4, at 209; slave/free citizen, Book I, chs. 5-7; sex, Book I, chs. XIII, IX). Prior to revolu-  
38 tion in transportation of the last five hundred or so years, it was commonly understood that geo-  
39 graphy provided a natural barrier to communal formation. The development of divisions in  
40 Scandinavian national consciousness was explained as originating, in large part, by reason of  
41 geography and climate. See Report by a Study Group of Members of the Royal Institute of  
42 International Affairs, *Nationalism* 22 (Frank Cass & Co., Ltd., 1963) (1939). The same basis of com-  
43 munal separation, geography and climate, was raised by American political theorists of the  
44 Southern States as a basis justifying secession from the Federal Republic. See J. C. Calhoun,  
45 'Speech on the Admission of California—And the General State of the Union' in R. M. Lence (ed.),  
*John C. Calhoun, Union and Liberty: The Political Philosophy of John C. Calhoun* (1992) 573,  
586-588 (4 March 1850).

<sup>54</sup> Borrowing the term by analogy to the minute regulation of the life of Christian monks,  
M. Foucault, *Discipline and Punish: The Birth of the Prison* (1975) (Alan Sheridan, trans. 1979)



perspective.<sup>55</sup> The modern nation states of Europe serve as the current equivalent of the Classical Greek City-States, the sovereign states of Renaissance Italy, and the Kingdoms of pre-Hapsburg Spain.<sup>56</sup> To Xerxes or Darius, the Greek city-states appeared as parts which, when joined, constituted the Greek nation. The modern Greek state is based, in part, on this construction.<sup>57</sup> But to the Greeks of the time, the opposite was true. Language, culture, ethnicity, political and social habits all separated Athenian from Spartan from Corinthian from Theban from the Greeks of the Ionian East and from the colonial West in Sicily and Southern Italy.<sup>58</sup> At what level of generality does one seek the Greek demos? Who should one ask? The Persians and other barbarians might answer—look to Greece, she is a group of communities which together constitute a nation, though not governed as such; the Greeks would have you look within Greece, that is look to the locality in which an unstable political citizenship is based. This political citizenship, in turn is based on the magnification of micro-differences elevated to a significance that might baffle the outsider. The kingdoms of Spain prior to the Hapsburg unification, and perhaps post-modern post-Franco Spain, present another parallel. The states of Renaissance Italy and pre-modern Germany, present others.<sup>59</sup> These paral-

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137. Foucault describes the mechanics of 'the tortured soul with its manipulated representations, the body subject to training,' (*ibid.*, at 131) of the politics of the disciplines, in the following terms:

'What was then being formed was a policy of coercions that act upon the body, a calculated manipulation of its elements, its gestures, its behaviour. . . A "political anatomy", which was also a "mechanics of power", was being born; it defined how one may have a hold over others' bodies, not only so that they may do what one wishes, but so they may operate as one wishes, with the techniques, the speed, and the efficiency that one determines. Thus discipline produces subjected and practiced bodies, "docile" bodies.'

*Ibid.*, 138. Culture, as practised within the state, is the perfect disciplinary institution. It is 'a network of mechanisms that would be everywhere and always alert, running through society without interruption in space or in time.' *Ibid.*, at 208–209.

<sup>55</sup> That the tools of social discipline can be deployed fairly quickly to effect profound changes in orientation has been demonstrated many times in Europe. For a few examples, consider the admission and then the expulsion of the Jews from membership in the communities of Europe. For a discussion of that process within the generation before the rise of National Socialism in 20th century Germany, see D. J. Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (1996) 71–78.

<sup>56</sup> Though I limit myself to a consideration of these parallels, there are others, both within and outside of Europe. They include the German principalities before 1870, the regions of the langue d'or and langue d'oc, Brittany, Burgundy and the Basque regions of a unified modern France; the Chinese states in the eras of imperial disunion; and the Japanese principalities in times of nominal imperial rule.

<sup>57</sup> See discussion at n. 169–171, *infra*.

<sup>58</sup> The Greeks, themselves, were well aware of this at the time. See Thucydides, in C. W. Crawley (trans.), *The Peloponnesian War* (1951) ('It appears therefore that the several Hellenic communities, comprising not only those who first acquired the name, city by city, as they came to understand each other, but also those who assumed it afterwards as the name of the whole people, were before the Trojan War prevented by their want of strength and the absence of mutual intercourse from displaying any collective action.' *Ibid.*, at Book I, ch. 1 at 5.)

<sup>59</sup> It is particularly interesting to see how the analogy is lost on those closest to it. Judge Udo di Fabio can argue forcefully about the relevance of the federal tradition of Germany for the EU, yet fail to see how that federal relationship, in constructing one state out of many related communities separated by religion, history, social organization and culture, could not apply with equal force

1 lels, and the dangers of making fetishes of micro-difference, are not lost on  
2 modern Europeans.

3 'At the end of the Renaissance . . . the Italian states were the leaders of the world in sci-  
4 ence, arts, weaponry, economics. Leaders of the world! But—they did not merge. And  
5 they lost their voice in the world. That is the lesson for us today. In the fields where we  
6 speak with one voice, Europe shall lead.'<sup>60</sup>

7  
8 The people of the nation states of Europe in the 21st century find themselves  
9 in the same position as the sub-national political communities of earlier ages.  
10 From the perspective of the French citizen in Paris, there is much that sepa-  
11 rates her from her counterpart in Madrid, or Berlin, or Marseilles. Indeed, as  
12 members of national sub-communities delight in reminding the rest of the  
13 world, the citizen of Barcelona is as quick to find the same sort of nation-  
14 defining differences between her and her counterpart in Madrid or Grenada,  
15 as the French citizen finds between herself and her neighbour in Berlin, or for  
16 that matter, Delhi. Europe has been so busy exploring her differences that she  
17 has lost consciousness of the reality of all that binds.<sup>61</sup> Europe has yet to rec-  
18 oncile itself to the meaning of Rome (in both its temporal and political mean-  
19 ings) and its fall at the hands of invading tribes.<sup>62</sup> The construction of a  
20 modern European state, in a sense, is meant again to piece together that first  
21 great European amalgamation.

22 Indeed, the spectacle of the fetish of the 'nation' based on a relatively short  
23 historical reality appears even more absurd from perspectives abroad. From  
24 the vantage of Moscow, Beijing, New Delhi or New York, the perspectives on  
25 difference within Europe can be quite different indeed. Consider Africa. The  
26 usual means by which Africa is used when considering the unity of Europe, at  
27 least as a socio-political proposition, is by focus on the Union of South Africa,  
28 a multi-lingual, multi-ethnic, multi-racial, multi-national state that has  
29 managed to overcome, for the moment, the obstacles of language, religion,  
30 ethnicity and the like, to cobble together not only a workable state, but the

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33 to the construction of a multi-leveled European state of some kind. The judge does get close, but  
34 hesitates to cross the line—for him, at least the differences between Bavaria and East Prussia,  
35 perhaps are less difficult to bridge than between the Saarland and Catalonia. See U. di Fabio,  
36 'A European Charter Towards a Constitution For the Union' (2001) 7 Colum. J. Eur. L. 159,  
168–169.

37 <sup>60</sup> Romano Prodi, President of the European Commission, quoted in an interview with the  
38 American publication, National Geographic, in T.R. Reid, 'The New Europe: The Euro Debuts This  
39 Month as Coin of the Realm in Europe, a Continent Striving for Political and Economic Cohesion',  
National Geographic, January 2002 Vol. 201, No. 1, at 32, 41.

40 <sup>61</sup> For example, Jean Claude Piris notes that '[g]eographically, Europe is more or less a distinct  
41 entity. . . . Historically, Europeans share their roots in the civilizations of Ancient Greece, Rome and  
42 Judeo-Christianity . . . Culturally, notwithstanding its richness and diversity, Europe is clearly quite  
43 distinct from other continents. . . .' J. C. Piris, 'Does the European Union Have a Constitution? Does  
44 It Need One?' (1999) 24 Eur. L. Rev. 557, 567.

45 <sup>62</sup> See L. C. Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The  
Example of the European Union*, Harvard Jean Monnet Working Paper, No. 4/98 (1998); 12 Emory  
Int'l L. Rev. (1998) 1331.

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Supra, n. 41.

most powerful state in its region.<sup>63</sup> South Africa does provide a useful perspective for reconsidering the actual extent and importance of 'difference' within Europe. More interesting, for my purposes here, is the recent flurry of efforts of the nation states of Africa to begin to form an 'ever closer union' patterned on the EU.<sup>64</sup> From the African perspective, unification is possible because globalization has rendered obsolete the African nation state as an effective level of political governance of communities similar to each other at some level of generality. 'This is the era of globalization. The United States has entered NAFTA with Canada and Mexico. The Europeans have achieved their unity, and every few years they have a new member of the European Union. China is a big country. . . Africa, on the other hand, is divided into small pieces, due to colonialism.'<sup>65</sup>

Asian perspectives are more telling. There has emerged within Asia an acceptance of state creation on the basis of democratic participation within a pluralistic polity. If Europe needs a model for the formation of a nation from out of a large group of related but politically separate communities, communities separated by language, religion, tradition, race, and traditions, it need look no further than the modern federal Republic of India.<sup>66</sup>

In 1947, as India gained independence, most of the world questioned whether the new Indian state could survive.<sup>67</sup> Indian nationalists—led by Mohandas Gandhi and Jawaharlal Nehru—aimed to unite British India and 562 princely states into a secular and democratic state.<sup>68</sup> The new 'Indians'

<sup>63</sup> An excellent example of this use is by Judge Mancini in his argument in favour of a federal state for the EU. See, G.F. Mancini, 'Europe: The Case for Statehood' in G.F. Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (2000) 51, 59–60.

<sup>64</sup> Recently, a Southern African Free Trade Zone has been announced, including most of the southern part of Africa. See J. Pearce, 'United States of Southern Africa?', BBC News 31 October 2000, available at: [http://news.bbc.co.uk/1/hi/english/world/africa/newsid\\_871000/871612.stm/](http://news.bbc.co.uk/1/hi/english/world/africa/newsid_871000/871612.stm/) (accessed 21 January 2002). The East African Community, consisting of Kenya, Uganda and Tanzania was revived again in 2001, with a meeting of the East African Parliament in January 2002. See, E. Omari, 'Kampala Calls for East African Political Union' *The Nation* (Nairobi, Kenya) 21 January 2002, available at: <http://allafrica.com/stories/printable/200201210452.html/> (accessed 24 January 2002). The most ambitious of the integration projects involves the transformation of the Organization of African Unity into the African Union. The new African Union is to be modeled on the EU. See N. Onishi, 'African Bloc Hoping to Do Better as the 'African Union'' *The New York Times*, 12 July 2001, at A-3, col. 1 (noting problems of underfunding, the significant involvement of the Libyans, and a strong tradition of supporting heads of state against the interests of their own people). 'If all goes to plan, the Union's executive council, parliament, court of justice, peacekeeping force and financial institutions will foster greater cooperation, end wars, promote prosperity and evolve into a single political body to rival NAFTA and the European Union.' S. McLeod, 'New Dawn for Africa?' *Time.com: World*, available at: <http://www.time.com/time/world/printout/0,8816,101184,00.html/> (accessed 24 January 2002).

<sup>65</sup> S. McLeod, *supra* n. 64 (quoting Ali Treki, the Libyan secretary for African unity). For a discussion, see, e.g., Makau Wa Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 *Mich. J. Int'l L.* 1113.

<sup>66</sup> Europeans have been looking to pluralist, multi-ethnic states, other than the United States, to overcome current objections to a European state based on the 'no demos' idea. See, e.g., G.F. Mancini, 'Europe: The Case for Statehood' in G.F. Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (2000) 51, 60 (looking to the example of India and South Africa for multi-lingual, multi-ethnic democratic states).

<sup>67</sup> A. N. Das, *India Invented: A Nation-in-The Making* (1992) 135.

<sup>68</sup> R. L. Hardgrave, Jr., 'India: The Dilemmas of Diversity' 4/4 *J. of Democracy* (1993) 54–68.



1 spoke more than a dozen major languages and belonged to a multitude of  
 2 religions.<sup>69</sup> European views regarding a nation of India were best character-  
 3 ized by John Strachey's declaration, 'there is not, and never was an India, nor  
 4 ever any country of India, possessing according to European ideas, any sort of  
 5 unity, physical, political, social or religious; no nation, no "people of India" of  
 6 which we hear so much'.<sup>70</sup> Judging from the 19th century British and French  
 7 models, India possessed none of the characteristics of a nation. The new  
 8 nation lacked a common language, a shared historical experience, a common  
 9 religious tradition and racial homogeneity, all of which were thought to be  
 10 prerequisites for the formation of a nation.<sup>71</sup>

11 Early nationalists asserted that a national unity could be established  
 12 whether it be through religion or secularism. The foremost Indian national-  
 13 ists—Gandhi and Nehru—disagreed sharply over whether India's national  
 14 identity should be built around religion or the establishment of a purely secu-  
 15 lar state.<sup>72</sup> Gandhi refused to divide religion from the political realm and strove  
 16 to refute the colonial charge that religion must keep India divided.<sup>73</sup> Utilizing  
 17 religious symbols that allowed him to be viewed as a religious saint among  
 18 many of India's religions (although the symbols were predominantly Hindu),  
 19 Gandhi created an Indian identity based on *swadeshi*, a patriotism based on a  
 20 reverence for everyday India.<sup>74</sup>

21 While Gandhi's Hindu-oriented freedom campaign brought independence  
 22 to India, it was Nehru's vision of secular state that lay the foundation of the  
 23 new Indian republic.<sup>75</sup> Nehru rejected European paradigms of a national iden-  
 24 tity and instead believed that an Indian identity could only emerge within the  
 25 institutional and territorial structure of a state.<sup>76</sup> Nehru dedicated himself to  
 26 the formation of an Indian identity which protected religious and cultural dif-  
 27 ferences rather than the imposition of a unitary 'Indianness'.<sup>77</sup> Nehru man-  
 28 aged to create an Indian identity based on democracy versus ethnic, linguistic  
 29 or religious criteria.<sup>78</sup> In *The Discovery of India*, written on the eve of  
 30 Independence, Nehru characterized India as a place of cultural mixing and 'an  
 31

32 <sup>69</sup> *Ibid.*

<sup>70</sup> J. Strachey, *India* (1885) 5.

33 <sup>71</sup> A. T. Embree, *Utopias in Conflict: Religion and Nationalism in India* (1990) 61.

34 <sup>72</sup> B. Chandra, *India's Struggle for Independence 1857–1947* (1988) 522–524. Prominent Indian  
 35 nationalists—Nehru and Gandhi—established secularism as a basic component of the national-  
 36 ist ideology. Both Nehru and Gandhi believed that the objective of unification of the Indian people  
 37 could only be realized by taking into account regional, religious, caste, ethnic and linguistic dif-  
 38 ferences. While both leaders believed in the establishment of a secular state, Gandhi envisioned a  
 39 role for religion in the new India and utilized religious symbolism in his campaign for indepen-  
 40 dence. Nehru adhered to the establishment of a strict secular Indian state.

<sup>73</sup> S. Khilnani, *The Idea of India* (1997) 164.

<sup>74</sup> *Ibid.*

<sup>75</sup> J. Alam, *India: Living With Modernity* (1999) 147.

41 <sup>76</sup> 'Nehru believed that an Indian identity could emerge only within the territorial and institu-  
 42 tional frame of a state. A specifically Indian compromise was needed, and he saw strengths in this.  
 43 That compromise was outlined in the practical adaption, after 1947, of the state into a distinctive  
 44 model shaped by Nehru's understanding of the Indian past: a model committed to protecting cul-  
 45 tural and religious difference rather than imposing a uniform "Indianness".' S. Khilnani, *supra* n. 73,  
 167.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, at 173.

ancient palimpsest on which layer upon layer of thought and reverie had been inscribed, and yet no succeeding layer had completely hidden or erased what had been written previously'.<sup>79</sup> From 1947 to 1964, Nehru carefully navigated India through the effects of Partition, debates over a national language and an increased push for states rights.<sup>80</sup> Nehru ended his tenure as Prime Minister in 1964 but the Congress Party continued as the primary political party until 1996. Since the ascent of the Bharatiya Janata Party (BJP), the foremost Hindu Nationalist party in India, many have argued that Nehru's model of secularism assisted the rise in Hindu nationalist sentiment.<sup>81</sup>

Since the late 1980s and early 1990s India's political landscape has witnessed a resurgence of Hindu nationalism.<sup>82</sup> Much of the rise in Hindu nationalism can be attributed to the controversy surrounding the Babri Masjid (mosque) in Ayodhya.<sup>83</sup> Since independence, Hindu nationalist parties have lobbied for the destruction of the Babri Masjid and the construction of the Sri Ram Mandir temple. In 1992, Hindu nationalists destroyed the Babri Masjid. The ensuing riots killed thousands of Indian Muslims and prompted a surge of Hindu nationalism.<sup>84</sup> The Babri Masjid–Sri Ram Mandir confrontations continue through 2002—yet they do not serve as any indication that India will tear itself apart. Throughout the early 1990s the BJP had made small gains in national and state-wide elections and in mid-1996, the BJP won the national election.<sup>85</sup> However, since the early 1990s the strong tide of Hindu nationalism has weakened. After the 1993 election, the BJP relied less on ethnic-religious mobilization and focused more on social and economic issues.<sup>86</sup> During the late 1990s, in an attempt to widen their electoral base, the BJP modified many of their positions especially regarding language. In the early 1990s, the BJP campaigned under the slogan of 'One Nation, One People, One Culture'<sup>87</sup> and pledged to remake India into a Hindu state by promoting the Hindi language, re-writing Indian history to exclude Mughal history<sup>88</sup> and a general promotion of Hindu culture. More recently, however, the BJP has dropped most of its predominantly Hindu nationalist policies in place of social, economic and defence policies that encompass a wider spectrum of the Indian populace. India, it seems, will not be unmade, despite her history and traditional divisions. Yet India also serves as testament to the power to remake or create a

<sup>79</sup> J. Nehru, *The Discovery of India* (1946) 38–39.

<sup>80</sup> Khilnani, *supra* n. 73, 178–179.

<sup>81</sup> *Ibid.*, 183.

<sup>82</sup> C. Jaffreot, *The Hindu Nationalist Movement in India* (1996) 1.

<sup>83</sup> During the Mughal era, Emperor Babur constructed the Babri Masjid (mosque) at the supposed site of Lord Ram's birth. Ram is one of the central Hindu deities in Vedic Hinduism. Hindu mythology tells that Ram was born in the town of Ayodhya in modern-day Uttar Pradesh. See, Khilnani, *supra* n. 73, 52–54.

<sup>84</sup> P. van der Veer, 'Writing Violence' in D. Ludden (ed.), *Contesting the Nation: Religion, Community and the Politics of Democracy in India* (1996) 253–254.

<sup>85</sup> D. Ludden, 'Introduction. Ayodhya: A Window on the World', in D. Ludden (ed.), *Contesting the Nation: Religion, Community and Politics of Democracy in India* (1996) 16–17.

<sup>86</sup> C. Jaffreot, *The Hindu Nationalist Movement in India* (1996) 533.

<sup>87</sup> BJP Election Manifesto, available at: <http://www.bjp.org/manifes/chap2.html/>.

<sup>88</sup> Education initiatives stated that, 'Curricula be Indianised and spiritualised and emphasise the teaching of Indian philosophy, including the Vedas and Upanishads in higher education. Sanskrit be made compulsory'. H. Baweja, 'Failing the Test' *India Today*, 2 November 1998 at 17.

*Euro and the European Demos*

31

1 national consciousness even where cultural, linguistic and religious difference  
2 are as great as those traits that these communities share in common.

3 The example of India has not been lost on European integrationists. ‘The  
4 conclusion of a study of various transnational links between the (then) six  
5 member countries in the late 1960s was that “if . . . India is seen as a nation,  
6 then Europe may well be described as an emergent nation”.’<sup>89</sup> European states,  
7 like India, have been adept at manipulating the multiple possibilities for com-  
8 munal definition—emphasizing either region, ‘nation’, or empire as the appro-  
9 priate repository of sovereignty as advantage required. In politics that  
10 advantage falls to the nation state and undercuts most effectively against  
11 national minorities (sub-national communities with national aspirations in  
12 some cases). In economics and commerce, that advantage falls to the supra-  
13 national state. The great irony here is the difficulty that Europe appears to have  
14 in seeing the multiple possibilities of itself. It stares at a mirror and can see  
15 only the great differences between nose, eyes, ears and throat. The rest of the  
16 world, observing this act of Narcissus, can only wonder at Europe’s inability to  
17 see its face. Students of power and the deployment of culture can only marvel  
18 at the way in which small sub-communal elites have so successfully narrowed  
19 the perspective of so many communities in such similar ways.

20 Reality and rhetoric can be deployed in defence of virtually any construction  
21 of demos. The absence of an absolute answer to the question of the place of  
22 residence of an authentic demos provides, ironically enough, an absolute  
23 answer to those who would absolutely deny the singularity of Europe—an  
24 answer that will not sit well with this camp. A demos encompasses any com-  
25 munity that wills itself into existence. Aristotle may well have had the right of  
26 it, in a manner that would conform to the understanding of the German  
27 Federal Constitutional Court, when he described the organic way in which the  
28 domestic gives rise ultimately to civil and political society.

29 ‘That society then which nature has established for daily support is the domestic. . . but  
30 the society of many families, which was first instituted for their lasting, mutual advan-  
31 tage, is called a village, and a village is most naturally composed of the descendants of  
32 one family. . . And when many villages so entirely join themselves together as in every  
33 respect to form but one society, that society is a city and contains in itself . . . the end  
34 and perfection of government.’<sup>90</sup>

35 But the German Federal Constitutional Court might well point to the limits of  
36 Aristotle’s City—‘one that is too large is capable of self-defence in what is nec-  
37 essary; but then it is a nation and not a city: for it will be very difficult to accom-  
38 modate a form of government to it: for who would choose to be the general of  
39 such an unwieldy multitude. . . ’<sup>91</sup> And here again is the fatality of that  
40 argument; for it must concede that Europe might ‘naturally’ lend itself to con-  
41 ception as a nation in the sense that Aristotle understood the term—the  
42

43 <sup>89</sup> J. Pinder, ‘European Community and Nation-State: A Case for a Neofederalism?’, in B. F.  
44 Nelsen and A. C-G Stubb (eds.), *The European Union: Readings on the Theory and Practice of*  
45 *European Integration* (2nd ed., 1998) 189, 192.

<sup>90</sup> Aristotle, *supra* n. 4 Book I, ch. 2, at 3.

<sup>91</sup> *Ibid.*, Book VII, ch. 4, at 209.

ungovernable meta-city. At this point technology comes to the rescue. Technology has overcome Aristotle's objections to the ungovernability of nations—like that of the Greeks before the Common Era. As Spain demonstrated after the 16th century, and perhaps more successfully, as Germany and Italy demonstrated within Europe in the 19th century, and perhaps more successfully still, as India, the People's Republic of China and the United States have demonstrated in the 20th century, it is no longer difficult to govern nations, however conceived. Not that there are not failures. Yugoslavia is a significant failure of a small nation, the Soviet Union a failure of a larger and more heterogeneous unit. However, technological changes have made it possible to construct the impossible—states spanning vast geographies and with large related but diverse amalgamations of people exercising rights within a democratic political framework.<sup>92</sup>

Possibility, however, is not reality. Existence as city or nation is more than a matter of will. Existence becomes tangible through its attributes—government, and communal solidarity. The institutions of the EU themselves contribute to the translation of will to action. Europe today works hard to naturalize those attributes that confirm its existence. It has done this directly and indirectly.

First, at the formal federal level, the Treaties permit the institutions of the EU with some authority to foster a common European meta-culture. The most important areas of influence consist of education<sup>93</sup> and culture fostering.<sup>94</sup> The Erasmus and Socrates programs have been the great vehicle through which the institutions of Europe have sought to create a harmonization of the

<sup>92</sup> 'What does a nation mean when you can fly across it in ten minutes?', N. H. Jones, *Hitler's Heralds: The Story of the Freikorps 1918–1923* (1987) 246 (quoting Ernst Jünger, the bard of the old German Freikorps). On the relationship between technology and change socio-cultural organization generally, see, M. Foucault, *Discipline and Punish: The Birth of the Prison* (1975) (Alan Sheridan, trans., 1995) 224–228. The United States in the 19th century and the Russian/Soviet Empires of the 20th century are examples of the power of technology to bring larger territories under a single effective system of control.

<sup>93</sup> Originally, the competence of the EU with respect to education was limited to vocational training. The Treaty on European Union specifically added education to the competencies of the EU (Articles 3(p) and 149, ex 3(p) and 126). However, the institutions of the EU had made broad incursions into the field of education well before the enactment of these provisions on the basis of a broad interpretation of the language of the Treaties then in effect. For a discussion of the way in which competence for education is shared between the EU, the Member States and the Regions, see, e.g., K. Lenaerts, 'Subsidiarity and Community Competence in the Field of Education' (1995) 1 Colum. J. Eur. L. 1.

<sup>94</sup> The EU has a limited competence in matters of culture. The main thrust of Art. 151 (ex 128) is in the form of an ambiguous command to the Community: 'The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.' EU Treaty, Art. 151(1) (ex 128(1)). The Community is also required to 'take cultural aspects into account in its actions under other provisions of [the EU Treaty]. EU Treaty, Art. 151(4) (ex 128(4)). The Community is, however, limited to the enactment of 'incentive measures' and is specifically prohibited from 'any harmonization of the laws and regulations of the Member States' in its efforts 'to contribute to the achievement of the objectives referred to in this Article.' EU Treaty, Art. 151(5) (ex 128(5)). 'Flowering of culture' is defined as improving and disseminating the history of the European peoples, conserving and safeguarding cultural heritage, non-commercial cultural exchanges of artistic and literary 'cultural expression'. EU Treaty, Art. 151(2) (ex 128(2)).

1 national culture.<sup>95</sup> While the authority over education originally might have  
2 derived from the need to optimize the economics of market integration within  
3 Europe, the cultural dimension of education in common has not been lost.<sup>96</sup>  
4 Educational harmonization extends to language as well—with potentially sig-  
5 nificant results. The relatively recent LINGUA program, for example, seeks to  
6 encourage partnerships between educational institutions for the promotion of  
7 language education.<sup>97</sup> Indeed, increasingly since the 1980s, the EU Council has  
8 been speaking about ‘the concept of a knowledge union. In order to achieve a  
9 knowledge union, a major effort is needed in the area of education and train-  
10 ing.’<sup>98</sup> To that end, a number of other programs, designed to bring the peoples  
11 of the EU together for education in amalgamated groups, have been adopted.<sup>99</sup>  
12  
13

14 <sup>95</sup> For the Erasmus program of educational exchange and mobility, see, e.g., European Action  
15 Program for the Mobility of University Students (ERASMUS), Council Decision 87/327/EEC of 15  
16 June 1987 [1987] OJ L 166/20 (adopting program for the mobility of university students (Erasmus);  
17 Council Decision 89/663/EEC [1989] OJ L 395/23, amending Decision 87/327/EEC; Dec. 819/95  
18 [1995] OJ L 87/10 (Socrates). Commentators have noted that ‘[t]he Erasmus–Socrates Program is a  
19 massive program for educational exchange at university level in all disciplines of science includ-  
20 ing law. It was initiated by the European commission in 1989 and has spawned ever since dozens  
21 of university networks for educational exchange in Europe’. F. J. Vanistendael, ‘Blitz Survey of the  
22 Challenges for Legal Education in Europe (2000) 18 Dick. J. Int’l L. 457 (discussing efforts since the  
23 1999 Sorbonne–Bologna Declaration to harmonize university education within Europe through:  
24 ‘(a) comparability in academic degrees, (b) a uniform structure of the university curriculum in all  
25 disciplines and (c) a common system of transfers for course credits.’ *Ibid.*, at 460).

26 <sup>96</sup> Vivian Curran nicely lays this out:

27 ‘The area of higher education is another instance of potentially huge significance and implica-  
28 tions of the subsumption of the cultural under the economic, by recategorizing cultural phe-  
29 nomena under the rubric of an economic matter. The Presentation Paper of the European  
30 Socrates educational program declares that education is of central importance to Europe’s eco-  
31 nomic future. As a matter of economics, education becomes subject to harmonization. The  
32 description of education’s importance as dwelling in the realm of the economic is not an unten-  
33 able or unreasonable position inasmuch as the idea links education to the future economic  
34 potential of Europe’s youth. The Europeanization of education, however, also concerns the  
35 deepest issues of the Member States’ traditions and heritages, with massive cultural implica-  
36 tions.’

37 V. G. Curran, ‘Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of  
38 the European Union’ (2001) 7 Colum. J. Eur. L. 63 & n. 292 (citing Presentation of the Socrates  
39 Program, available at: [http:// europa.eu.int/eucomm/dg22socrates.html/](http://europa.eu.int/eucomm/dg22socrates.html/)).

40 <sup>97</sup> Dec. 89/489 [1989] OJ L 239. ‘The LINGUA program, which will also be reorganized under  
41 the SOCRATES education programs, focuses on activities that promote partnerships between  
42 schools in Europe. LINGUA, in particular, is working to improve foreign language competence in  
43 the EU.’ Coopers & Lybrand, Report: ‘The Impact of European Union Activities on Sport’ (1995)  
44 17 Loy. L.A. Int’l & Comp. L.J.245. For the LINGUA program, see Council Dec. 89/489 [1989] OJ L  
45 239/24. The LINGUA program was highly controversial when adopted and ‘greatly watered down  
in response to opposition from the UK’. J. Shaw, ‘From the Margins to the Centre: Education and  
Training Law and Policy’ in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (1999) 555,  
567 & n. 47.

<sup>98</sup> Council Conclusions of 22 September 1997 on the communication concerning the White  
Paper ‘Teaching and learning towards the learning society’, 397Y1004(04), OJ C 303 , 04/10/1997 p.  
0008–0008, available at: [http://europa.eu.int/eur-lex/en/lif/dat/1997/en\\_397Y1004\\_04.html/](http://europa.eu.int/eur-lex/en/lif/dat/1997/en_397Y1004_04.html/)  
(accessed 15 February 2002).

<sup>99</sup> Programs include Leonardo da Vinci, Dec. 94/819/EEC [1994] OJ L 340 and Tempus, Dec.  
90/233/EEC [1990] OJ L 131; Lingua, *supra* n. 97.

The unifying and homogenizing effects of education may be a necessary by-product of education in common.<sup>100</sup>

The EU has also made use of its limited and essentially indirect authority under Article 151 (ex 128)<sup>101</sup> to seek to move culture onto a European level of discussion. The institutions of the EU have made clear their view that its authority with respect to culture is an important ingredient in the integration of Europe.

'(1) Culture has an important intrinsic value to all people in Europe, is an essential element of European integration and contributes to the affirmation and vitality of the European model of society and to the Community's influence on the international scene. . . (2) Culture is both an economic factor and a factor in social integration and citizenship; for that reason, it has an important role to play in meeting the new challenges facing the Community, such as globalisation, the information society, social cohesion and the creation of employment.'<sup>102</sup>

Culture serves as an important source of integration by providing the means for awakening the peoples of Europe to the commonalities between them, even in the face of well learned local differences.<sup>103</sup> The EC Council has indicated that culture and education, working together for the 'construction of a genuine European area of knowledge is a priority for the European Community and that it is through education that Europeans will acquire the

<sup>100</sup> In this conventional educational project is the sort of radicalism intimated by Michel Foucault, in this case in the service of a unification project at the expense of the traditional nation state. 'There is the first function of the university: to put students out of circulation. Its second function, however, is one of integration. Once a student has spent six or seven years of his life within this artificial society, he becomes 'absorbable': society can consume him. Insidiously, he will have received the values of this society. He will have been given socially desirable models of behavior. . . .' M. Foucault, 'Rituals of Exclusion' in J. Johnston (trans.), S. Lotringer (ed.), *Michel Foucault, Foucault Live (Interviews, 1966-84)* (1989) 63, 66 (interview with John K. Simon, 1971).

<sup>101</sup> ~~The main thrust of Art. 151 (ex 128) is in the form of an ambiguous command to the Community: 'The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore'. EU Treaty, Art. 151 (1). The Community is also required to 'take cultural aspects into account in its actions under other provisions of [the EU Treaty]'. EU Treaty, Art. 151(4). The Community is, however, limited to the enactment of 'incentive measures' and is specifically prohibited from 'any harmonization of the laws and regulations of the Member States' in its efforts 'to contribute to the achievement of the objectives referred to in this Article'. EU Treaty, Art. 151(5). 'Flowering of culture' is defined as improving and disseminating the history of the European peoples, conserving and safeguarding cultural heritage, non-commercial cultural exchanges of artistic and literary 'cultural expression'. EU Treaty, Art. 151(2).~~

<sup>102</sup> Decision No 508/2000/EC of the European Parliament and of the Council of 14 February 2000 Establishing the Culture 2000 Program, 300D0508, OJ L 063 , 10/03/2000 p. 0001-0009, available at: [http://europa.eu.int/eur-lex/en/lif/dat/2000/en\\_300D0508.html/](http://europa.eu.int/eur-lex/en/lif/dat/2000/en_300D0508.html/) (accessed 14 February 2002).

<sup>103</sup> Thus, in establishing the Culture 2000 Program, there was noted that:

'If citizens give their full support to, and participate fully in, European integration, greater emphasis should be placed on their common cultural values and roots as a key element of their identity and their membership of a society founded on freedom, democracy, tolerance and solidarity; a better balance should be achieved between the economic and cultural aspects of the Community, so that these aspects can complement and sustain each other.'

*Ibid.*

See n. 94,  
supra.

1 shared cultural references that are the basis of European citizenship and of a  
2 political Europe'.<sup>104</sup> Cultural education programs have been established with  
3 this in mind.<sup>105</sup>

4 Second, the Treaties also foster commonality indirectly. The establishment  
5 of citizenship in the European Union provides a political foundation for the  
6 creation of greater political integration.<sup>106</sup> 'Although the exact nature of Union  
7 citizenship may now seem nebulous, it is nevertheless a progressive concept  
8 . . . [creating] a mechanism whereby the substantive content of the institution  
9 might be developed in step with the general fleshing out of the Union.'<sup>107</sup>  
10 Indeed, even before the formalization of EU citizenship, the institutions of the  
11 EU had been busy creating direct connections between the EU and citizens of  
12 the Member States. Most of these connections were juridical.<sup>108</sup> The Four  
13 Freedoms themselves serve to bind the multitudes of Europe as effectively as  
14 any direct command.<sup>109</sup> The Four Freedoms provide the basis for creation of  
15 those habits of everyday life which inexorably bind a community together.<sup>110</sup>  
16

17 <sup>104</sup> Resolution of the Council and of the representatives of the Governments of the Member  
18 States, meeting within the Council of 14 December 2000 concerning an action plan for mobility,  
19 300Y1223(02), O J C 371, 23/12/2000 P. 0004–0010, available at: [http://europa.eu.int/eur-lex/  
20 en/lif/dat/2000/en\\_300Y1223\\_02.html/](http://europa.eu.int/eur-lex/en/lif/dat/2000/en_300Y1223_02.html/) (accessed 12 February 2002) (encouraging the use of EU  
21 treaty powers to facilitate the mobility of children and others involved in education). John Dewey  
22 reminds us of the power of education when schools are made 'an embryonic community life,  
23 active with types of occupations that reflect the life of the larger society and permeated through-  
24 out with the spirit of art, history and science'. J. Dewey, *The School and Society and the Child and  
25 the Curriculum* (1915).

26 <sup>105</sup> See, e.g., *Ariane*, Dec. 2085/97 [1997] OJ L 291/3; and *Raphael*, Dec. 2228/97 [1997] OJ L  
27 305/3.

28 <sup>106</sup> Art. 8(1) EC provides that '[e]very person holding the nationality of a Member State shall be  
29 a citizen of the Union'.

30 <sup>107</sup> M. Everson, 'The Legacy of the Market Citizen', in J. Shaw and G. More (eds.), *New Legal  
31 Dynamics of European Union* (1995) 71, 72 ('the most pressing concern to be addressed via the  
32 medium of Union citizenship is to establish some form of allegiance between Union citizens and  
33 the institutions of the Community', *ibid.*, at 89). The integrative possibilities of citizenship in  
34 Europe might even transcend the ancient conflicts of European tribes. 'Equally, people living in  
35 Northern Ireland, for example, might seek to identify themselves through the idea of European cit-  
36 izenship as a way of transcending the conflict of national identities.' G. de Búrca, 'The Language  
37 of Rights and European Integration', in J. Shaw and G. more (eds.), *ibid.*, 26, 49.

38 <sup>108</sup> The most important of these were the creation of the doctrine of 'direct effect' of certain EU  
39 actions formally directed to the Member States. See, e.g., Paul P. Craig, 'Once Upon a Time in the  
40 West: Direct Effect and the Federalization of EEC Law (1992) 12 Oxford J. Legal Stud. 453. But the  
41 extensive jurisdiction of the European Court of Justice, especially with respect to its sole authority  
42 to interpret Community law authentically within the legal systems of the nation states, through  
43 the procedure for referral by national courts to the European Court of Justice for binding guidance  
44 with respect to the application of Community law to particular cases, has tended to reconstitute  
45 the EU judicial branch as the collective referent for all of the Member States—a significant act of  
practical integration to the extent the other institutions of the EU have acted in the political  
sphere. See B. Jobert and P. Muller, *L'Etat en action. Politiques Publiques et Corporatismes* (1987) (on  
*référentiel collectif*).

46 <sup>109</sup> For a pre-Maastricht Treaty expression of this argument, the basis of which is still quite  
47 interesting, see, e.g., D. Kommers and M. Waelbroeck, 'Legal Integration and the Free Movement  
48 of Goods: The American and European Experience' in M. Cappelletti, M. Seccombe and J. Weiler  
49 (eds.), *Integration Through Law: Europe and the American Federal Experience, Vol. 1 Methods, Tools  
50 and Institutions, Book 3 Forces and Potential for a European Identity* (1986) 165.

51 <sup>110</sup> See *supra* n. 44.

'Community law empowers each individual citizen to cross national borders. This is not just a matter of mobility and the right of establishment. It extends to challenging the supreme power of national sovereignty.'<sup>111</sup>

The unification of currency works powerfully within the Treaties' construction effort on a variety of levels. At the first level, it creates unification in fact. The unification of currency emphasizes the singular political space running throughout most of the EU. Those within the single currency area will feel part of a single economic space; those outside will feel more removed from the rest, more foreign.<sup>112</sup> The American experience with a common currency provides evidence of the powerful effect of currency unification in crafting a nation from out of a union of limited purpose—like the early American Republic. The European Commission has drawn on this analogy as persuasive.<sup>113</sup> On the other hand, currency unification does not invariably or quickly lead to unification in fact. Consider the ineffectiveness of currency unification within the African subcontinent in this respect. Thus, for example, the common currency regime in place among the former French African colonies of West Africa, based on the CFA Franc, has done little to promote unification. It is possible, however, that currency unification, in that case, was meant more to provide France with a greater continuing influence in the region, than to promote integration. Yet despite this, even within Africa, currency unification is seen as a critical strategic first step in economic and eventual political unification.<sup>114</sup>

Indeed, the United States is often seen as the paradigmatic example of the benefits of a monetary union.<sup>115</sup> In the days before and after the American Revolution, Americans used English, Spanish and French currencies.<sup>116</sup> In 1690, the Massachusetts Bay Colony issued 'bills of credits' which were issued to pay returning soldiers to be redeemed for specie, used to pay taxes or accepted as legal tender.<sup>117</sup> Other colonies followed the Massachusetts example **who thought** that by printing money they could avoid a raise in taxes.<sup>118</sup> The Currency Act of 1782 declared the first American currency and established

<sup>111</sup> B. Kohler-Koch, 'The Evolution and Transformation of European Governance' in B. Kohler-Koch and R. Eising (eds.), *The Transformation of Governance in the European Union* (1999) 14, 19.

<sup>112</sup> Recent writings from out of the UK tend to emphasize this split. See M. Holmes, 'The Single Currency: Evaluating Europe's Monetary Experiment', in V. N. Koutrajou and L. A. Emerson (eds.), *supra* n. 20, 180.

<sup>113</sup> Not everyone agrees. See Holmes, *ibid.*, 180 (arguing that the American analogy doesn't work because there is a greater labour freedom of movement, a common language and a flexible tax regime in the United States). Indeed identity theorists have emphasized how difference can create identity borders not only between states, but within states as well. National identity can be constructed to exclude some of its citizens. See C. F. Stychin, *A Nation by Rights: National Culture, Sexual Identity Politics, and the Discourse of Rights* (1998) 21–51 (sexual minorities).

<sup>114</sup> Thus, for example, currency union appears to be a significant component of regional integration within West Africa. See 'West Africa Opts for Currency Union', BBC News, 21 April 2001, available at: [http://news.bbc.co.uk/1/hi/english/world/africa/newsid\\_721000/721707.stm/](http://news.bbc.co.uk/1/hi/english/world/africa/newsid_721000/721707.stm/) (accessed 24 January 2001).

<sup>115</sup> Hugh Rockoff, 'How Long Did It Take the United States to Become an Optimal Currency Area', National Bureau of Economic Research Working Paper No. H124, available at: <http://www.nber.org/digest/jun00/h0124.html/>.

<sup>116</sup> L. V. Brock, *The Currency of the American Colonies, 1700–1764* (1975) 5.

<sup>117</sup> *Ibid.*, at 7.

<sup>118</sup> *Ibid.*, at 18.

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1 the decimal system.<sup>119</sup> Between 1789 and 1836, the national government spo-  
 2 radically issued paper bank notes to eliminate confusion between states and  
 3 simplify trade between the states through the ill fated Bank of the United  
 4 States.<sup>120</sup> With the closing of the second bank of the United States in 1836, state  
 5 banks oversaw the issuing of paper money, issuing bank notes with over 30,000  
 6 varieties of colour and design.<sup>121</sup> It was not unusual for one state to refuse to  
 7 honour the notes of another, or for one bank to refuse to honor those of  
 8 another even within the same state. As a result of the Civil War, Congress  
 9 passed the National Bank Act of 1863, which provided for uniform national  
 10 currency, resulted in the elimination of State bank paper through taxation and  
 11 created both the national banks and national bank notes.<sup>122</sup> Taking the long  
 12 view, then, it becomes clear that currency integration came to the US between  
 13 1865 and 1914, that is during that part of American history when the victors of  
 14 the Civil War consolidated their victory by transforming the union into a more  
 15 integrated nation by transferring significant power from the states to the fed-  
 16 eral government. Currency unification was an integral part of the successful  
 17 project to create a nation after 1865.

18 At the second level, the unification of currency contributes to the psychol-  
 19 ogy of unification. Emphasizing Europe, even a Europe of constituent parts  
 20 that share a long history of interaction, even a Europe that can admit to shar-  
 21 ing only tragic interaction, helps create a foundational normative core that  
 22 justifies claims of a common heritage.<sup>123</sup> Europe's history, after all can be read  
 23 authoritatively either as the misapplied attempts to rebuild the continent as  
 24 a singular unit, or as the fractious attempts of tribal groups to make space  
 25 for themselves and dominate others.<sup>124</sup> Those in Britain, for example, who  
 26 most vociferously oppose monetary unification understand the symbolic  
 27  
 28  
 29

30 <sup>119</sup> W. Wisely, *A Tool of Power: The Political History of Money* (1977) 43.

31 <sup>120</sup> R. H. Timberlake, *Monetary Policy in the United States* (1978) 7-8.

32 <sup>121</sup> Wisely, *supra*, n. 119, 43-44.

33 <sup>122</sup> Timberlake, *supra* n. 120, 93. This eventually led to the stabilization of the currency. After  
 34 financial panics in 1893 and 1907, the Federal Reserve Act of 1913 created the Federal Reserve  
 35 System as the nation's central bank to regulate the flow of money and create economic stability  
 36 and growth. Timberlake, 215-24. By the 1930s, all regions of the country were part of a single opti-  
 37 mal currency area. Rockoff, *supra* n. 115. For a general discussion see J. W. Hurst, *A Legal History*  
 38 *of Money in the United States* (1973).

39 <sup>123</sup> See D. Obradovic, 'Policy Legitimacy and the European Union' (1996) 34 J. Common Market  
 40 Stud. 191 (describing the need of a justificatory underlying a legitimate demos, understood 'in its  
 41 broad sense as the symbolic values within which people share an idea of origin, continuity, his-  
 42 torical memories, collective remembrance, common heritage and tradition, as a common des-  
 43 tiny'. *Ibid.*, at 195-196).

44 <sup>124</sup> See, e.g., L. C. Backer, Forging Federal Systems Within a Matrix of Contained Conflict: The  
 45 Example of the European Union (1998) 12 *Emory Int'l L. Rev.* 1331 ('First, Europe has subjected  
 itself to a fifteen hundred year search to recreate the *Imperium Romanum*. The essence of these  
 repeated efforts has been to draw Europeans together under one or another uniform "law" of vary-  
 ing intrusiveness. . . Europeans also have sought to preserve the independence of their particular,  
 and by their accounts diverse, ways of life. They have resisted all but the most general and theo-  
 retical understanding of themselves as Europeans.' *Ibid.*, at 1332).

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supra,  
n. 41

importance of monetary union for acceptance of a notion of minimal cultural community necessary for ultimate political union of some kind.<sup>125</sup>

At the third level, the unification of currency provides evidence of new communal barriers as against those not part of the emerging community. Money is a tangible thing. In commercial intercourse it can act as both a channel and a barrier. Money in the form of the euro serves as a channel of commerce increasing the efficiency of commercial intercourse throughout the area in which it circulates. Conversely, the channel becomes a barrier separating those using a particular currency as commercial roadways, and those outside that system of integrated commercial highway system. Money's everyday use serves as a daily reminder of connection deep enough to cause severe pain on separation. In this sense, currency integration not only furthers economic and political integration, but it makes disintegration that much more disastrous.

Yet, it is possible to argue that the Treaties cut both ways with respect to the construction of a common culture versus the preservation of the cultures of the Member States. The culture preservation provisions are a study in the possibilities of multi-directionality with respect to the definition of a European demos, and the preservation of 'culture' or culture as a political device.

'Protection of group culture stands potentially, like the principle of subsidiarity, against the expansiveness of harmonization not only at the level of the Community itself, but also at the level of the Member State. Here is vested the possibilities of self-determination at a social, cultural or economic level, whether or not the outcome is formal political independence or autonomy. . . In the EU, the Member States have sought to bottle the genie of self-determination within strict confines. But I suspect that the 'culture clause' will quickly escape its borders and become as potent a force as subsidiarity and harmonization.'<sup>126</sup>

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On the other hand, there may be no more to this than the articulation of a fairly well accepted desire to preserve on an equal basis all the distinctions of those subordinate communities which together construct the whole.<sup>127</sup> Protecting

<sup>125</sup> Jeremy Rand notes that:

'Another concept of sovereignty could be less political but more about symbols of being British, such as having the Queen's head on British banknotes and coinage. From this perspective, developments in European integration such as the EMU, which include proposals to change the currency, are perceived as a challenge to sovereignty and also to identity.'

J. Rand, *British Identity and European Integration*, *supra* n. 20, at 31.

<sup>126</sup> L. C. Backer, 'Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems' (1997) 4 *Tulsa J. Comp. & Int'l L.* 185, 193.

<sup>127</sup> Protection of national and subnational cultural norms has also become something of a cottage industry in European international law. Consider the flowing of international law which touches on these concerns: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221; Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (1966); Convention on the Elimination of All Forms of Discrimination Against Women, 19 I.L.M. 33 (1979); Framework Convention on the Protection of National Minorities, in *Framework Convention for the Protection of National Minorities and Explanatory Report* (Council of Europe publication 1995); European Cultural Convention, 218 U.N.T.S. 139 (1955); and European Charter for Regional and Minority Languages (Strasbourg, 5 November 1992, Eur. Treaty Ser. No. 148).

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1 the regional traditions of the Yucatan in Mexico or of Mississippi in the United  
2 States does not inexorably lead to the conclusion that either the Yucatan or  
3 Mississippi constitute a demos worthy of separate political existence.<sup>128</sup>

4 Moreover, it is possible to suggest that the EU itself formalizes an official  
5 hesitation to acknowledge any move toward political unification. The preamble  
6 of the Treaty of European Union suggests an ambiguity when it declares an  
7 intention to seek ‘an ever closer union among the peoples of Europe’.<sup>129</sup> The  
8 suggestion, of course, is that the reference to people in the plural implies a hes-  
9 itation to recognize the sort of singular demos necessary for the formation of  
10 a single political unit.<sup>130</sup> The irony of this argument, of course, is not lost on  
11 Americans, whose own Constitution was tortured in a similar way prior to the  
12 American Civil War, but to opposite effect.<sup>131</sup> In a related vein, the Treaty of  
13 European Union also announced the general principle of ‘respect [for] the  
14

15 <sup>128</sup> Perversely, it also does not mean the opposite either. For the Yucatan, see the recounting of  
16 the Chiapas rebellion, as much a question of demos as of economics. Robert Wolf, ‘The Regionalist  
17 Answer’ (2000) 9 Minn. J. Global Trade 610 (‘Anticipation of NAFTA’s negative effects sparked the  
18 Zapatista uprising in Chiapas on NAFTA’s a January 1994 implementation date. The poverty-  
19 stricken Mayan Indian peasants in the region said NAFTA was their “death warrant.”’ *Ibid.*, at 615).  
20 It was not long ago that thoughtful people made strong arguments supporting the notion that two  
21 incompatible communities existed in the United States, requiring separation. See J. C. Calhoun,  
22 ‘Speech on the Admission of California—And the General State of the Union’ in R. M. Lance (ed.),  
23 *supra* n. 53, 586–588 (describing the way the spiritual, political and social cords that bound the  
24 union had been snapped between the slaveholding and free states to produce two distinct polities  
25 in place of one). Moreover, self-determination has been hailed as the ‘new constitutive dynamic of  
26 the world community. . . Of the many consequences of this historical, contemporary, and collec-  
27 tive process is a new global skepticism about the adequacy of the national state, especially in mat-  
28 ters of justice, rights, economic equity, and representative government, plus its ability to control  
29 its own markets and control sources of environmental degradation within its borders.’ H. J.  
30 Richardson, III, ‘“Failed States,” Self-Determination, and Preventive Diplomacy: Colonialist  
31 Nostalgia and Democratic Expectation’ (1996) 10 Temp. Int’l & Comp. L.J. 1. This notion is taken  
32 up in M. H. Halperin et al., *Self-Determination in the New World Order* (1992) 46–52.

33 <sup>129</sup> The TEU Preamble provides a related double set of goals, separated by several others. On the  
34 one hand, the Preamble expresses the desire ‘to deepen the solidarity between their peoples while  
35 respecting their history, their culture and their traditions’, and on the other, it resolves to ‘continue  
36 the process of creating an ever closer union among the peoples of Europe, in which decisions are  
37 taken as closely as possible to the citizen in accordance with the principle of subsidiarity’. TEU,  
38 Preamble, available at: <http://europa.eu.int/eur-lex/en/treaties/livre101.html/> (accessed, 25  
39 February 2002).

40 <sup>130</sup> Jean-Claude Piris sums up this argument nicely in articulating the argument against the  
41 proposition that the EU is a state.

42 ‘The *first* element in this definition of a State refers to “a people” in the singular, and so does the  
43 preamble of the U.S. Constitution, which begins with the words “We the People of the United  
44 States”. As far as the E.U. is concerned, it is undeniably made up of several Nations, and the  
45 Community Treaty refers in its very first preambular clause to “an ever closer union among the  
46 peoples of Europe”, in the plural.’

47 J. C. Piris, ‘Does the European Union Have a Constitution? Does It Need One?’ (1999) 24 Eur. L. Rev.  
48 557, 566–67.

49 <sup>131</sup> One of the great anti-federalist commentators of the early American Republic made an anal-  
50 ogous argument from the opposite pole—John C. Calhoun argued vigorously that the ‘We, the  
51 people of the United States’, in the American constitution referred to the various people consti-  
52 tuted within each of the state signatories to the American constitution. See John C. Calhoun, ‘A  
53 Discourse on the Constitution and Government of the United States’, in Ross M. Lence (ed.), *supra*  
54 n. 53, 194–96. See S. de Grazia, *A Country With no Name: Tales From the Constitution* (1997) 245.

national identities of its Member States'.<sup>132</sup> Indeed comparisons with the United States are usually misapplied—perhaps for political effect. The greatest sin in that regard is the tendency to compare the Community with the United States *today* rather than with the United States *at an equivalent time in its formation*.<sup>133</sup>

The ambiguity of the Treaty on this point is deliberate, and 'reflects the ambivalence that member states have always felt about the Union, as well as their political, cultural, ethnic, and historical diversity'.<sup>134</sup> From one perspective, the provision on 'ever closer union' can signify an intention to respect the national independence of the Member States. From another perspective, it may signify no more than that the institutions of the general government would not act arbitrarily to threaten the common identity of the people within a Member State. Such a reading would not affect the authority to build a national identity at a higher, currently supra-national level of community.

Another prominent example of Member State ambivalence to union is the regional system developing within the EU. The Committee of the Regions was established by the Treaty on European Union as a means of providing regional groups of Member States with additional voice within the EU governance system.<sup>135</sup> Though the members of the Committee of the Regions owe a primary duty to the Community over the interests of the Member State each represents, the object of this advisory body was to attempt a decentralization of EU governance in a way that might provide greater voices at a level of commonality greater than that of the nation state but less general than at the level of Europe

<sup>132</sup> Treaty on European Union, Art. 6, sec. 3 (ex Art. F, sec. 3), 1997 OJ C 340/2 at 153 (consolidated treaty version).

<sup>133</sup> Comparing the United States and EU today is comparing apples and oranges—comparing a mature federation whose development over two hundred years was shaped by war as well as constitutional revolution, with a union in its earliest stages of development. Any such comparison will lead to one result—there is no comparison! For those whose object it is to present a comparison incapable of comparison to prove, for example, that an object can't be reached, then this sort of distorting comparison makes sense. For one example of this common error:

'However, despite the undoubted force of the economic interdependence of the European Community's member states, the degree of political commitment to a European society—as compared with that within the United States, for example—remains rather weak. It may be that if too great a gulf opens up between the values expressed in Community law and policy and those which underpin the different cultural, legal and political systems of the different member states a crisis point may be reached and the "commitment" to a European society undermined.'

G. de Búrca, 'The Language of Rights and European Integration', in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union* (1995) 26, 49. It is true enough that the degree of political commitment is much weaker within the EU than the US today, and that a political crisis of sufficient strength might tear the EU asunder. Yet unstated is that the very same could have been said of the United States in 1839, 50 years after the Philadelphia Constitutional Convention. Indeed, the US suffered through such a crisis, the union was torn asunder, and it was only by dint of a bloody civil war that a nation emerged from out of a union of semi-sovereign states. See L. C. Backer, 'The Extra-National State: American Confederate Federalism and the European Union' (2001) 7 Colum. J. Eur. L. 173.

<sup>134</sup> G. Burghardt, 'The Future of the European Union' 25 Fletcher Forum World Affairs (2001) 67, 69 (explaining the reasons the EU Treaties do not address the eventual shape of the Union).

<sup>135</sup> Art. 263E (ex 198a).

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1 as a whole.<sup>136</sup> The Committee of the Regions represents not so much an  
2 attempt at devolution, but a black letter suggestion that political integration  
3 does not mean the sort of internal monolithic unification that has occurred  
4 with the creation of many of the Member States of the EU itself. Monetary uni-  
5 fication plays a part in the conflict between state and region as well.

6 'If you think about how monetary union is going to deepen economic integration and  
7 rationalisation geographically across Europe, it is inevitable that national frontiers in  
8 the eyes of the legitimate interest groups of the region will diminish in importance and  
9 the relevance of the agenda for different regional authorities of cross-regional interests,  
10 particularly where those regions are close to national frontiers, is definitely going to  
11 increase. The reshaping of our economic structure is going to tend to neglect the old  
12 traditional national frontiers more and more and so the business of the regions  
13 becomes more important.'<sup>137</sup>

14 Indeed, the suggestion has been made by a close observer of Europe, that inte-  
15 gration may lead first to the creation of regional super states within Europe  
16 before the integration of these super states is achieved within a federal style  
17 European state.<sup>138</sup>

18 Thus, devolution inherent in the creation of sub-institutional organs like the  
19 Committee of the Regions carries over into the relationship between the EU  
20 and its Member States. The language with which that relationship is  
21 addressed, and the transfers of authority—sovereignty—that closer union  
22 might entail—has been that of democratic legitimacy and authenticity, tested  
23 by adherence to basic principles of democratic organization, and authority  
24 based on a concrete expression of the will of all of the peoples subject to a new  
25 political authority.<sup>139</sup> Democratic legitimacy, turned on its head, provides a  
26 culturally powerful voice for political union. Democratic legitimacy provides  
27 the answer to the question of participation and control, which is at the heart  
28 of the government building projects of the West since the Second World War. A  
29 legitimate—that is democratic—political structure can serve as the entire  
30 basis of union. The language of legitimacy substitutes, or even displaces, all  
31 issues of cultural union. In this way, with fundamental human rights concerns  
32 appeased, political union becomes a technical issue. Brussels can continue  
33 feeding the technocracy while celebrating the cultural disunity of the cousins  
34 making up the European political family. Disunity is possible, and politically  
35 harmless, because it becomes irrelevant if social organization is grounded on  
36 process—representation and expression—rather than culture, or cultural

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38 <sup>136</sup> See, N. Roht-Arriaza, 'The Committee of the Regions and the Role of Regional Governments  
39 in the European Union' (1997) 20 *Hastings Int'l & Comp. L. J.* 413.

40 <sup>137</sup> 'Questions and Answers' V. N. Koutrajou and L. A. Emerson (eds.), *supra* n. 20, 219 (com-  
41 ments of Lucie Emerson).

42 <sup>138</sup> Bronisław Geremek, *The Common Roots of Europe* (1991) (J. Aleksandrowicz et al., trans.,  
43 1996) 183. ('The federal alternative could take many forms: a Scandinavian and a Western federa-  
44 tion, a Balkan and Central European one, or a European union consisting of several federations.')

45 <sup>139</sup> See, e.g., J. H. Weiler, 'After Maastricht: Community Legitimacy in Post 1992 Europe' in W. J.  
Adams (ed.), *Singular Europe: Economy and Polity of the European Community After 1992* (1993)  
11, 37.

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organization. Disunity is possible, in part, because culture becomes subordinated, *ab initio*, to the legitimacy concerns of political organization.<sup>140</sup>

In this sense, and giving fuller vent to the irony of the preceding paragraph, the legitimacy debate seeks to substitute arguments about democratic or representative political organization, an approach of the superego, for discussion of cultural similarity, an approach of the ego. The nation state, it would seem, is a conscious construction of a moral species; it occupies the position of conscious reflection of the best normative form of political organization. It is the culminating product of Enlightenment rationality—a science built on moral truths. The nation state, as thus constructed, represents a reaction against the ‘naturalism’, the uncontrollable excess and violence, of a political ordering that is not constructed, but is, in other words, organic. The *Volk*, demos, thus represents the violence and uncompromising exclusivity of Nationalist Socialist Racial theory. All of Europe since the middle of the 20th century represents the actualization of a reaction against this.<sup>141</sup> Part of the antipathy generated by the German Federal Constitutional Court’s *Bonner* decision was based on a horror at the thought of a re-emergence, especially from out of Germany, of a racist *Volk* theory of state formation.<sup>142</sup> But the distortions of a pathological racism ought not blind us to the realities of *Volk* organization in the political sphere.<sup>143</sup> Such blindness would lead us to the nonsense that is willing to concede that India and United States are a fraud, in that they are ‘soulless’ states, states without a *Volk*, artificial constructs waiting for disunion. The ego of the

<sup>140</sup> For a discussion of the implementation of this legitimacy hierarchy in today’s Europe, see, e.g., L. C. Backer, ‘Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems’ (1997) 4 *Tulsa J. Comp. & Int’l L.* 185 (examining the implications of *P v. S & Cornwall County Council*, Case C–13/94, 2 *CMLR* 247 (1996); *ibid.*, at 194).

<sup>141</sup> This reaction is built into the very consciousness of the EU. Weiler wonderfully captures the essence of this construction in J.H.H. Weiler, *supra* n. 33. Vivian Grosswald Curren nicely describes the way in which this reaction against the manifestation of the psychotic romanticism of German *Volkish* theory affected the field of comparative law in a fundamental way. See V. G. Curran, ‘Cultural Immersion, Difference and Categories in Comparative Law’, 46 *Am. J. Comp. L.* 43 (1998). For an attempt to rehabilitate academic German Romanticism from its perversions at the hands of the servants of National Socialism, see V. G. Curran, ‘Herder and the Holocaust: A Debate About Difference and Determinism in the Context of Comparative Law’ in F.C. de Coste et al. (eds.), *The Holocaust’s Ghost* (2000).

<sup>142</sup> For a criticism of this racial theory of nations, see, e.g., J.H.H. Weiler, ‘Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision’ (1995) 1 *Euro. L. J.* 21958; Herdegen, ‘Maastricht and the German Constitutional Court: Constitutional Restraints for an “Ever Closer Union” ’ (1994) 31 *Common Mkt. L. Rev.* 23549.

<sup>143</sup> Thus what made German *Volk* understanding so psychotic, and its other European cousins so excluding, was the racialization underlying the notion of *Volk*. This racialization, ironically enough, was the product not of the Westphalian settlement of the 17th century, but of the bad science of the 19th century—the pseudo science of race and social Darwinism in particular. See D. J. Goldhagen, *supra* n. 55, 74. The German *Volkish* distortion had pre-modern precursors—in a Spain newly united and desperate to construct a single nation from out of any number of states and groups of people. See A. D. Ortiz, *Los judeoconversos en la España Moderna* (1992). Yet *Volk* understood in other than pseudo-biological terms, does provide that strong basis of social affinity which may well be a necessary predicate to stable political union. We understand this notion best in the United States by the concept of assimilation—the creation of a minimum basis of commonality sufficient to support a political union.

1 *Volk*, the emotive tie based on similarity at some level related to generally  
2 shared important characteristics, must provide the foundation for the operation  
3 of the superego, the rational tie based on the necessity of maximizing the  
4 ideals of community. To put the preceding in the more modern language of  
5 philosophy, the democratic deficit arguments represent the thoughtfulness  
6 and restraint of the Apollinian, which achieves its highest utility in harnessing  
7 the otherwise unrestrained energy of the Dionysian within community—the  
8 *Volk* consciousness itself.<sup>144</sup>

9 The peoples of Europe, together, have opened themselves to acceptance of  
10 a basic form of normative social organization that posits pluralism, defence of  
11 the cultural artifact of difference, and acceptance of institutions of governance  
12 that transcends the communal boundaries of tribe. The EU, of course, is both  
13 goal and example in this context, but it is hardly the only one. Acceptance  
14 of the European human rights framework, the North Atlantic Treaty  
15 Organization, the World Trade Organization, the international framework for  
16 political crimes, and framework for a developing and hegemonic international  
17 common law, all contribute to a normative structure, in theory and fact within  
18 Europe, in which the national community is subsumed beneath multiple layers  
19 of superior governance within a social foundation that prizes pluralism  
20 and diversity within the context of European civilization.

21 Looking at Europe at the beginning of the 21st Century, then, the similarity  
22 between the nascent Europe today and India a half century ago is striking. The  
23 possibilities of political union were just as promising. But what of language?  
24 What of national and sub-national cultural variation? What of variations in the  
25 dominant religion of the meta-community? The answer requires a European  
26 reclaiming of the insights of the way system and sub-systems can work in  
27 a complementary manner to a single political end of flexible expression  
28 controlled not from the top, but through the bottom. An inefficient political  
29 system, perhaps. Yet, it is potentially a system that avoids the false, anti-  
30 democratic, efficiencies of traditional hierarchical systems by leaving the  
31 power to control the superior government in the hands of the inferior units.<sup>145</sup>

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34 <sup>144</sup> Cf. F. Nietzsche, *The Birth of Tragedy* (1872; 1886) (W. Kaufmann, trans. & ed., 1967) (1872; 1886).

35 <sup>145</sup> For an argument in favour of a political union of Europe based on control from the bottom,  
36 that is from the Member States on a supra-national administrative apparatus, see L. C. Backer,  
37 'The Extra-National State: American Confederate Federalism and the European Union' (2001) 7  
38 *Colum. J. Eur. L.* 173. The current French government, like the German Federal Constitutional  
39 Court, appear to favour the creation of a state (by whatever name is politically palatable) which is  
40 based on the preservation of control of the top layer by the Member States. 'I am in favor of strong  
41 (EU) integration but we must also respect the governments who are the expression of the peoples  
42 and states' R. Graham, 'Paris Savages Schroder's Blueprint for EU Reform' *Financial Times*  
43 (London), 3 May 2001, at 9 (Quoting Pierre Moscovici, the French minister for Europe). The French  
44 minister, of course, confuses *Volk* and state. Udo di Fabio, Justice of the German Federal  
45 Constitutional Court (Second Senate) has the right of it when he suggests that the

'traditional state is transforming its role from an autocratic governing association with comprehensive formative claims to control into a collective actor who acts vertically in the supranational association of states for its citizens and horizontally seeks to accomplish order and the

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Such a political overlay should be inefficient—it must be messy. Yet messiness is no reason for avoiding union.<sup>146</sup>

And what of the sub-national communities that dot Europe—the Catalonias, Wales, Britannys, Corsicas—that appear so restive from time to time? The sub-national is always the Achilles heel of those who argue against a politically unified Europe. These sub-national communities weaken the authoritativeness of the wailing of those who worry about the absence of a unifying folk-myth of Europe, or a lack of some shared sense of sameness at some plausible level of generality that would sustain a political union. The weakness is inherent in the very context of a Europe of Member States, each of which now represents what the EU proposes to be, each of which by its own history gives the lie to the anti-Europe pronouncement. But that has always been the rub for the 'legitimists'. Spain, England, Germany, Italy, France, each in turn represents the result of a 'justificatory principle' of national union at the point of a bayonet, or as a consequence of a marriage, and now beyond question as a result of sanctification by blood and time. One need only ask a Scot, or a Catalan, or a Breton, the list is nearly endless. From their perspective, the arguments against Europe are equally the arguments against Spain, France, Germany, the United Kingdom, the list goes on.<sup>147</sup> Modern Europe, in contrast to its nation state predecessors and constituent parts, will represent the first time in the history of the communities in habiting the continent that a union of plural communities will occur through a conscious positive act of the people of those communities.

A union based on commonalities—currency, shared culture (writ large) and a history which has drawn a line between the tribes of what we call 'Europe' and other places, may comprise a better basis for rationalizing the existence of a nation than many other bases that have had to do—for example the hand of colonial overlords in Africa, the hand of racialized hierarchies in Latin

common good in the community, in the face of the powerful unleashed forces of the world economy.'

U. di Fabio, 'A European Charter: Towards a Constitution for the Union' (2001) 7 Colum. J. Eur. L. 159, 172. He, however, like many others, would refuse to recognize within this 'supra-national' entity exercising sovereign authority a state every bit as authoritative within its sphere of competence as the German federal state or the German *Land*.

<sup>146</sup> I recall an argument made years ago in the context of the examination of the possibility of unification through law or legal education:

'Traditionally, "unification" has been looked upon as a territorial, political matter. After all, what determines territorial boundaries is essentially a political process. Political systems, and only political systems, fit neatly inside territorial boundaries. The economy, the culture, the language, the religion—all these are likely to spill over the political boundaries, or stop short of them.'

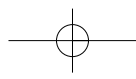
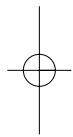
L. M. Friedman and G. Teubner, 'Legal Education and Legal Integration: European Hopes and American Experience' in M. Cappelletti, M. Seccombe, J. Weiler (eds.), *Integration Through Law: Europe and the American Federal Experience, Vol 1 Methods, Tools and Institutions, Book 3 Forces and Potential for a European Identity* 345, 363.

<sup>147</sup> Some Europeans have come tentatively to expressions of these notions. See, e.g., J. C. Piris, 'Does the European Union Have a Constitution? Does It Need One?' (1999) 24 Eur. L. Rev. 557, 567 ('it is quite normal for everyone to have multiple affinities and loyalties').

join together

The constitution of a politically joined

mark a unique event -





1 America, the conquest of non-Han peoples in China. 'When men have lived  
2 together for a long time under similar conditions (of climate, soil, danger,  
3 needs, and work), then there *comes to be* . . . a people.'<sup>148</sup> Such a union of com-  
4 monalities, a union *beyond* family, race and blood, *beyond* the state, can  
5 embrace within it the smaller sub-communities that form part of its body.  
6 Such a union can preserve the state, to the extent the state can continue to  
7 justify its existence. A supra-nation firmly bound by the commonalities of its  
8 peoples can provide a secure political framework for devolution in fact, if not  
9 in form in which the nation state and sub-national communities can exit as  
10 viable political units without justifiable fear that either poses a mortal threat to  
11 the other. This result is possible where Member State and sub-national com-  
12 munity each exist as subordinate political units of the larger community to  
13 which each belongs.

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15  
16 **II. 'Conspiracies of the Elites' and European Integration**

17  
18 The legitimacy debate, the debate about the democratic deficit, also serves as  
19 a convenient code—a hidden language used by some to convey an opposition  
20 to a political union of Europe, but based on very different grounds. Running  
21 through the debate about the suitability of Europe for nationhood is a fear of  
22 the inevitability of the progress from regional trade association to nation.<sup>149</sup>  
23 The legitimacy argument, the idea that this process toward nationhood is  
24 essentially anti-democratic,<sup>150</sup> merges the belief in the existence of incompat-  
25 ible cultural difference in Europe with the inevitability of the political union of  
26 these incompatibles. The product, the EU, it would then be suggested, can  
27 only be premised on a fundamental illegitimacy—the manipulation of the  
28 levers of power by a small cadre of people acting behind the scenes to effect a  
29 union of incompatibles without consent.

30 These arguments are culturally significant,<sup>151</sup> and disturbing. They resonate  
31 on an unconscious level with a cultural assumption about free will and the  
32 invisible hand that moves events.<sup>152</sup> Both of these are deeply ingrained in the

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34 <sup>148</sup> F. Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future* (1886) (Walter  
35 Kaufmann, trans., 1966) s. 268 at 216 (in the context of a description of the nature of the sort of  
36 commonality that creates a people, not based on blood, or race, or even a shared language, but  
37 rather is based on a sharing of the same experiences in ways not shared by others, for which lan-  
38 guage or words in language serve as an abbreviation of that experience).

39 <sup>149</sup> See, e.g., D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European*  
40 *Community* (1997).

41 <sup>150</sup> There is a mountain of writing on the 'democratic deficit' in its various aspects. See, e.g.,  
42 R. Bellamy et al. (eds.), *Democracy and Constitutional Culture in the Union of Europe* (1995);  
43 R. Bellamy and D. Castiglione (eds.), *Constitutionalism in Transformation: European and*  
44 *Theoretical Perspectives* (1996); A. Follesdal and P. Koslowski (eds.), *Democracy and the European*  
45 *Union* (1998).

<sup>151</sup> On cultural significance within communal discourse, see L. C. Backer, Altheimer  
Symposium on Racial Equity in the 21st Century: 'Culturally Significant Speech: Law, Courts,  
Society and Racial Equity' (1999) 21 U. Ark. Little Rock L.J. 845.

<sup>152</sup> D. J. Goldhagen, *supra* n. 55, 71–78.

West. The partition of Czechoslovakia in the early 1990s was sometimes explained in conspiratorial terms—the manipulation of the many by the few for personal gain.<sup>153</sup> The defeat of Germany in the War of 1914–18 by the treason of the Jews provided another outlet of conspiracy theory.<sup>154</sup> The idea of secret societies manipulating the unsuspecting does not need the Jews, as such. In the 21st century, Freemasons,<sup>155</sup> or the transnational capitalist class<sup>156</sup> will do as well. For the religious, the political agenda of sexual minorities, especially gay men and lesbians, also benefit from the language of conspiracy.<sup>157</sup>

Who is forcing the nation of Europe on the unsuspecting? In this case it is usually thought to be the cosmopolitan classes—traitors to their respective *Volkish* communities. The members of these classes—intellectuals, merchants, and the political elite—have been substituted for the traditional conspirators of European folk-culture—Jews and freemasons. The focus on an international merchant class at the forefront of a soulless drive toward internationalism is a popular topic of discourse on both sides of the Atlantic. For example, from the American side has come the idea that:

‘These days, it is business elites that are declaring themselves most ardently to be citizens of Europe, or even global citizens, and thereby apparently most willing to forego the specific identities of the nation-state; . . . this new type of global citizenship is pragmatic and has grown up without feelings of regional or global solidarity of the sort associated with a sense of community . . . which implies a commitment to the well being of the relevant community.’<sup>158</sup>

Europeans have long favoured this approach as well. A favourite conspiratorial group is the ‘political elite’ or just the ‘elite’.<sup>159</sup> The evidence from the 1990s is that the European elite is absolutely determined to procure the single currency. Being guided by political will, and fearful of what happened last time,

<sup>153</sup> Eric Stein, ‘Peaceful Separation: “A New Virus”?’ (1997) 36 Colum. J. Transnat’l L. 25; B. Schwartz and S. Waywood, ‘A Model Declaration on the Right of Succession’ (1998) 11 N.Y. Int’l L. Rev. 1, 36–37.

<sup>154</sup> ‘Hitler blamed the Jewish–Marxist clique for Germany’s defeat in World War I. He went so far as to write that the extermination of twelve thousand of these Jewish “traitors, profiteers, usurers, and swindlers” might have saved the lives of “a million real Germans”.’ M. Lippman, ‘Law, Lawyers, and Legality in the Third Reich: the Perversion of Principle and Professionalism’ (1997) 11 Temp. Int’l & Comp. L.J. 199, 204 (citing, in part, Adolf Hitler, *Mein Kampf* (Ralph Manheim trans., 1971) 679–80).

<sup>155</sup> See Kees van der Pijl, *Transnational Classes and International Relations* (1998) 98–135.

<sup>156</sup> See L. Sklair, *The Transnational Capitalist Class* (2001) (‘The concept of the transnational capitalist class implies that there is one central inner circle that makes system-wide decisions, and that it connects in a variety of ways with subsidiary members in communities, cities, countries, and supranational regions.’ *Ibid.*, 21).

<sup>157</sup> For a masterful job of demonstrating the way in which the religious right wing in the United States has appropriated the language of conspiratorial anti-Semitism against primarily gay men and lesbians, see D. Herman, *Normalcy on the Defensive: The Christian Right’s Anti-Gay Agenda* (1996).

<sup>158</sup> R. Falk, *Predatory Globalization: A Critique* (1999) 39–40.

<sup>159</sup> See, e.g., B. Connolly, *The Rotten Heart of Europe: The Dirty War for Europe’s Money* (1995) (from a politically conservative perspective). Cf. Daniela Obradovic, ‘Policy Legitimacy and the European Union’ (1996) 34 J. Common Market Stud. 191, 193 (parenthetical).

1 nothing is going to stop them.<sup>160</sup> This notion of the helpless populace in the  
2 face of the exertion of the political will of the 'elite' touches directly on the inte-  
3 gration of currency.

4 Ironically, over a century ago, Friedrich Nietzsche accused the political elites  
5 of conspiring for European disunity. 'Owing to the pathological estrangement  
6 which the insanity of nationality has induced . . . , owing also to the short-  
7 sighted and quick handed politicians who are at the top today with the help of  
8 this insanity, . . . the most unequivocal portents are now being overlooked . . . —  
9 that Europe wants to become one.'<sup>161</sup>

10 'The euro is not only a high risk strategy in economic terms but also in European terms.  
11 If the euro fails, then the European project—the experiment—will go with it. Because  
12 the stakes are so high, I would agree . . . that the euro had to be a political decision; it  
13 is based on political will, and I don't think it will fail therefore for that reason. Europe  
14 cannot afford to let it fail.'<sup>162</sup>

15  
16 These elites have a long history of affecting European politics in a way in  
17 which the popular will becomes irrelevant.<sup>163</sup> What applied to 19th century  
18 Italy has been said to apply to 20th century Slovakia as well.<sup>164</sup> Conspiracy the-  
19 ories thus provide an endless theatre of illegitimacy for the formation of those  
20 states that constitute the Member States of the EU states. The popular will had  
21 little to do with the formation of even the modern European states.

22 What emerges is a theory of illegitimacy based on lack of popular participa-  
23 tion in either the structuring of the European Union itself,<sup>165</sup> or in the approval

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25 <sup>160</sup> M. Holmes, 'The Single Currency: Evaluating Europe's Monetary Experiment' in V. N.  
26 Koutrajou and L. A. Emerson (eds.), *supra* n. 20, at 182. The author also quotes Norman Lamont  
27 suggesting the illegitimacy of the currency convergence process by looking at the way the qualify-  
28 ing criteria for single currency participation was ignored. 'How can anyone believe in the impar-  
29 tial rule of law in the EU any longer? Treaties are meaningless and ignored when they are  
30 inconvenient. Politics drives all.' Norman Lamont, Bruges Group Press Release, 25 March 1998,  
31 quoted in Holmes, *ibid.*, at 182.

32 <sup>161</sup> F. Nietzsche, *supra* n. 148, 196 at section 256.

33 <sup>162</sup> Questions and Answers, in V. N. Koutrajou and L. A. Emerson (eds.), *supra* n. 20, 219 (com-  
34 ments of Jeremy Rand) .

35 <sup>163</sup> Consider in this light Judge Mancini's description of the formation of the Italian state in the  
36 19th century.

37 'The unification of Italy between 1859 and 1861 was the result of the work of thin political and  
38 intellectual elites aided and abetted by two powerful nation-states, France and Britain. The  
39 claim, sometimes to be found in our primary-school textbooks, that the *Resurgimento* sprang  
40 from popular demand and involved popular participation is a pious untruth.'

41 G.F. Mancini, 'Europe: The Case for Statehood' in G.F. Mancini, *Democracy and Constitutionalism*  
42 *in the European Union: Collected Essays* (2000) 51, 59.

43 <sup>164</sup> There are those who have argued that the movement to partition Czechoslovakia into two  
44 Republics was also the product of thin elites in both states moving a substantially disinterested  
45 population along. See *supra* n. 152.

46 <sup>165</sup> See S. Weatherhill, 'Flexibility or Fragmentation: Trends in European Integration' in John A.  
47 Usher (ed.), *The State of the European Union: Structure, Enlargement and Economic Union* (2000)  
48 1, 19 (proposing the production of a constitutional document for the EU produced through open  
49 debate as a legitimating counter to the 'the current damaging alienation from the EU's endeavours  
50 bred in large measure by the intransparency of both the intergovernmental conferences and the  
51 finally agreed Treaties. . .').

of that structure through popular sanction. If the process toward integration is neither popularly motivated nor transparent, then it must be motivated by other forces which need the cover of an opaque process to do their work. These small cadres of the influential may have motives in addition to political union—assimilation.<sup>166</sup> It would follow that the product of this work, integration at the Community level, is not the result of the popular will and cannot on that basis be seen as a legitimate movement toward political union. In this way, the 'democratic deficit' argument is wed to 'conspiracy' theory to demonstrate the inability of the EU to meet a basic normative requirement for nation building—construction from the 'bottom' up.

Perversely, the conspiracy of the elites theory of integration might well *advance* the legitimacy of political integration of Europe. Such conspiracies of merchants, politicians, and others seeking influence within Europe may well evidence the creation of the sort of European-wide civil society that is a prerequisite to a stable European political order. Thus Jurgen Habermas has argued that there can be no integrated European state.

community  
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'Unless a European-wide integrated public sphere develops in the ambit of a common political culture: a civil society with interest associations; non-governmental organizations; citizens' movements, etc.; and naturally a party system appropriate to a European arena. In short, this entails public communication that transcends the boundaries of the until now limited national public sphere.'<sup>167</sup>

Such a common public society is beginning to emerge within Europe. The business community of course has been among the first to sense the consequences of a shift of power, and to act on this sense to protect its interests.<sup>168</sup> But the business community is by no means alone in that respect.<sup>169</sup>

Indeed, conspiracy seems to be the way in which the modern nations of Europe themselves were created. The conspiracy among the elite was not, however, to create community where none existed, but rather to create recognition of community where a common consciousness of an existing community had yet to find expression. The rise of modern Greece provides a case in point. 'The revolt against Turkish rule which broke out in 1821 had a social and

<sup>166</sup> C. Gamberale, 'National Identities and Citizenship in the European Union' (1995) 1 Eur. Pub. L. 633, 659 (expressing a fear of the transformation of 'the abstract construction of fortress Europe . . . into a concrete new ethnic Europe').

<sup>167</sup> J. Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' (1995) 1 Eur. L. Rev. 262. See also J. Habermas, 'Citizenship and National Identity' in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans., 1996) 491-515.

<sup>168</sup> 'As more regulation is enacted by EU institutions, Brussels has become a center for lobbying activity, especially by Europe-wide trade associations. While lobbying is not as intensive and widespread in Brussels as in Washington, sector-specific trade associations are increasingly engaged in direct lobbying.' G. Shaffer, 'Mechanisms for the Negotiation of International Trade Claims by Public Authorities on Behalf of Private Enterprises in the European Union: a Public-Private Partnership' (1998) 92 Am. Soc'y Int'l L. Proc. 212, 221.

<sup>169</sup> See, e.g., E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 Am. J. Int'l L. 1 (on the role of elites in the process of European integration).

*Euro and the European Demos*

49

1 economic rather than a national character.<sup>170</sup> Russian influence, a secret  
2 society, the *Philike Hetairia* provided the ground forces for rebellion. Exiled  
3 Greeks provided a revival of the Greek language and a national consciousness  
4 on a Western model of state formation. Together, these foreigners and elites  
5 cobbled together a nation from out of a community of related clans. It would,  
6 however, take generations for the idea of national community to become nat-  
7 uralized within the newly independent kingdom.<sup>171</sup> Slovakia and Lithuania  
8 owe much of their national consciousness to an elite in exile, for the most part  
9 in the United States, where the relative freedom of expression and minority  
10 status in a foreign land contributed greatly to the formation of communal self-  
11 consciousness which, when exported back to the 'homelands' contributed  
12 critically to the emerging nationalism of Lithuania and Slovakia immediately  
13 preceding the second world war.<sup>172</sup>

14 Elites appear to have a long association with the creation of modern states  
15 in Europe, even conspiratorial elites working with indifference to the senti-  
16 ments of the people on whose behalf they ostensibly toiled. Elites appear to  
17 perform culturally and politically authentic service in this effort, although  
18 when measured against the staff used to judge elites working for recognition  
19 of the European nation, they might also have been judged inauthentic, anti-  
20 democratic and illegitimate. On this basis, consistent treatment may lead to a  
21 conclusion that, in the absence of sentimentality for the passage of time, there  
22 may be a certain illegitimacy to the Member States themselves. The illegiti-  
23 macy theory underlying opposition to a greater political consolidation of the  
24 EU might also require, if applied to the Member States themselves, a reversion  
25 to a pre-Westphalian state of political organization. That it is not might suggest  
26 the expediency of the argument, and therefore its real value to the debate on  
27 political union.

28 There is another, related, level to the conspiracy theories of European recon-  
29 stitution. In this alternative scenario, Germany is viewed as the villain, whose  
30 machinations form the heart of the conspiracy to reconstitute the continent of  
31 Europe as a political union of some type.

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34 <sup>170</sup> Report by a Study Group of Members of the Royal Institute of International Affairs,  
Nationalism (Frank Cass & Co., Ltd., 1963) (1939) 91.

35 <sup>171</sup> As C.W. Crowley nicely put it:

36 'Most of the troubles of Greece were due less to the so-called selfishness of the Powers than to  
37 the fundamental difference between the new Greeks and the old, between the intelligence of the  
38 Revolution and its instruments, almost between East and West.'

39 C.W. Crowley, *The Quesiton of Greek Independence, 1821-32* (1930) 12.

40 <sup>172</sup> Report by a Study Group of Members of the Royal Institute of International Affairs,  
Nationalism (Frank Cass & Co., Ltd., 1963) (1939) 109. In Latvia and Estonia, '[i]t was German  
41 Protestant pastors who, fired by the teachings of Herder, reduced the Lettish and Estonian lan-  
42 guages to writing in the first half of the nineteenth century.' *Ibid.*, at 108. Cultural societies fol-  
43 lowed, which were instrumental in fostering linguistic, cultural and national self consciousness.  
44 *Ibid.* It is hard to understand, given this history, the fear of inauthenticity, as the 'elites' within the  
45 EU now attempt, through cultural education, the same sort of national consciousness raising,  
with a construction of a European nation as its object.

‘ “There is a long tradition in German foreign policy of giving up sovereignty in order to increase, indirectly, Germany’s influence over Europe,” Professor Seidelmann [Professor of International Relations, University of Giessen] said. Thus, he said, “Germans gave up the mark and adopted the euro as a common European currency—yet essentially created a European monetary system modeled on their own, with a central bank whose headquarters are in Frankfurt.” ’<sup>173</sup>

Here is revealed the great fear of Europe: Germany, whose ambitions were thwarted at the cost of millions of casualties, at the cost of Europe’s global domination, ultimately emerges triumphant through its control of the international system, once created in large part to tame it.<sup>174</sup> It may be a kinder, gentler Germany that has triumphed, but Germany all the same. Indeed, some have suggested that the EU has evolved into a system the policy patterns of which favour the Germans, whose system of governance is most compatible with that of the EU and least with that of the French, Italian and British.<sup>175</sup>

In one great sense, this form of anti-Europeanism is a proxy for anti-German sentiment.<sup>176</sup> This is the special form of the anti-Europeanism of the

<sup>173</sup> E. L. Andrews, ‘Germans Offer Plan to Remake Europe Union’ *New York Times*, 1 May 2001 at A-1. The sentiments expressed are by no means isolated. See, e.g., D. Marsh, *The Bundesbank: The Bank that Rules Europe* (1992).

<sup>174</sup> Consider the recent comments of Andrea Bosco which suggests that, euro or not, Germany emerges triumphant within Europe:

‘EMU is a consequence of German reunification. This was the condition that Mitterand—and not only he—put to the Germans. If the euro fails . . . Then we would move towards a German economic, monetary and political hegemony over Europe; not in a way of course which brings back the ghosts of the past, but in a different way. . . . But that is the only way in which we can prevent German hegemony from happening on the Continent.’

‘Questions and Answers’ in V. N. Koutrajou and L. A. Emerson (eds.), *supra* n. 20, 220–21 (comments of Andrea Bosco).

<sup>175</sup> In a very interesting study, Vivian Schmidt has argued that EU policy-making processes tend to favour corporatist systems, like those of Germany, over statist systems, like those of Italy, France and the U.K. She concludes that ‘statist polities have had a harder time adjusting to EU level policy formulation, a more difficult task in implementing the policy changes engendered by the EU, and a greater challenge in adapting their national governance patterns to the new realities. V. A. Schmidt, ‘National Patterns of Governance Under Siege: The Impact of European Integration’ in B. Kohler-Koch and R. Eising (eds.), *The Transformation of Governance in the European Union* (1999) 155, 156–57.

‘Superior organization is not the only reason German firms do well. Their experience of a consensual style of negotiating with a multitude of actors in horizontal networks, without any clearly-recognised authorities, makes their adaptation to the EU model much easier than for the French, who are typically used to vertically-organised networks where clearly defined governmental authorities generally make the decision. Moreover, although the British are better used to dealing in horizontal networks, they may offend more, given a policy making culture in which the signature British politeness is sometimes but a thin veneer barely hiding a combative and conflictual style. . . . With compromise and consensus the *modus vivendi* then, Germany’s policy making style resembles the EU the most.’

*Ibid.*, at 165.

<sup>176</sup> ‘While the independence of the ECB and the lack of a real “economic government” at the EU level has been identified as important concerns, these two points are often simply a shorthand for reluctance, or indeed opposition, regarding the adoption of the German Bundesbank model as the institutional model for the ECB.’ F. Snyder, ‘EMU Revisited: Are We Making a Constitution? What Constitution are We Making?’ in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (1999)

1 English.<sup>177</sup> But it is a sentiment shared by others within the EU. The French  
 2 tend to become concerned in the face of German action without prior consul-  
 3 tation (and the approval of Paris). French opposition to the recent call by the  
 4 Germans for the transformation of the EU into an entity that in some measure  
 5 resembles the German federal state, was based on both irritation ~~on~~ German  
 6 arrogance and fear of German hegemony.<sup>178</sup> Such a pattern, national imperi-  
 7 alism masquerading as universalism, elicits strong historical and cultural  
 8 reactions within Europe—creating greater incentive for fracture than for  
 9 union.<sup>179</sup>

with

10 But what have we when this underbelly of discourse is exposed? Ironically,  
 11 at its most benign level, the democratic-deficit debate evidences a full flower-  
 12 ing of the power of an *elites* to shape discourse on the supra-national plane.  
 13 Indeed, the democratic-deficit debate, when combined with the notions of  
 14 illegitimacy and inauthenticity which form the heart of the ‘elites without the  
 15 people’ characterizations of EU governance, itself serves to illuminate another  
 16 elite—those who have attempted to seize authority to determine what passes  
 17 muster as authentic and legitimate within the European political sphere, and  
 18 what does not. Who speaks for the people here? The professorate? The English  
 19 newspapers? Non-governmental organizations? All are elites within the fields  
 20 of their competence. All seek to speak for an entirety, the people, to other por-  
 21 tions of a society of cross cutting elites. The usual passivity of the people, and  
 22 their amenability to manipulation, appears assumed—the question then  
 23 turns on which of the elites can exert the more persuasive force. Here, perhaps,  
 24 is a darker and more culturally sensitive version of the well known  
 25 Schumpeterian model of democracy as a battle by elites for control of the

26  
 27  
 28 417, 465. Thus, the almost take-it-for-granted sense of German domination of the EU in some cur-  
 29 rent work. See, e.g., P. Falk, *Predatory Globalization, A Critique* (1999) (‘Within regional frame-  
 30 works, hegemonic relations of varying sorts can be established, as seems to be the case with  
 respect to Germany in Europe. . .’ *Ibid.*, at 68).

31 <sup>177</sup> ‘The most lurid prophecies of the Euro-sceptics are coming true. The EU—or at least the  
 32 nations at the old, Carolingian core—have set their course, and will not be deflected. How much  
 33 longer can Britain afford to go along with them?’ ‘The Federal Juggernaut’ *The Daily Telegraph*  
 34 (London), 17 December 2001, available at: <http://www.telegraph.co.uk/opinion/main.jhtml?xml=%2Fopinion%2F2001%2F12%2F17%2Fd11701.xml/> (accessed 15 February 2001).

35 <sup>178</sup> The response to German Chancellor Schroder’s call for the transformation of the EU into a  
 36 more conventionally federal state, was delivered by France’s minister for Europe: ‘It’s a statement  
 37 which goes far, which goes far perhaps in a rather German sense, that is very federalist. . . I don’t  
 think this is in the mainstream of European thinking.’ R. Graham, ‘Paris Savages Schroder’s  
 38 Blueprint for EU Reform’ *Financial Times* (London), 3 May 2001, at 9.

39 <sup>179</sup> ‘Here is the paradox of Europe, condensed within the borders of that doomed Austro-  
 40 Hungarian experiment in multinational federalism. The Imperial machinery in Vienna unsuc-  
 41 cessfully attempted to impose an “imperial” universalism within a heterodox community because  
 42 it lacked the power to act as the instrument of transborder harmonization. Though “imperial,” it  
 43 always appeared as “merely” Austrian and therefore incapable of successful appeal to universal-  
 44 ism. Ironically, solicitude for the “common person” was lost after 1918 in the wake of the rejection  
 45 of the universalism offered through Vienna as the heterodox population of Austria-Hungary  
 rushed to establish tribal nations, each with national minorities ripe for exploitation.’ L. C. Backer,  
‘Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European  
 Union’ (1998) 12 Emory Int’l L. Rev. 1331, 1359.

Supra,  
 n. 41,  
 at p.

a democratically formed

minds (and votes) of the general populace.<sup>180</sup> Or perhaps this is action more in the style of the late Roman Republic where within an ostensibly republican political structure, either elites constantly sought the role of *primi inter pares*,<sup>181</sup> or the mob served as the most effective source of direct popular opinion.<sup>182</sup> Others have described the interaction as a mix of elite and demagogic politics. 'But however weighty the decisions of electoral majorities, nothing is likely to get settled without the consent and the participation of corporate groups controlling key resources.'<sup>183</sup>

But there is more than irony at work here. There is a perverseness to the anti-democratic/conspiracy theory arguments against the creation of a closer union among the Member States of the EU. The perverseness rises from out of the unstated implications of these arguments so blithely and blindly targeted against Europe. It seems clear that the power directed against the EU by elites and other conspirators, and that the disregard for democratic principles from which these elites operate, work as efficiently at the level of the Member States of the EU as they do at the level of the institutions of the EU.

Surely the great theories of conspiracy, of the extensive subterranean power and influence of the political, business, or intellectual elites across Europe, must reach as powerfully within each Member State as it has reached across them to construct the EU. Judge Mancini has expressed the widely accepted account of the creation of the Italian state as the product of thin elites who brought an otherwise indifferent populace along.<sup>184</sup> The same can be said for the construction of Germany, and of the countries that emerged from out of the rubble of Austria-Hungary nearly a century ago. Perhaps an engaged elite is a necessary prerequisite to state formation. At a level of political engagement below that of state creation, it is well known that elites work aggressively to secure favourable treatment by governments.<sup>185</sup>

they

But assuming the existence, strength and goals of these elites can be troubling indeed. Surely, it is as likely that the great elites—intellectuals, business people, politicians, and the like—so adept at manipulating Europe toward political union, are as adept at manipulating the Member States to do their bidding as well. The existence of these elites, if believed, provide as great a threat to the democratic legitimacy of the Member States as it does of the EU.

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<sup>180</sup> For the classic statement, see, J. Schumpeter, *Capitalism, Socialism and Democracy* (1942).

<sup>181</sup> The politics of the First and Second Triumvirates is well known. For a generally well respected discussion, see H. H. Scullard, *From the Gracchi to Nero: A History of Rome 133 BC to AD 68* (3rd ed., 1970).

<sup>182</sup> The careers of P. Clodius Pulcher and T. Annii Milo provide an instructive example to a democracy of the mob. See Plutarch, 'The Life of Cicero' in *Plutarch, Fall of the Roman Republic* (Rex Warner, trans., 1958) 311, 340–47.

<sup>183</sup> P. Flora, S. Kuhnle and D. Urwin (eds.), *Stein Rokkan, State Formation, Nation-Building, and Mass Politics in Europe: The Theory of Stein Rokken* (1999) 261.

<sup>184</sup> See, G.F. Mancini, *supra* n. 63, at 59 and discussion above.

<sup>185</sup> There is much writing in this area. Consider a recent example from the field of project finance. See C. Pedamon, 'How is Convergence Best Achieved in International Project Finance?' (2001) 24 *Fordham Int'l L. Rev.* 1272 ('The role of these interest groups ranges from lobbying for legislation to funding its drafting and even to participating in its drafting.' *Ibid.*, at 1289).



1 Yet such a charge, so piously heeded at the EU level, is largely ignored other-  
2 wise. To do otherwise would be to concede that the great democratic deficit,  
3 the charge leveled at Europe, is equally applicable within the Member States.  
4 Such a substantial undermining of the democratic basis of Western States  
5 would be politically intolerable—even if true. It is officially anathema. For the  
6 same reasons, perhaps, it is less anathema when leveled, if inconsistently, at  
7 the EU.<sup>186</sup>

8 Whatever the merits of the passive populace model in the past, it is hard to  
9 square the arguments that the construction of Europe is somehow a sub-  
10 terfuge of powerful behind-the-scene actors on the one hand, and that this  
11 subterfuge is being perpetrated against an otherwise vigilant population that  
12 intelligently participates in the political process (but only of the nation state)  
13 on the other hand. This subterfuge depends on a belief that popular sover-  
14 eignty, as an active legitimizing and conscious force, extends no farther than  
15 the borders of the Member States, even though the supra-national character of  
16 the EU is now well known and its effects widely felt at the individual level. The  
17 logical inconsistency of this form of argument is difficult to ignore. The popu-  
18 lace cannot be simultaneously characterized essentially as presumptively  
19 engaged and passive, smart and stupid, strong and weak, depending on  
20 the level of governance involved. To do so is to create the kind of gateway to  
21 dictatorship of the proletariat ideas<sup>187</sup> that Europe has, we hope, mercifully  
22 outgrown.

23 But more difficult than the argument positing the selective indifference of  
24 the people to participate in the creation and maintenance of a state is the con-  
25 sequence of that argument: that the current relationship between the Member  
26 States and the institutions of the EU are not sufficiently democratic, and thus  
27 the process of ‘ever closer union’ within the EU, effected through that rela-  
28 tionship, is also tainted. The argument presupposes the need for direct partic-  
29 ipation by the people at every level of governance.<sup>188</sup> It suggests that  
30 representative governance is ineffective, absent a certain quantum of direct  
31 connection between the people and each level of government. The people of  
32 Europe however constituted, this underlying notion presumes, may not speak  
33 authentically within Europe if the people must speak through their Member  
34

35 <sup>186</sup> It is possible to argue, for instance, that, in the battle for the allocation of power between the  
36 Member States and the EU, the democratic standing of each of these levels of governance can play  
37 a great role in popular sentiment for the transfer of more authority up to the EU or for the reten-  
38 tion of greater authority at the level of the Member States. Democratic deficit, then, becomes a  
39 strategic tool of power allocation in the emerging federal state of Europe. For a discussion of the  
40 context in which this bargaining occurs from a cultural perspective, see L. C. Backer, *supra* n. 62.

41 <sup>187</sup> ‘And from it follows that the “special repressive force” for the suppression of the proletariat  
42 by the bourgeoisie, . . . Must be replaced by a “special repressive force” for the suppression of the  
43 bourgeoisie by the proletariat (the dictatorship of the proletariat).’ V.I. Lenin, *The State and  
44 Revolution* (1917) (2nd ed. 1970) 20.

45 <sup>188</sup> And certainly the EU itself has now committed to this model of governance. See, e.g., Laeken  
Declaration, *supra* n. 3 (‘Within the Union, the European institutions must be brought closer to its  
citizens. Citizens undoubtedly support the Union’s broad aims, but they do not always see a con-  
nection between those goals and the Union’s everyday action.’)

State representatives. Authenticity, it must follow, requires that the people speak only through representatives directly chosen for that purpose, and not through their democratically elected representatives at the Member State level. As a result, this view of democratic authenticity, like the notion of authenticity required for service in the EU Commission, might lead to the conclusion that the representatives elected would have an obligation to represent the interests of Europe as a whole, rather than the Member State in which the locality from which they were elected is located. The nation state thus becomes, to some extent, irrelevant in the politics of Europe, except at the level of theory.<sup>189</sup> From this it would seem to follow that the elected representatives of Europe, to be authentic, must represent, or spring out of, Europe as a whole, rather than the localities from which they are elected. It posits as a sort of bogeyman, the necessity for the extinguishment of the nation state in order to give rise to an authentic European federal state.

Yet this notion, even in the exaggerated form presented, is nowhere the rule. Even in that prototype of modern federations, the United States, there is an expectation that representatives of states will, in pursuing the national interest, well represent the interests of the state from which they were elected, as well as the nation, as circumstances require. Even the German *Land* have not yet dissolved into inconsequential historical appendages.<sup>190</sup> Authentic direct democratic participation, if that is the model which Europe chooses for itself, does not require, as a necessary predicate for legitimacy, the obliteration of subordinate levels of governance, or even of such sub-systems jealous of their peculiarities as against contrary expression from the centre.<sup>191</sup>

Yet consider these ideas from a different perspective. The representatives of the people of the Member States, when acting within the frontiers of their territory are presumed to act as the representatives of the sovereign popular

<sup>189</sup> For the similar American experience, as reflected in the jurisprudence of the Supreme Court, see, e.g., *Garcia v. San Antonio Metropolitan Transit Authority*, 469 US 528 (1985) (on the nature of the secondary political influence of states through the officials elected by the people in the federal government). Cf. H. Wechsler, 'The Political Safeguards of Federalism' in H. Wechsler (ed.), *Principles, Politics, and Fundamental Laws* (1961) 49–82.

<sup>190</sup> Germany has sought to provide a voice for its subordinate political units within the EU itself. For a discussion, see, e.g., M. A. Rogoff, 'The European Union, Germany and the Lander: New Patterns of Political Relations in Europe' 5 *Colum. J. Eur. L.* (1999) 415 (arrangements to allow *Lander* participation in EU governance have significant positive value and accord with the trend in Europe to push political power down to the local level and up to the supra-national level).

<sup>191</sup> In its own politically cobbled way, the Laeken Declaration tries to reach for this conception of a multi-layered state, consisting of communities more jealous of their prerogatives than those subordinate units of Germany, Italy or the United States.

'In coordinating the economic, financial and fiscal environment, the basic issue should continue to be proper operation of the internal market and the single currency, without this jeopardizing Member States' individuality. National and regional differences frequently stem from history or tradition. They can be enriching. In other words, what citizens understand by "good governance" is opening up fresh opportunities, not imposing further red tape. What they expect is more results, better responses to practical issues and not a European superstate or European institutions inveigling their way into every nook and cranny of life.'

Laeken Declaration *supra* n. 3.

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1 will.<sup>192</sup> Yet, when acting within the institutions of the EU, these same repre-  
2 sentatives of democratically elected governments become merely part of a  
3 trans-national political elite whose work is essentially anti-democratic.  
4 Elected representatives of the people, those charged with the carrying out of  
5 the popular will, thus lose their representative and sovereign character when  
6 acting outside the territory from which they were elected. They become some-  
7 thing less democratic, less representative, less the instrument of the popular  
8 will, merely through the expedient of a change of focus. This position defies  
9 logic and distorts democratic theory. First, such representatives are always at  
10 risk of losing their position should the people, dissatisfied with the direction of  
11 their policies or their performance, choose to replace them with others.  
12 Second, because Member State representatives understand the strength of  
13 this relationship, they are unlikely to act contrary to the popular will. EU  
14 institutions are grounded on this connection between the people of the  
15 several Member States, acting through their democratically elected officials,  
16 and the institutions of the EU—particularly the EU Council.<sup>193</sup> English politics  
17 provides a telling example, where popular sentiment against closer union  
18 has resulted in the derogation of the UK from several key facets of European  
19 integration, not the least of which is monetary union.<sup>194</sup>

20 Ultimately, fear forms the bedrock of the legitimists' and democratic deficit  
21 *cum* conspiracy theory critiques. It is not necessarily that elites will advance  
22 some subterfuge that makes the creation of an authentic democratically cre-  
23 ated polity possible. The fear is that some elites that do not share the views of  
24 the legitimist elites will prevail upon the populace of Europe to amalgamate  
25 and, in that amalgamation, to adopt a model of governance not to their liking.  
26 This legitimist elite understands the fragility of the democratic principle, the  
27

28 <sup>192</sup> Note that if they are not, then, we must all abandon any pretence to democratic purpose and  
29 admit that we use democracy as a subterfuge to bring the population along as oligarches and other  
30 elites vie for power among themselves. See R. Michels, *Political Parties: A Sociological Study of the*  
31 *Oligarchical Tendencies of Modern Democracy* (1949). But democracy, and democratic principles,  
32 must stand for more than the sham behind which murky elites hide the actual deployment of  
33 political power. The constitutional and democratic principles project of the last century must  
34 stand for more than an unusually effective means of pacifying an otherwise reluctant population  
35 to accept the reality of their domination. For an articulation of that hope, see, e.g., P. Bachrach, *The*  
36 *Theory of Democratic Elitism: A Critique* (1967).

35 <sup>193</sup> The Laekin Declaration reminds its readers that: 'Twenty years ago, with the first direct elec-  
36 tions to the European Parliament, the Community's democratic legitimacy, which until then had  
37 lain with the Council alone, was considerably strengthened.' Laeken Declaration, *supra* n. 3 ('The  
38 national parliaments also contribute towards the legitimacy of the European project.')

39 <sup>194</sup> The UK has not participated in the euro. It has elected to maintain its own currency. Some  
40 commentators have taken the opportunity to supply a basis for separating the UK from the rest of  
41 Europe. In this way, of course, it is possible to create the basis for separating the UK not only from  
42 social and monetary, but more importantly from political union as well. See, e.g., Martin Holmes,  
43 'The Single Currency: Evaluating Europe's Monetary Experiment' in V. N. Koutrajou and L. A.  
44 Emerson (eds.), *supra* n. 20, at 187–189 (providing ten points of fundamental difference between  
45 the UK and the rest of Europe supporting UK non-participation in the euro). More interesting on  
this score, has been the attention given to some Conservative Party members who are seeking UK  
entrance into the North American Free Trade Agreement. See Daniel S. Potts, Note: 'Dubious  
Partnership: the Legal, Political, and Economic Implications of Adding the United Kingdom to the  
North American Free Trade Agreement' (2002) 11 Minn. J. Global Trade 155.

power of imposition of democratic organization based on consent of the governed, and the ease with which that willingness to consent can be molded by competing elites—that is, those whose voices seem to carry more loudly within the amphitheatre of democratic political structure. They have absorbed the lesson of John C. Calhoun, who understood the peril to his slave holding way of life in the American South before the Civil War of 1861–65 posed by a democratic process open to action based on the ability of elites to convince the voting populace of the benefits of one course over another.<sup>195</sup> In a very real sense, the conspiracy theory debate is merely the visible portion of the great battle between power elites within Europe over their ability to influence, to induce, the sovereign people to insist on one or another course of action in connection with the construction of a political, as well as economic, Europe.

Anti-democratic arguments grounded in suppositions about the machinations of small groups of elites working behind the scenes without popular authority or approval serves more as an indictment of the way the Member States are constituted *today* rather than an indictment of the way in which the EU may *in the future* be constituted. The march-of-the-anti-democratic-elites theory conflates economic theory with political theory. The argument infuses into the economic imperatives of the single market and economic integration a sort of political determinism that posits a political choice as inevitable as market optimality, and as anti-democratic. In other words—just as market forces seek the greatest level of efficiency in which participation and diversity are sacrificed for uniformity and profit maximization, in which economies of scale tend to favour the larger and more efficient over the smaller and less efficient producers, so political systems mimicking the economic ordering will also sacrifice the smaller and less efficient political units, in favour of the larger and more efficient systems of governance.<sup>196</sup>

<sup>195</sup> Thus, John C. Calhoun explained the danger of democratic politics to the viability of a union in which a sizeable portion of the population turned against the original American constitutional compromise protecting the right of people to hold slaves, when the democratic principle resulted in the acceptance of the doctrine that the federal government was free to determine the extent of its own powers and to enforce that determination by force of arms:

‘The consequence would be inevitable—a large portion of the Northern States believed slavery to be a sin, and would believe it as an obligation of conscience to abolish it if they should feel themselves in any degree responsible for its continuance, and that this doctrine [of federal authority to determine its powers and enforce them militarily] would necessarily lead to the belief of such responsibility. I then predicted that it would commence as it has with this fanatical portion of society [part of the Northern elite], and they would begin their operations on the ignorant, the weak, the young, and the thoughtless, and would gradually extend upwards til they would be strong enough to obtain political control, when he and others holding the highest status in society, would, however reluctant, be compelled to yield to their doctrines, or to be driven into obscurity.’

J. C. Calhoun, *supra* n. 53, at 470–471.

<sup>196</sup> Pierre Bourdieu provides a hint of this attitude in a different context:

‘Du fait de l’unification du champ économique, au travers notamment de *l’unification monétaire* et de la généralisation des échanges monétaires qui arrache des plus en plus complètement les petits producteurs ruraux à l’autarcie, tous les agents sociaux sont objectivement jetés dans un jeu économique pour lequel ils ne sont pas toujours équipés, et sont soumis à la norme

1 Political economies of scale favour the largest political unit, and those ele-  
 2 ments of society that will have a hand in the running of this great enterprise  
 3 will tend to marshal their forces to ensure its eventual triumph. This seems  
 4 especially the case in federal-type governments.<sup>197</sup> But while Western society  
 5 permits a certain measure of anti-democratic activity within economic sys-  
 6 tems, it has rejected that model for the construction of political systems. Thus,  
 7 political union following economic union must be suspect as engineering  
 8 political 'inevitable' without consent. It is with substantial trepidation that  
 9 such arguments should be made; it is with even more trepidation that such  
 10 arguments ought to be given credence.

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12  
13 **III. Towards a New Europe**

14  
15 The construction of a nation out of Europe would not mark the first time a  
 16 state was created out of a number of related parts. The creation of a nation out  
 17 of constituent communities requires an act of will, supported by a compelling  
 18 animating idea of selfhood and sometimes a little incentive (coercion) in its

19  
20  
21  
22 objectivement imposée par la concurrence de forces productives et de modes de production plus  
 23 efficaces. L'unification qui transforme peu à peu les fiefs en provinces, le pouvoir direct à base  
 24 personnelle en un pouvoir indirect à base territoriale, s'accompagne d'une uniformisation, d'un  
 25 normalisation, dont le paradigme est la standardisation des poids et mesures ou le monopole de  
 26 l'émission des signes monétaires, et, corrélativement, d'une abolition des particularismes asso-  
 27 ciés à la localisation dans l'espace géographique. La 'départicularisation' et la 'délocalisation' sont au  
 28 nombre des mécanismes que contribuent à porter l'ensemble des processus sociaux concernés à  
 un degré d'universalisation supérieur en les arrachant aux particularismes (linguistiques, cul-  
 turels, mais aussi économiques) associés à la particularité du local.'

29 (As a consequence of the unification of the economic field, through monetary unification and  
 30 the generalization of monetary exchanges which more and more completely pulled small rural  
 31 producers away from self sufficiency, all social agents are objectively thrown into an economic  
 32 game with respect to which they are not always prepared, and are subject to norms objectively  
 33 imposed through the concurrence of productive forces and the most efficient modes of pro-  
 34 duction. The unification that little by little transforms fiefs into provinces, directs personal  
 35 authority into indirect territorial authority, is accompanied by standardization and normaliza-  
 36 tion, of which the paradigm is the standardization of weights and measures or the monopoly  
 37 over the distribution of monetary indicators, and as a correlative, of an abolition of particulari-  
 38 ties associated with localization within a geographic space. 'Departicularization' and 'delocal-  
 39 ization' are among the mechanisms that contribute to putting together the social processes with  
 a higher degree of universalization by stripping away the idiosyncracies associated with local  
 particularities.

P. Bourdieu, *Les Structures sociales de l'Économie* (2000) 274.

40 <sup>197</sup> For the US, see, e.g., W. W. Van Alstyne, 'The Second Death of Federalism' 83 Mich. L. Rev.  
 41 (1985) 1709. For a very conservative critique, see L. Graglia, 'From Federal Union to National  
 42 Monolith: Mileposts in the Demise of American Federalism' 16 Harv. J. L. & Pub. Pol'y (1993)  
 43 129. For India, see, e.g., S. Shatri, 'Lessons for the European Community from the Indian  
 44 Experience With Federalism' (1994) 17 Hastings Int'l & Comp. L. Rev. 633 (Indian model based on  
 45 a strong central government with state governments that are not sovereign but which retain cer-  
 tain enumerated powers; the general government of India, thus has great latitude to devolve  
 power).

close  
parenthesis  
←

creation.<sup>198</sup> The basis of a European demos is already in place. What is lacking is a sustained mutual will to acknowledge the reality of what Europe has been moving toward for the last half century. While the current foreign minister of Germany, Joschka Fischer, 'calls for federation, with fundamental reform of the institutional structures and written constitution',<sup>199</sup> the French President Jacques Chirac agrees but would press for union among the willing Member States with subsidiary status for the rest in a union 'in which nations link their destinies without giving up their identities'.<sup>200</sup> The British Prime Minister Tony Blair also looks for greater cohesion but on a more pragmatic basis 'fashion[ing] the institutions necessary to get the job done, keeping its unique blend of intergovernmental and supra-national decision-making'<sup>201</sup> and the Benelux countries seek further integration in a manner that would protect their interests in the union—'stronger community institutions, a binding Charter of Fundamental Rights, and a directly elected Commission President'.<sup>202</sup> In the rush to secure Member State advantage, these representatives of the majority of the peoples of Europe fail to acknowledge the fundamental normative assumption underlying their debate—the European demos exists, union is coming.

The form of political organization that demos will choose—*that* is an altogether different question. The fundamental error of many commentators and theorists in the field is to conflate the two. A demos does not demand a specific form of political governance. Likewise, no specific form of governance substitutes for a demos. A federation, a system based on inter-governmentalism, a super-administrative state controlled from below, an inefficient state—all of these models are possible given a demos that can be united within a single political system. Thus, the democratic deficit arguments, to the extent they suggest that no authentic community can be created through a governance system deemed illegitimate, I think, is less than helpful. It may well be that Europe chooses, as a community, to invest legitimacy only in political systems that are based on direct participatory democratic ideals. But *that* investment cannot be the basis for authentication of a social community—democratization is fundamental primarily for the legitimation of its form of governance.<sup>203</sup> Moreover, it is as likely that the form of governance of the Member States will

<sup>198</sup> The construction of a nation out of the union of the several states that became the United States is a telling case in point. The construction of a nation out of the union of states required a series of wars for defence (against Britain 1812–14) and expansion (against Mexico in 1848), and against itself (the Civil War 1861–65), as well as a series of fundamental changes in the national constitution (particularly the 14th, 16th and 17th Amendments).

<sup>199</sup> G. Burghardt, 'The Future of the European Union' 25 *Fletcher Forum World Affairs* (2001) 67, 69. Dr. Burghardt was, at the time this article was written, EU Ambassador to the United States. J. Hooper and I. Black, 'Showdown Over Europe: Blair Put on the Spot as Germany Increases Pace of Integration: Demands for Inner Core of States' *The Guardian* (London), 23 June 2000, at 1.

<sup>200</sup> G. Burghardt, *The Future of the European Union*, *ibid.*, 67, 70. <sup>201</sup> *Ibid.* <sup>202</sup> *Ibid.*

<sup>203</sup> See U. di Fabio, 'A European Charter Towards a Constitution For the Union' 7 *Colum. J. Eur. L.* (2001) 159, 171–172 ('The old nations that support the Union must fight for a form of organization that protects the rich fruits of supranational ties and allows other nations of the continent to enjoy them as well. At the same time, these nations must be careful not to abandon their own identities as the sounding board of democracy.' *Ibid.*, at 172).

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1 change as a result of the pattern of governance emerging within the institu-  
2 tions of the EU as it is likely that the reverse will happen. 'The conventional  
3 wisdom is that the ever growing range of EC competence, covering more and  
4 more policy areas, and the frequency and depth of interference have a signifi-  
5 cant impact on the member states. Through our studies, we have amassed  
6 empirical evidence of such impacts, but they are neither clear cut, nor do they  
7 point in any one direction.'<sup>204</sup>

8 The great debates in Europe today over devolution from a nation state  
9 centre to sub-national communities serve as a dress rehearsal, upside down,  
10 for the great debates about the evolution of a European state. For like union  
11 at the highest level, political devolution of governmental authority is also  
12 coming to Europe.<sup>205</sup> The logic of the arguments favouring a devolution of  
13 political authority from a nation state to its regions, preserving both the iden-  
14 tities of the national community and those of the regions, is equally applica-  
15 ble to the cession of political authority to a European state, however  
16 constructed, preserving regional and national identity within the context of a  
17 meta-identity common to all.<sup>206</sup> What, after all, is the difference between  
18 Catalonia or Scotland in relation to Spain and the UK, on the one hand, and  
19 Spain and the UK to a European state, on the other hand? Possible answers  
20 include the usual: history, inertia, current political reality, fear of the future,  
21 of the inevitable, perhaps. But, to paraphrase a recent article in the Guardian,  
22 to talk about the recognition of a European *Volk* as the end of the nation state  
23 is the hyperbolic nonsense of desperate minds. A European state would serve  
24 merely as a new confederal kind of Europe and provide a basis for the peo-  
25 ples of Europe together to reconcile the power of global economic and cul-  
26 tural forces with the desire to preserve identity at the general, regional and  
27 local levels.<sup>207</sup>

28 <sup>204</sup> R. Eising and B. Kohler-Koch, 'Governance in the European Union: A Comparative  
29 Assessment' in B. Kohler-Koch and R. Eising (eds.), *The Transformation of Governance in the*  
30 *European Union* (1999) 267, 279.

31 <sup>205</sup> M. A. Rogoff, 'Federalism in Italy and the Relevance of the American Experience' (1998) 12  
32 *Tulane Eur. & Civ. L. Forum* 65, J. Newhouse, *Europe Adrift* (1996) (describing transnational  
33 regional arrangements in Europe).

34 <sup>206</sup> In this sense, then, it may not be for nothing that the organs of European government have  
35 been leading the charge toward devolution within Europe. See Community Charter for  
36 Regionalization, [1988] OJ C 326/296 (annexed to Resolution on Community regional policy and  
37 the role of regions, [1988] OJ C 326/289), at Article 24(3). The Community Charter for  
38 Regionalization of 1988 urges the Member States to provide for regional governance, at least with  
39 respect to the implementation of EU law, 'by the appropriate constitutional provisions, or, failing  
40 that, legal provisions at the highest possible level'.

41 <sup>207</sup> Thus Hugo Young, in an assault on the politics of the British Conservative Party with respect  
42 to regional devolution in the UK wrote:

43 'But to talk about this [devolution] as the end of Britain is the hyperbolic nonsense of desperate  
44 minds. It's merely a new, confederal type of Britain, stumbling towards a model that arises by  
45 popular regional demand, and provides the possibility of Britain reconciling the power of global  
46 economic forces with a desire to preserve identity. Devolved institutions, when they've had time  
47 to bed down and be understood as normal, will say that Britain flourishes as a land of multiple  
48 identities.'

49 H. Young, 'What is Britishness? Tory Dream While Labour Defines' *The Guardian* (London),

The EU today has added both strength and irony to Rousseau's declaration of nearly two centuries ago that 'Il n'y a plus aujourd'hui de Français, d'Allemands, d'Espagnols, d'Anglais même, quoi qu'on en dise; il n'y a que des Européens.'<sup>208</sup> Each national community stands now in the shadow of that which they each have shared responsibility for building, but which they have until now refused to acknowledge.

'Abendlich strahlt der Sonne Auge;  
in prächt'ger Glut prangt glänzend die Burg.  
In des Morgens Scheine mutig erschimmernd,  
lag sie herrenlos hehr verlockend vor mir.  
Von Morgen bis Abend in Müh'und Angst  
nicht wonnig ward sie gewonnen!  
Es naht die Nacht: vor ihrem Neid  
bietet sie Bergung nun.  
So grüss'ich die Burg,  
sicher vor Bang' und Graun, folge mir, Frau:  
in Walhall wohne mit mir!'<sup>209</sup>

'Europe is on its way to becoming one big family.'<sup>210</sup> Monetary integration is a great step in the direction of integration. 'The debate about the EMU is thus a debate about the future of the EU as a polity, the European social model, and

28 March 2000, available at: <http://www.guardian.co.uk/Print/0,3858,3979289,00.html/> (accessed 3 February 2002).

<sup>208</sup> ('Today there are no longer any Frenchmen, Spaniards, Germans, Englishmen, whatever is said otherwise; there are only Europeans.') Rousseau, *Considérations sur le Gouvernement de Pologne, et sur sa réformation* (1772). And the irony:

'The transition from nation-states to the state of Europe would require that Europe usurp the place of one's country as a fatherland. Many of the necessary conditions for such a transition, both psychological and objective, have already been fulfilled. There are elites which spark feelings of European identity; there is a community of traditions and values; there is also a common repertoire of symbols and myths. And yet the European community has not achieved a status analogous to that of the national communities which go to make it up—not even on the humble scale of Western Europe.'

B. <sup>aw</sup> Geremek, *The Common Roots of Europe* (1991) (Jan Aleksandrowicz et al., trans., 1996) 182–183.

<sup>209</sup> 'The sun's eye sheds its evening beams;  
in its glorious gleam the castle shines in splendour.  
In the radiance of the morning it glittered proudly  
but stood before me tenantless, grand and inviting.  
From morn to eve, in care and anxiety  
not lightly was it won!  
Night draws on; from its envy  
it now offers shelter.  
Thus I salute the fortress,  
safe from terror and dread. Wife,  
follow me and dwell with me in Valhalla!'

Richard Wagner, *Das Rheingold*, Scene 4: An Open Space on a Mountaintop (Lionel Salter, trans.) (Wotan speaking).

<sup>210</sup> Laeken Declaration, *supra* n. 3.



*Euro and the European Demos*

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1 the nature of European identity.’<sup>211</sup> It is time for family members to reconcile  
2 themselves to their connections—by culture— and in that spirit of reconcilia-  
3 tion that marked the creation of the first European Communities, to move for-  
4 ward to wherever forward will lead.

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6 <sup>211</sup> F. Snyder, ‘EMU Revisited: Are We Making a Constitution? What Constitution are we  
7 Making?’ in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (1999) 417, 418.

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