

ARTICLES : SPECIAL ISSUE  
CONFRONTING MEMORIES – CONSTITUTIONALIZATION  
AFTER BITTER EXPERIENCES

Constitutional *Erinnerungsarbeit*: Ambivalence and Translation\*

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A. Tarnished with Futility

Contributions dealing with the European constitution have abounded over the last few years. Now that the amended Draft of the Constitutional Treaty has been adopted by the European Council, they are likely to burgeon even more. For scholars working in the field, this creates a paradoxical situation. Why write another piece on Europe's constitutionalization – even if it be with the unmovable confidence that it is necessary to rescue the existing debate from impending debilitation? Under current circumstances, any paper on the issue is doomed to be buried among countless other like-minded interventions.

Admittedly, this question lingered as the author was writing a text in which he submits a perspective which has so far remained unaccounted for, but which he deems nonetheless to be crucial to the understanding of what it is that makes the constitutionalization of Europe particularly *European*. The following observations, therefore, are presented in a reflexive mood. They first take on a *genre*, namely, the prevailing European constitutional theory, by challenging its underlying commitment to timeless reason. Then, they turn to two different constitutional traditions and seek to explain how a recurring tension between them lends shape to the current ambivalent situation. The final part of the paper tries to explain why the pursuit of imperial ambitions, or, at least, their pretence, might be consistent with this ambivalence.

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## B. The Deep Past

Under the impression of supremacy and direct effect, European constitutional theory has been quick in attaching the label “constitution” to primary Community law. The widespread propensity to describe the Community in constitutional terms suggests that the debate is beset by a timeless frame of mind. It is taken for granted that, if certain features distinguish a system of co-operation from an international regime, it is to be accurately characterized as a “constitution”; however, the fact that this notion attains political prominence at a specific period of human history, which may have already come to its conclusion, is scarcely ever reflected in the current debate.<sup>1</sup>

This prevailing commitment to timelessness makes itself felt even in the way in which the analytical instruments of rational choice theory have been deployed to transform the history of integration into a gigantic, and admittedly complex, syllogism.<sup>2</sup> Rational choice theory rests upon presuppositions concerning human intelligence and nature through which reason itself is given an unalterable appearance. Not for a single moment do its proponents ponder whether what is taken by them to be reason might be historically volatile, from which it could, arguably, follow that what is deemed necessary by one generation may well appear to be contingent to the next.<sup>3</sup>

Furthermore, the commitment to timelessness is manifest throughout discourses that approach the constitution of Europe by claiming that it is a system of norms whose meaning is susceptible to interpretative elaboration. From such a perspective, the intervention of time can only be accommodated in a timeless mode, that is to say, by recasting the involution of temporality in terms of timeless principles. Normative reasoning cannot accept the proposition that what is binding today may not be binding tomorrow unless there is a rule that accounts for either

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<sup>1</sup> A prominent exception is Dieter Grimm. See his most recent *Die Verfassung im Prozess der Entstaatlichung*, in: DER STAAT DES GRUNDGESETZES - KONTINUITÄT UND WANDEL 145 (MICHAEL BRENNER, PETER M. HUBER, MARKUS MÖSTL, EDS., 2004).

<sup>2</sup> Most prominently, ANDREW MORAVCSIK, THE CHOICE FOR EUROPE. SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT (1998).

<sup>3</sup> There can be little doubt that the foremost philosopher fascinated by the idea of the historicity of reason was F.W.J. Schelling. See AXEL HUTTER, GESCHICHTLICHE VERNUNFT. DIE WEITERFÜHRUNG DER KANTISCHEN VERNUNFTKRITIK IN DER SPÄTPHILOSOPHIE SCHELLINGS (1996).

validation or invalidation. The validity of norms is indefinite.<sup>4</sup> Their very point is to bind time.<sup>5</sup>

Finally, even where the very normative force of the European constitution is expounded with reference to historical experience, the time frame applied is so extremely restricted that it scarcely extends further back than to the catastrophe of the Second World War. This, I contend, is not enough. We need to unearth Europe's constitutional past.

More precisely, the following remarks are aimed at recovering a constitutional past that is deeper than the past represented in timeless discourse.<sup>6</sup> This is not to say that uncovering that past requires us to go as far back as possible in historical time, possibly to the point at which human recollection comes to an end. A deep past, while itself being set in – and not against – historical time, accounts for the fragility of the present.<sup>7</sup> It shows what keeps history going. Indeed, encounters with the deep past help us understand the obliteration wrought by time. In particular, it prepares us to recognize that the loss of trust in the world that we associate with experiences of “evil”<sup>8</sup> is a real and always present possibility. Historical change has an ineffable ground, which is also the ground of existence.<sup>9</sup> What we can do, however, is to sketch the conditions under which the next eruption in time might come upon us.

<sup>4</sup> See Adolf Julius Merkl, *Die Unveränderlichkeit von Gesetzen – ein normlogisches Gebot*, reprinted in: DIE WIENER RECHTSTHEORETISCHE SCHULE, vol. 2 1079 (H. KLECATSKY ET AL., EDS., 1968).

<sup>5</sup> See THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM 62 (1970); NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 129 (1993). Against this background, there is scarcely anything less ingenious than analysing a constitution in terms of a “pre-commitment strategy”. See STEVEN HOLMES, PASSIONS AND CONSTRAINT. ON THE THEORY OF LIBERAL DEMOCRACY 134 (1995). It is merely another way of acknowledging that the constitution is a norm.

<sup>6</sup> The other author invoking a “deep past” in a constitutional context is Bruce Ackerman, by which he means the formative one-hundred and fifty years of the history of the American constitution. See BRUCE ACKERMAN, WE THE PEOPLE, VOL. 1: FOUNDATIONS (1991). A past becomes “deep” according to Ackerman once the contemporaries who experienced the past as a present are gone. This, to be sure, is a shallow concept of time's depth. A past is deep if it renders the present unruly, unstable and fragile.

<sup>7</sup> Both Friedrich W.J. Schelling and Thomas Mann were intrigued by this type of “deep past”. See FRIEDRICH W.J. SCHELLING, AGES OF THE WORLD (1997, ORIGINALLY WRITTEN IN 1813). THOMAS MANN, JOSEPH UND SEINE BRÜDER, VOL. 1: DIE GESCHICHTEN JAAKOB'S (1983).

<sup>8</sup> Encounters with “evil” undermine our trust in the world. See, already, HANNAH ARENDT, THE LIFE OF THE MIND, VOL. 1: THINKING 4 (1978), and, more recently, SUSAN NEIMAN, EVIL IN MODERN THOUGHT. AN ALTERNATIVE HISTORY OF PHILOSOPHY 9 (2D ED., 2004).

<sup>9</sup> See WOLFRAM HOGREBE, PRÄDIKATION UND GENESIS. METAPHYSIK ALS FUNDAMENTALHEURISTIK IM AUSGANG VON SCHELLING'S, WELTALTER' (1989).

Accounting for the past in such a way pays heed to what has been cherished by most continental philosophy,<sup>10</sup> namely, the “trace of nothingness” that is borne by whatever there is, irretrievably marking it with the scar of death. Inexplicable things happen all the time; some of them we may welcome, such as the fall of the Berlin Wall; others we may abhor. The Holocaust happened, and it could happen again, at any time. Exploring the deep past is an attempt to understand why seeing ourselves governed by the reasons of a timeless present does not capture our historical existence.

In his landmark essay on the meaning of working through the past,<sup>11</sup> Adorno cautioned his contemporaries against treating the past as though it was already discontinuous with the present. Remembering the past, especially if it awakens us to shameful memories, is not a comforting exercise that we are able to engage in with the aim of instilling confidence that past horrors lie forever behind us; instead, the task of taking history seriously presupposes interest in continuity with regard to the conditions that have made what we cannot but be ashamed of possible.

### C. The Pre-modern against the Modern

I can only give a very rough sketch of what this implies for constitutional theory here. It has to do with an unruly tension between two historically pre-eminent conceptions of constitutional rule.

In its historically most leading pre-modern understanding, a constitution is the bulwark that protects a political community against the corrosive effects of time.<sup>12</sup> It makes the community resistant to the threat of decay, corruption and disintegration *from within*. It took several centuries of constitutional reasoning, beginning with Plato’s first sketch of the succession of constitutional forms in the *Republic* to Polybios’ theory of the cyclical recurrence of pure forms to define the antidote to the annihilating force of time.<sup>13</sup> For the ancients and their Renaissance followers, the key to making communities time-resistant is the deliberate mix of constitutional forms. Such forms mutually support each other by preventing, through their co-presence, their counterpart’s lapse into a degenerate mode. A viable constitution is, thus understood, essentially the mutual stabilization of pure constitutional forms.

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<sup>10</sup> For a tour d’horizon, see RÜDIGER SAFRANSKI, *DAS BÖSE ODER DAS DRAMA DER FREIHEIT* (1997).

<sup>11</sup> See Theodor W. Adorno, *The Meaning of Working Through the Past*, in: CRITICAL MODELS. INTERVENTIONS AND CATCHWORDS 89 (TRANS. HENRY W. PICKFORD, 1998).

<sup>12</sup> This problem has been beautifully reconstructed by JOHN G.A. POCOCK in his *THE MACHIAVELLIAN MOMENT. FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 31 (1975).

<sup>13</sup> For a useful introduction, see HERFRIED MÜNKLER, *MACHIAVELLI. DIE BEGRÜNDUNG DES POLITISCHEN DENKENS DER NEUZEIT AUS DER KRISE DER REPUBLIK FLORENZ* 120 (1984).

Monarchy is much less prone to collapse into tyranny when there is aristocracy. Aristocracy is less likely to behave arrogantly where it is moderated with democratic institutions.

In the format of mixed monarchy theory, pre-modern thought had been preserved in a venerable state until the eve of the American Revolution.<sup>14</sup> It became more or less displaced by modern democratic constitutionalism to whose major thrust I will return below. At this point, I might add that, even though it was not done with an eye to the mixing of constitutional forms, but with regard to the temperament of approaching the European constitution instead, Joseph Weiler has become the most sophisticated reformist of pre-modern constitutional thought.<sup>15</sup> In his eyes, the European constitution has one major point. Surprisingly, it is not so-much integration, as the prevention of the disintegrative effects that are built into the system of nation states. Such a system, as is well known, is rife with conflict—be it at the level of international relations or at the level of personal encounters between citizens and foreigners. A supranational system is necessary to keep abuses of national sovereignty and national sentiments at bay. What a nation gains if supranationality works successfully, is the preservation of the good of that nationality — a sense of belonging and originality — and the elimination of what its ills are, in other words, collective violence, protectionism, and discrimination. Thus, from a functional perspective, the constitution of Europe, correctly understood, occupies the place which had been formerly occupied by the “mix” of constitutional forms. It preserves what is good while preventing the recurrence of what it bad.

It should be borne in mind that nothing could matter less to pre-modern thinking than the interpretative tinkering with constitutional provisions, which are written out in a constitutional document, *qua* norms. Norms are emphatically *not* what the pre-modern tradition is interested in. For pre-modern thought, defining and managing constitutional constraints requires great political skill in preserving and fine-tuning the adequate balance between the key players and the social forces (in marked contrast to the separation of powers in which the powers are not linked to certain social strata). Where the prevailing constitutional mentality is pre-modern, a concern about “institutional balance” may well be reflected even in the reasoning of Courts, although vesting constitutional authority in Courts is not essential to it (or only if the prestige associated with judicial bodies counsels in favour of doing so).

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<sup>14</sup> A great document, it barely needs mentioning, expressing this European tradition of constitutional thinking is Charles I. Response to the Nineteen Propositions. See *THE STUART CONSTITUTION. DOCUMENTS AND COMMENTARY* 18 (2nd ED., JOHN.PHILIPPS KENYON, ED., 1986).

<sup>15</sup> See his *THE CONSTITUTION OF EUROPE* (1999).

The role attributed to the text is a minor one, simply because the text is not seen as expressive of higher norms. The constitution itself is not a norm, it is a fragile constellation of forces. Despite being a result, it attains a potential of its own to regulate, and is thus transmuted into a product that regulates its own productive forces.

Modern constitutional law, which emerged in the wake of the American and the French Revolutions, is different from the pre-modern tinkering with constitutional design. In a sense, modern constitutional law is the attempt to answer one question. It asks which institutional provisions are best to constitute popular self-rule.

This question marks a decisive break. Modern constitutional law is about giving free reign to the *will*, provided that the will in question is the will of the nation. It also envelops a different perspective on time. The constitution does not merely prevent the dismemberment of the polity, it actually establishes the continuum through which the political process can lend shape to the nation.

One might suspect that, owing to my tacit reference to Sieyes, what I have in mind here is a decidedly continental affair – a French idea that was subsequently turned into something sinister and ugly by obscure German right-wing constitutional doctrine. But this is not the case. The voluntarism of modern constitutional law – and at this point, I agree with Ackerman – is a *revolutionary achievement* on both sides of the Atlantic. It is from the perspective of this revolutionary history that Ackerman defines, in a hermeneutic vein, the task of a constitution precisely in terms of the question a constitution is meant to answer.<sup>16</sup> The question is, roughly speaking, how many elections, and which types of election, a political movement should be required to win before it may attain the position of “full authority”. Such authority is exercised, in a constitutional democracy, by whoever wields the *pouvoir constituant*.

On a phenomenological scale, Ackerman’s formulation of the question to which a constitution is meant to supply the answer, reflects, entirely accurately, the difference between normal politics and high-energy politics which spills over into the constitutional domain. Among the essential sub-questions that a constitution needs to answer here concerns the role that ought to be attributed, if at all, to the elected “leader” of a nation. The question is decisive, for it determines whether democratic representation will be predicated on either identification or deliberation. In any event, the overarching structuring task of a constitution whose purpose it is to invest a people with the power of agency is to create, using

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<sup>16</sup> See Bruce Ackerman, *The New Separation of Powers*, 113 HARVARD LAW REVIEW 634 (2000).

Hermann Heller's parlance, "unity of will" (*Willenseinheit*)<sup>17</sup> through the use of different procedures (for example, through voting or delegation) and with different normative effects. The contrast to the pre-modern notion could scarcely be starker. Pre-modern constitutionalism is reactive, for it concerns itself with keeping abuses at bay. By contrast, the central point of modern constitutional law is to create an artificial vehicle for collective action, where, if it were not for such a vehicle, the nation would be much worse off or remain in a morally despicable state. The modern conception of constitutional rule understands that what is political about men is their capacity to identify and to overcome false necessity.<sup>18</sup> A constitution helps human agency to assert itself over whatever purports to represent the world's natural order, be that entrenched hereditary privilege or the impression of unalterable economic laws.

There can be little doubt that the European constitution fits the pre-modern mould much better than its modern counterpart. Quite obviously, and not the least according to its self-understanding, the constitution of the European Union is largely about taming disintegrating forces, such as protectionist policies or trans-national cartels. In addition, both the administrative elitism of the Commission and the bypassing of national democratic constraints by national "leaders" in the Council betray that an aristocratic spirit has been revived in the European polity.<sup>19</sup> The leaders and the well-trained trans-national political élite, aided and abetted by the champions of large-scale European industries, compete when it comes to agenda-setting whereas the peoples participate in a far less eminent position.<sup>20</sup> The European constitution, as though it had been designed by students of Aristoteles' *Politics*, exhibits a peculiar mix of oligarchic and democratic elements, with the former quite evidently overshadowing the latter.

It is tempting to mistake such a presence of the past with the advent of consumerism, or even to go so far as to claim, recklessly, that the EU engrosses

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<sup>17</sup> See HERMANN HELLER, STAATSLHRE 113-114 (6TH ED., 1983).

<sup>18</sup> No doubt, this is a major theme of Roberto Mangabeira Unger's work. See his FALSE NECESSITY (1987). But, see, also, MARTIN SHAPIRO, DEMOCRACY'S PLACE (1996).

<sup>19</sup> It should not come as a surprize that one of the most outspoken defenders of European technocracy has already begun to re-describe the Union in pre-modern terms and with a telling uneasiness regarding its aristocratic element. See Giandomenico Majone, *Delegation of Regulatory Powers in a Mixed Polity*, 8 EUROPEAN LAW JOURNAL 319 (2002).

<sup>20</sup> We should not forget that when it comes to voting and responsiveness, the European Parliament suffers from a *grave* democracy deficit of its own.

mankind in a post-political state.<sup>21</sup> This would make sense only if the meaning of the political were limited to moments of mobilisation. But this is not the case. Attaining a lasting equilibrium among conflicting forces is quite as much a political action as inciting some furious frenzy in dumbfounded masses.<sup>22</sup> However, by attaining a fragile balance among competing forces, it denigrates the human potential to overcome false necessity. The European Union rests upon many such false necessities, with the necessity of becoming the “most competitive market economy” being only one salient case in point. Its existence belittles those who rest their hopes on the modern project of constitutional democracy. All talk of a “democracy deficit”, in addition to having become dull, reproduces a callous euphemism of what European integration has really done to democracy. It has demoted democracy to a minor element in a gigantic regulatory machine, and it increasingly looks as though, in the eyes of the European Union, it could be more or less dispensed with in the future, not least because of the Commission’s new management of “transnational deliberative networks”.<sup>23</sup>

It would also be erroneous to suppose that the darker legacy of the European legal tradition was exhausted in National Socialism and milder forms of totalitarian rule, such as Italian Fascism or Francoism in Spain. In an Adornoian vein, we ought to keep track of the conditions which make the recrudescence of profound political instability likely, even if they do not give rise to either dictatorship or genocide. Belittlement of autonomy and the human capability to conduct oneself is definitely to be counted among these conditions.<sup>24</sup> Moreover, the impending triumph of

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<sup>21</sup> See Ulrich Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Union*, 9 EUROPEAN LAW JOURNAL 14, 19 (2002).

<sup>22</sup> Haltern, *supra*, note 21, claims that the European integration process is apolitical also because it did not require any sacrifice. It would rest, thus understood, on the stable reproduction of multi-lateral win-win situations. But this is utterly implausible. Integration demanded substantial sacrifice, in particular on the part of Germany, and there is reason to fear that the integration process might even falter if it ceased to be fed by German resources in the future. See Niall Ferguson, *The End of Europe?* [http://www.travelbrochuregraphics.com/extra/end\\_of\\_europe.htm](http://www.travelbrochuregraphics.com/extra/end_of_europe.htm).

<sup>23</sup> See the European Commission’s White Paper: [*European Governance. A White Paper*, COM(2001) 428 final of 25 July 2001, O.J. 2001, C 287/5; [http://europa.eu.int/comm/governance/index\\_en.htm](http://europa.eu.int/comm/governance/index_en.htm). Unfortunately, political scientists are prone to buy into this garbage—or, pardon me, molehill. For a discussion, see MOUNTAIN OR MOLEHILL? A CRITICAL APPRAISAL OF THE COMMISSION WHITE PAPER ON GOVERNANCE, JEAN MONNET WORKING PAPER, No. 6/01 (CHRISTIAN. JOERGES / YVES MENY / J.H.H. WEILER, EDS., 2001), <http://www.JeanMonnetProgram.org>.

<sup>24</sup> See Adorno (note 11), 98-99: “[...] [T]he objective conditions of society that engendered fascism continue to exist. Fascism essentially cannot be derived from subjective dispositions. The economic order, and to a great extent also the economic organization modelled upon it, now as then renders the majority of people dependent upon conditions beyond their control and this maintains them in a state of political immaturity. If they want to live, then no other avenue remains but to adapt, submit themselves to the given conditions; they must negate precisely that autonomous subjectivity to which the idea of



Europe's pre-modern political legacy creates a situation in which it becomes increasingly easy to disparage protest owing to a self-fulfilling prophecy. Just as the smart management of constitutional forms by the ruling élite alienates Europeans from the Union's work — a fact that is much bemoaned in Commission communications — the lack of partisan struggle at European level makes it likely that *democracy by identification* will be chosen as the preferred avenue of protest, in particular, when leaders cunningly appeal to narcissistic images of collective self-aggrandizement. This will be read, by the ruling élite, as confirming their suspicion that democracy, albeit indispensable, is a dangerous affair if untrammelled.

The emerging ambivalence could scarcely be more intriguing. From the perspective of both constitutional traditions, the potential for evil resides in its respective other. For the pre-modern élitist, a perennial populist threat resides in democracy. For the modern constitutionalist, the Union sacrifices political autonomy for the sake of greater economic efficiency or, even worse, serves the interests of large-scale European industries. Depending on the way of looking at it, the situation presents itself either as a *coup* by neo-liberal élites or as the masses' insatiable appetite for tyranny. This ambivalence gives rise to enormous tension. We need only to sharpen our sense of the alternative to understand what is at stake here. If integration were to succeed at further demoting democracy into a neat exhibit from an earlier period of European history then pre-revolutionary Europe would carry the day over the ideals of the *bourgeois* revolutions. Not merely "real socialism" but also "national democracy" would then have been overcome in Europe. This would mark the end of the ideals of the Enlightenment, which are, ironically, still publicly cherished in the solemn Preamble to the Draft of the European Constitution. Moreover, the auto-justificatory logic of Europe's fight against the ills of democracy would readily denounce all protest as either national-fundamentalist or even potentially fascist or totalitarian. As a result, a great achievement of European modernity would be threatened with extinction, with capitalism remaining in an institutional format that promises to insulate its smooth reproduction from intermittent shocks from below.

Both perceptions constitute the deep past that accounts for our historical reality. In combination, they give rise to an explosive potential for expressing political

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democracy appeals; they can preserve themselves only if they renounce their self. To see through the nexus of deception, they would need to make precisely that painful intellectual effort that the organization of everyday life, and not least of all a cultural industry inflated to the point of totality, prevents. The necessity of such adaptation, of identification with the given, the status quo, with power as such, creates the potential for totalitarianism. The potential is reinforced by the dissatisfaction and the rage that very constraint to adapt produces and reproduces. Because reality does not deliver the autonomy or, ultimately, the potential happiness that the concept of democracy actually promises, people remain indifferent to democracy, if they do not in fact secretly detest it."

discontent. From European history, this potential inherits a sense of uneasiness with regard to *both* renditions of the good of a political community, that is, stability and growth on the one hand (which is preferred by pre-moderns) and the authenticity of a common way of life on the other.<sup>25</sup> As of yet, Europeans have not settled on either. This explains why Europe's past is deep.<sup>26</sup>

#### D. The Atlantic and the Continental: Two Meanings of "Empire"

The deep past shapes the present. It does not go away. The drama of constitutionalization remains with us today.

It should be clear, however, that, as it stands, the Union has little or even no appeal to the great majority of the people in Europe. People feel belittled by the Union. The matters that people are most concerned about, namely, health insurance, pension schemes, affordable education, jobs, are either outside the purview of community competence or subject to the placebo politics of the Open Method of Co-ordination.<sup>27</sup>

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<sup>25</sup> Stability, after all, appears to indicate that those subject to political rule are not dissatisfied. But a society that is merely stable without being democratic may also accumulate dissatisfaction to the point at which it may eventuate in outbursts of political violence. Autonomy defies, on the other hand, the sublation of democracy to a global state. There is no autonomy without identity. And is not identity exclusive? Is not democracy for that very reason fatally unfit for transnational governance?

<sup>26</sup> Intriguingly, the predominance of the European Union has *actually* removed ambivalence in the concept of democracy. It concerns the ontological and the deontological rendition of loyalty and solidarity. National democracy is nowadays often cast in ontological terms. Solidarity among citizens is possible because citizens are ready to sacrifice out of a feeling of belonging. Such solidarity is absent on the transnational level simply because people do not experience themselves as conjoined with others by a common destiny. The sense of belonging ("collective identity") accounts for the willingness to sacrifice. The fatherland asks its soldiers to risk their lives on the battlefield. Soldiers do, indeed, risk their lives out of a sense of obligation to a larger whole of which they consider themselves to be part. Unfortunately, this ontological conception of national solidarity prevails in current discourse. It eclipses the deontological understanding that lends nationalism a much more defensible form. The deontological understanding does not jump from the alleged fact of homogeneity to the conclusion that there is loyalty. It simply says that if the existence of certain obligations is desirable then in all likelihood some political boundedness is indispensable to see them fulfilled. The source of such boundedness is irrelevant. In its deontological understanding, nationality is neither as sweet nor as abysmal as in its ontological form. It provides a critical principle to assess the progress of transnational governance, for if its growth threatens to thwart the existence of morally valuable obligations, then such progress may not be desirable after all. The potential for a nationalist critique of supranationality is far from being exhausted. See FRITZ W. SCHARPF, GOVERNING IN EUROPE. EFFECTIVE AND DEMOCRATIC? (1999).

<sup>27</sup> For a much more balanced and sober critique of the OMC, see Christian Joerges, *What is Left of the European Economic Constitution. A Melancholic Polemic*, 13 EUI WORKING PAPERS IN LAW (2004).

The alternative that remains to the EU to obtain appeal lies in articulation at a symbolic level. The Union can only make people bigger by enlisting their existence to a transcendent cause. The Laeken Declaration is among the first documents which successfully tapped the resources of symbolic reconciliation:

*“Now that the Cold War is over and we are living in a globalised, yet also highly fragmented world, Europe needs to shoulder its responsibilities in the governance of globalisation. The role it has to play is that of a power resolutely doing battle against all violence, all terror and all fanaticism, but which also does not turn a blind eye to the world's heartrending injustices. In short, a power wanting to change the course of world affairs in such a way as to benefit not just the rich countries but also the poorest. A power seeking to set globalisation within a moral framework, in other words to anchor it in solidarity and sustainable development.”<sup>28</sup>*

The image of Europe as the benign empire (as opposed to you-know-who) is more than dimly reflected in these sentences. This is not a new idea. It is, no doubt, part of Europe's deep past.

For the greater part of European history, the notion of *imperium* has played a much more prominent role than the notion of a constitution, let alone a republic. The notion is elusive, to be sure, and the many associations that it evokes make it also terribly fascinating.

Until recently, the description of a hegemonic political force in terms of an empire has lain dormant in political theory — most probably owing to post-colonial sensibilities and the association of “empire” with the forever blemished “*Reich*”.<sup>29</sup> It took the downfall of the Soviet Empire (sic!), the emergence of an ever tighter system of global economic relations and the American turn to unilateralism to project the notion back to the centre of current affairs journalism.<sup>30</sup> In its application to the unrivalled American military capacity, the notion of “empire” undoubtedly inherits from British world-rule its association with military dominance and the

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<sup>28</sup> Declaration of the Future of the Union, European Council 15 December 2001,

[http://europa.eu.int/futurum/documents/offtext/doc151201\\_en.htm](http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm).

<sup>29</sup> The exception is, of course, the work by MICHAEL HARDT / ANTONIO NEGRI, *EMPIRE* (2000).

<sup>30</sup> In the meantime, a literary cottage industry has emerged on American imperialism. For an overview, see *NEW YORK TIMES BOOK REVIEW* of 24 July 2004.

generation of wealth – along with the sense of a mission underlying the global spread of a parent civilization.<sup>31</sup>

But there is a continental notion of empire, too, which, at least in its own vein, stays closer to the true origin of imperial rule. Since the days of the Roman Empire, it had been understood that there is always an empire ruling the world. From this perspective – military dominance aside, which was clearly the case for imperial Rome – “ruling the world” basically means two things. First, the empire creates the world in its own image (which makes it quite plain that America is an empire, in particular, through the building of shopping malls).<sup>32</sup> Second, the world is exhausted in what is within the empire’s domain. What is outside, therefore, is staged at some subterranean level, doomed to live below the level of relevance or, indeed, subsistence.

Another component is essential to the continental notion of “empire”, namely, the idea that world history is organized according to a pre-ordained succession of empires. In combination with the drive for a restoration of Rome, which has been present in Europe since the early Middle Ages, it has inspired the translation of empire (*translatio imperii*), which subsequently became a founding myth of political authority. The translation means the transfer of the power of the Roman Empire from Byzantium to the Frank kings through the coronation of Charlemagne by the Pope.<sup>33</sup> With the Pope claiming to be the purveyor of Rome’s imperial legacy, the empire had a religious foundation and it bestowed a sense of a mission *sub specie aeternitatis* on the exercise of power. As is well known, no less a figure than Carl Schmitt used a highly peculiar interpretation of the writings of Saint Paul to describe the mission of the empire in terms of deferring the second coming and, thus, averting the end of the world.<sup>34</sup> The empire guarantees peace, even, and most importantly, peace with God. The empire is permanent. It creates a world in which an irreversible time reproduces an unchanging present.<sup>35</sup> More straightforwardly, the empire takes the place of the world, or, at any rate, of the world in its right

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<sup>31</sup> See the intriguing book by NIALL FERGUSON, *EMPIRE. THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (2002).

<sup>32</sup> In his book *COLOSSUS. THE PRICE OF AMERICA’S EMPIRE* (2004), NIALL FERGUSON is inclined to underestimate how much America owes its hegemony to the celebration of trite, even vulgar, consumerism.

<sup>33</sup> See Christiane Kunst, *Imperium*, in: *DER NEUE PAULY* vol. 14 577 (M. LANDFESTER, ED., 2001).

<sup>34</sup> See CARL SCHMITT, *DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPEAUM* 28 (1950).

<sup>35</sup> Timeless discourses, we are in the position to realize at this point, are able to flourish under imperial conditions.

condition. The disappearing of an empire can only be compared with the death of a beloved person. It is a world-destroying or, less dramatically, world-altering event. One need only read *The Radetzky March* or *The Emperor's Tomb* by Joseph Roth or Stefan Zweig's *The World of Yesterday* in order to realize what such a loss means.

In a perceptive essay, the German philosopher Peter Sloterdijk observed that to be European means always to participate in yet another translation of empire.<sup>36</sup> Every translation of empire restores the impression of a permanent world. The European empire has lain dormant since its last replicas were destroyed – on the continent – as a consequence of the “great war”. We are currently witnessing the next translation, which takes place, of course, on a symbolic level. In the course of enlargement, there has been much talk about the “re-unification” of Europe, and innocent observers have always wondered what it might be that has purportedly been put together again. Clearly, these are symbolic gestures. But underlying such loose political lingo is the idea of translation. The empire, which had existed in numerous vestiges, is in the process of resurrection.<sup>37</sup> However, in the face of Europe's questionable military capacity, how this contrasts with the Anglo-American version of empire, is a different matter I would contend, however, that military control may not be a necessary condition for the empire to exist. Accession, multi-speed association, free trade agreements, regional initiatives, and the creation of a ring of friends suffice to direct the attention of the surrounding world towards the centre and to give the periphery the incentive to recreate itself in its own image. European integration is poised to make post-war civilization permanent and to present it as the model case for the organization of human kind, at any rate, in as much as the European values are concerned.<sup>38</sup>

Consequently, I conclude with the submission that the only way that remains for the European integration project to have appeal is of an imperial kind.<sup>39</sup> Thus, we

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<sup>36</sup> See PETER SLOTERDIJK, *FALLS EUROPA ERWACHT. GEDANKEN ZUM PROGRAMM EINER WELTMACHT AM ENDE DES ZEITALTERS IHRER POLITISCHEN ABSENCE* (1994)

<sup>37</sup> I add that nobody would disagree more with such a statement, if it were taken to be a statement of facts, than Ferguson. See, *supra*, note 32, 256-257.

<sup>38</sup> FERGUSON (note 32), 229-230 cites remarks by the British diplomat Robert Cooper calling for a “new kind of imperialism” that would be “acceptable to a world of human rights and cosmopolitan values”. Indeed, according to Cooper, the “post-modern EU” offers a vision of a co-operative empire.

<sup>39</sup> Having criticized some of the ideas of my colleague Ulrich Haltern above, I now have to admit that these observations make me vulnerable to a criticism of his. See Ulrich Haltern, *Raum – Recht – Integration. Ein Beitrag zum Verständnis von Souveränität*, to appear in: *EUROPÄISCHER RAUM UND GRENZEN. PROBLEME DER RÄUMLICHKEIT UND IDENTITÄTENBILDUNG IN EINEM VEREINTEN EUROPA* (R. HETTLAGE / P. DEGER, EDS., 2004). In his eyes, all tacit appeals to an imperial past are on a plane with the public relations humbug with which European institutions try to sell the EU to its citizens. I would reply that all the the “republican” means, such as fundamental rights charter and constitutional documents?,

should not forget that the *Reichsidee* is associated with many bitter experiences. The empire makes people important on a spiritual or symbolic level, while leaving many of them in a lamentable material state. Not unlike religion, imperial glory can be the opium that induces ideological slumber. We should take heed of its reappearance. But we should also be aware that there is nothing we can do to prevent its recurrence. For, without it, European integration would lack its core characteristic - and that is to be European.

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are doomed to be ridiculous, at best; however, this is not the case for the positioning of the Union against its deeper historical background.