

ARTICLES : SPECIAL ISSUE
CONFRONTING MEMORIES – CONSTITUTIONALIZATION
AFTER BITTER EXPERIENCES

The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History

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A. The Idea of Thick Constitutional Patriotism¹

A sense of cohesion grounded in a common identity is widely believed to be a prerequisite for a functioning democratic European polity.² If the European Union is to master successfully the tasks assigned to it in the Constitutional Treaty and, using a non-consensual procedure, decide on policies that concern the security of its citizens or have significant distributive effects, then a sufficiently thick common identity is believed to be necessary both to legitimate and to ensure the functioning of the polity in the long term. There is little doubt that such an identity is currently missing. The question is what such an identity should be³ and whether the pre-

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² Most recently, see JÜRGEN HABERMAS, *DER GESPALTENE WESTEN* 68-84 (2004). See, also, Jürgen Habermas, *Citizenship and National Identity, Its Achievements and its Limitations. On the Past and Future of Sovereignty and Citizenship*, 9 *RATIO IURIS* 125 (1996).

³ The debate on what European citizenship could mean could be spurred on by the inclusion of a citizenship clause in the Maastricht Treaty. Helpful contributions include Joseph H.H. Weiler, *To Be a European Citizen: Eros and Civilization*, in: *THE CONSTITUTION OF EUROPE* 324 (1999); Jessurun d'Oliveira, *European Citizenship: Its Meaning, Its Potential*, in: *EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION?* 126 (RENAUD DEHOUSSE, ED., 1994); *EUROPEAN CITIZENSHIP* (EPAMINONDAS. MARIAS, ED., 1994); Jo Shaw, *Citizenship of the Union: Towards Post-National Membership*, 6 *AEL* 237 (1995). See, also, GARCIA SOLEDAD, *EUROPEAN IDENTITY AND THE SEARCH FOR LEGITIMACY* (LONDON 1993).

political pre-requisites for the development of such an identity exist.⁴ Are there historical experiences and accomplishments that enable European citizens to understand themselves as having suffered a common past and which animate them to see themselves engaged in the construction of a common political future? What are the appropriate narratives around which a European identity could, over time, develop? What should the focus of a self-conscious politics of memory be? What are the implications for the role and structure of European historiography, in particular for the European legal and political historiography?

One well-known answer to this question is that the basic principles of the liberal democratic constitutional tradition should be understood as the focal point for the development of such a common identity.⁵ The constitutional commitment to human rights, democracy and the rule of law.⁶ In short, *constitutional patriotism* could be the basis for a common European identity.

I. Thin and Thick Constitutional Patriotism

But as has been pointed out,⁷ there are at least two problems with such an idea. First, both as an ideal and as an actual political and legal practice, there is *nothing specifically European* about these commitments. They are already reflected in the national constitutional commitments of all the Member States.⁸ They are shared by liberal democracies as different as Canada, South Africa and India. And, as universal principles, they claim to be morally valid everywhere that human beings politically organize their co-existence with one another. Second, it is doubtful whether the political liberal tradition of human rights, democracy and the rule of law is *sufficiently thick* to function as the cement of a supranational political community in light of potentially conflicting loyalties connected to ethically thicker national identities. How can abstract moral principles – rather than collectively shed blood, sweat and tears – be the kit for a political community?⁹

⁴ For a sceptical view, see Dieter Grimm, *Does Europe Need a Constitution?*, 1 ELJ 282 (1995). For a critical response, see Jürgen. Habermas, *A Response to Dieter Grimm*, 1 ELJ 303 (1995).

⁵ HABERMAS (note 2).

⁶ Art. I-2 of the Constitutional Treaty states: 'The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights...'

⁷ An early example of general scepticism about the possibility for any kind of meaningful European identity to develop is ANTHONY SMITH, *NATIONS AND NATIONALISM IN A GLOBAL ERA* 126 (1995).

⁸ See Joseph Weiler, *In Defense of the Status Quo*, in: *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 7 (JOSEPH H.H. WEILER/MARLENE WIND, EDS., 2003).

⁹ U. Haltern, in particular, laments the neglect of 'the political' by European constitutionalists and thinks the idea of ambitious identity politics to be doomed in a consumerist market culture; see Ulrich Haltern,

The response to both these challenges is an account of constitutional patriotism that is thicker than a mere commitment to abstract universal principles. The idea that constitutional patriotism should be understood merely as an attachment to the universal moral principles contained in national constitutional texts and nothing more (call this *thin constitutional patriotism*) has never been an adequate representation of the idea, at least not as it has been presented by its best known contemporary proponent, Jürgen Habermas. Citizens do not simply identify with the abstract norms laid down in the constitution. Instead, citizens appropriate and interpret them in the context of their particular history and in the light of their own ethical and political commitments.¹⁰ This process of appropriation and interpretation of basic political ideals takes place not only and as part of education in national schools. It takes place to a significant extent when political and legal claims are deliberated and negotiated in the public sphere. It also takes place as alliances are forged, programmes are articulated, political and legal battles are fought and choices are made. Thus, universal principles of justice may be textually fixed in the constitution. *But they derive their power to shape identities in the present from the connection with the struggles of the past and the ambitions for the future.* By being connected to the particular history, ambitions and current political practices of a particular community, thick constitutional patriotism reflects the specificity of a particular community.

II. Identity and the 'Other'

Thickness and specificity, then, can be achieved without emphasizing the importance of a contemporary 'Other', and without arming the boundaries, both symbolically and practically, to defend an imagined homeland.¹¹ It can be achieved by focusing inwardly and on self-knowledge. In Europe, it is not necessary to start painting dark pictures of a powerful Islamic fundamentalist threat or to paint the Islamic world as a radical 'Other', whatever the cultural and political differences may be to the internally diverse and highly fractured Muslim world. Nor is it necessary to succumb to anti-Americanism. If the major demonstrations which

Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination, 9 ELJ 14 (2003). See, also, DER EUROPARECHTLICHE BEGRIFF DES POLITISCHEN (habilitation thesis Humboldt Universität Berlin 2004). The idea of 'the Political' as a particular intensity of association and dissociation, is central to the constitutional and political thinking of CARL SCHMITT, DER BEGRIFF DES POLITISCHEN (1932).

¹⁰ In his latest book, Habermas takes at least the first steps to spell out what this could mean in the context of a European polity; see HABERMAS (note 2), especially Part II: *Die Stimme Europas in der Vielstimmigkeit seiner Nationen*.

¹¹ For an insistence on the importance of boundaries, particularistic identities and irrationality as a constitutive element of 'the political', see Haltern, (note 7).

contemporaneously took place on the 15 February 2003 in London, Rome, Madrid, Barcelona, Berlin and Paris against the US attack on Iraq do mark an important event in the constitution of a European public sphere and a European identity,¹² it can only be hoped that it is an identity focused on a commitment to a particular idea of an international legal order that shuns the unilateral use of force, a commitment which is, at the very least, shared by a strong minority in contemporary American politics. A mature European identity has no need of an American 'Other'.¹³ The United States is an 'Other' only in the banal sense that it is not part of the European Union. Whatever the legitimate concerns about the foreign policy of a particular U.S. administration are, an identity constitutively linked to branding outsiders as 'Others' is an immature identity grounded in weakness: for its stability, it focuses on something external to it. These are cheap shortcuts to a European identity, shortcuts that involve intolerably high moral and political costs. The clash of civilizations is no necessary feature of the contemporary social and political world. But it can easily be brought about as a self-fulfilling prophesy by those consumed in resentment or fear, and those who exploit it for political purposes.

In this respect, the American experience may provide the 'old continent' with a lesson. As self-absorbed and parochial as some manifestations of American constitutional patriotism may seem to many Europeans, nobody can doubt its strength. Yet, the stories that are central to it involve narratives about the establishment of an ever more integrative and perfect Union, and the remedying of injustices of the past, injustices related to Native Americans, to Blacks, to women, *etc.* Even when it comes to the 20th century wars, the emphasis in public life has mainly been on celebrating achievements, mourning the dead, and contemplating tragedy, mistakes and disagreement (as in the case of Vietnam). Historically, the emphasis has not been on drawing boundaries to exclude a non-American 'Other', notwithstanding the current official rhetoric. Emphasis is put on the serious reflection on the failures and achievements of the past in order to improve on them in the future.

III. Identity and Criteria for Membership

¹² See Jürgen Habermas and Jacques Derrida's essay published contemporaneously in various major European newspapers: *The 15th of February or: What Unites Europeans*, reprinted in: HABERMAS (note 2), 43-51.

¹³ Neither is it helpful to think of current European identity defined by differences to the US (e.g., with regard to the role of markets and of state intervention, the respective enthusiasm or scepticism about the role of technology, or the use of force in foreign affairs). See JÜRGEN HABERMAS' careful negotiation of this issue *id.*, 52, 53.

What then is the link between the idea of thick constitutional patriotism and the question who should be allowed to join? An identity focused on thick constitutional patriotism provides a basis for the existing law and practice of enlargement. "The European Union shall be open to all European States which respect its values and are committed to promoting them together."¹⁴ It insists that the only categorical requirements for membership are linked to the kind of criteria that the EU does in fact use: According to the Copenhagen criteria, a prospective member must be a stable democracy, respecting human rights, the rule of law and the protection of minorities, have a functioning market economy and be willing and able to adopt the common rules standards and policies that make up the body of EU Law. There is no basis to exclude anyone on additional cultural grounds. Clearly, this does not mean that South Africa or Singapore would be plausible candidates. There is the additional legal requirement that a state should be *European*. But the criterion of European-ness is no reason to launch into deep discussions of the ontology of European-ness. It is best understood as a loose geographical criterion that underlines the idea that the European Union is a *regional* and not a global organization. The universal idea it embodies is an idea of world order in which states are regionally integrated as well as belonging to organizations with universal membership. As a loose geographical criterion its application should be governed by political wisdom of a very practical kind in cases such as the accession of Turkey, Bosnia, Albania or the Ukraine. There is no point in asking, for example, whether Turkey is really European, to resolve the issue of Turkish membership. Its largest city is, whereas most of its land mass is not. Yet, most of its population centres are west of Cyprus, already an EU Member since May 2004. Instead, different questions need to be asked: What is there to gain and what is there to lose for the progressive realization of European constitutional principles and practices that embody them? Could Turkey's membership, for example, help integrate Muslim communities more effectively in existing Member States such as the UK, France and Germany and enrich European political practice by deepening the understanding of what pluralism is all about in Europe? Does Turkish European membership help stabilize and spread the ideas of human rights, democracy and the rule of law into the Muslim world, where they are currently struggling to take hold? Given the European Union's stance in the past that has given rise to legitimate expectations, what would the effects be if the European Union simply turned down Turkey in the Muslim world? On the other hand, is it true that such a step would effectively preclude the development of genuine European democracy, a European public sphere and strong social cohesion in Europe, because it would further alienate a majority of European citizens, and strengthen Euroscepticism across Europe? It may well be desirable for serious efforts to be made by the

¹⁴ See Art. 1 II of the Treaty Establishing a Constitution for Europe.

political establishment in Member States in favour of Turkey's accession, but it is highly problematical politically to move forward with Turkish integration, if a clear and stable majority of European citizens continues to be against it. In this respect, the decision by France to hold a referendum on Turkey's membership (as France had done in the case of the UK, Ireland and Denmark) need not be inappropriate. It is only an attempt by the French government to shift responsibility to its citizens and wash its hands of charges of cultural xenophobia if the government makes no serious efforts to persuade the electorate of the stakes and does not seek to raise the level of public discussion. Clearly, then, the stakes are high and the answer may not be an easy one. But it is a mistake to assume that arguments from European identity¹⁵ provide good reasons to exclude Turkey.

The prospect for the future development of a thick constitutional patriotism in Europe depends on at least two variables. The first is the nature of the political process at the European level. It either provides citizens with an opportunity and incentive to engage with these ideals and narratives in the course of an ongoing political practice, or it discourages such an engagement. Without the support of the requisite political practices any politics of memory will amount to little more than EU brand management. At best, it will produce a highly transient consumer loyalty to the EU. At worst, it will produce resentment and backlashes against the misappropriation of a vocabulary that is steeped in significance, while at the same time emptying it of all meaning. Much will have to be said about the current institutional practices and their reform by the Constitutional Treaty as well as the ratification procedure in this regard, but this is not the place to do it.¹⁶ Here, the focus is on the second variable. The second variable is the availability of suitable historical material that both animates and constrains the relevant historical narratives and the possible role of a European historiography.

B. Implications for the Role and Structure of European History

I. A Kantian Perspective on European History

One way in which thick constitutional patriotism differs from thin constitutional patriotism is that the former is embedded in a historical narrative about how the

¹⁵ For the relevance of Christianity as a focal point of a European identity, see below.

¹⁶ Elsewhere I have argued that the structure of the European political process as it currently exists and as it will continue to exist under the Constitutional Treaty undermines rather than fosters the development of a meaningful European identity see Mattias Kumm, *To Be a European Citizen: Constitutional Patriotism and the Treaty Establishing a Constitution for Europe*, in: *ASSESSING THE CONSTITUTIONAL TREATY* (ERIK O. ERIKSEN/JOHN E. FOSSUM/MATTIAS KUMM/ AUGUSTÍN MENENDEZ, EDS., FORTHCOMING 2005).

European polity developed to become what it is. But what kind of a historical narrative is it? What kind of historiography is of particular value for the purpose of serving as a frame of reference for an engaged European citizenry? The idea of constitutional patriotism is connected to a particular idea of European political and legal historiography. The historiography to which it is connected is not solely European because it takes a European perspective instead of framing the narratives within a national frame of reference. Such a European historiography is currently flourishing (in part, with the financial support of the Commission). Choosing a European frame of reference is a helpful first step to loosen the dominance of a national frame of reference in Europe, but it is not enough. Instead, the kind of historiography required for European political and legal history is one that *focuses on the progressive understanding of what are the basic constitutional principles of today - human rights, democracy and the rule of law - as a focal point that gives a European historical account its structure*. The idea of a historical account with such a structure which aims to provide support for the identity of transnational citizens is related to Kant's "*Idee einer allgemeinen Geschichte in weltbürgerlicher Absicht*".¹⁷ Kant developed the idea of an account of world history that took the political and moral principles of the Enlightenment as the prism through which history would usefully be told. Events would be analysed from the perspective of how they affected the emergence, interpretation or stifling of these very ideals. In Europe, such a project acquires a particular urgency from the fact that there is a transnational European polity that claims to be grounded in these ideals. Such an account would avoid what may well be two typical features of contemporary historiography that significantly undermine its value for the development of a European identity.

First, European political practices would not be the focus of an account that was *radically divorced* from national narratives. They should not be a mere addition to national histories focusing on the state and the nation, with a final chapter that begins, say, with Churchill's Zurich speech and the Schuman Declaration, and ends with the debates on the ratification of the Constitutional Treaty. Instead, such a historical focus would provide common themes that *integrate* narratives about national and European political and legal practices. Existing national narratives would be placed in a European context and European narratives would both feed off from and be an integral part of the plurality of national narratives across Europe.

Second, a 'European' focus of this kind would not insist on emphasizing the historically distant 'common roots' of classical antiquity or the often idealized or disparaged medieval Christian Europe and give short thrift or at best equal

¹⁷ IMMANUEL KANT, *GESAMMELTE WERKE*, vol. 6, 33-50 (WILHELM WEISCHEDL, ED., 1986).

weight¹⁸ to the past two centuries up to World War II,¹⁹ because they are believed to embody an age of divisive nationalism (as well as colonialism and imperialism). Instead, in the kind of account that is required, both Christianity and Nationalism²⁰ would have a central role to play. But a very differently focused one.

II. Excursion: Christianity and Nationalism as a part of European History

Clearly, Christianity is a historical force of practically unequalled import for European history. The focus on the Holy See and the Bishop of Rome may well have created the first sense of cohesion for a legal, political and cultural entity called Europe in the Middle Ages. Today, its presence continues to be felt in every city square in Europe where churches occupy prime locations. Its spiritual force today and the in the future of Europe should not be underestimated and ought not to be feared, but welcomed. The focus of European history would not be the story of a Christian Europe, but Christianity would have an important role to play in it.²¹ For the purpose of a history that is to serve as a common reference point for European citizens an account of Christianity could be helpfully focused on three aspects.

The first concerns the negotiations of the relationship between church and state and the gradual emancipation of public institutions and the public sphere from theological debates, clerical privilege and clerical authority. It is not just that for a Europe consisting of Christians, atheists, agnostics, deists, Jews and Muslims anything else would undermine the function of the narrative as a focal point of a common identity. In many respects, the Europe of medieval times rightly remains a negative model for the kind of society that Europe strives to become. For a Europe that endorses a public philosophy committed to the idea of free and equal citizens, a different focus would be appropriate.

One more recent aspect of Christianity that is of exemplary significance is the remarkable story of the conversion of the Catholic Church to the commitments of constitutional democracy – the transition from vehement opposition to ‘modernist’

¹⁸ See, for example, MICHAEL SALEWSKI, *GESCHICHTE EUROPAS* (2000). A remarkable European history is also NORMAN DAVIES, *EUROPE: A HISTORY* (1996).

¹⁹ See GORDON CRAIG, *GESCHICHTE EUROPAS VON 1815-1980: VOM WIENER KONGRESS BIS ZUR GEGENWART* (1989).

²⁰ For an excellent European history focused on of the role of the state and nation, see HAGEN SCHULZE, *STAAT UND NATION IN EUROPE* (1994).

²¹ For a recent argument that Christianity should be recognized and welcomed as a central element in the evolution of European civilization, see JOSEPH H.H. WEILER, *UN’EUROPA CHRISTIANA* (2003).

ideas to their partial embrace by the end of the Second Vatican Council.²² *It provides support for the idea that great religious traditions have the theological resources to reconcile and integrate a serious commitment to a godly life with an embrace of Political Liberalism and its institutions.*²³ The emancipation of the public sphere from theological debates, clerical privilege and clerical authority was a process that helped Christians to gain a *deeper understanding* of religious faith as it relates to freedom of conscience, tolerance and engagement with the world more generally. Even those who mourn the fact that religious practices have lost their hold on a large part of Europe's population and who advocate the re-evangelisation of Europe, have reasons to embrace the emancipation of legal and political life from theological debate, clerical privilege and clerical authority. The heated debates on a reference to God in the Preamble, in which devout Christians were present on both side of the issue, should not obscure this central point. A European constitution that rejects reference to God in its Preamble is not, in virtue of that fact, christophobic. And the inclusion of a reference to Christianity in the Preamble is not necessarily an effective first step of the re-evangelisation of Europe.

Finally, a history not so much of Church institutions, but of the ways of life, struggles and questions it has given rise to in European history could help keep in the public eye the idea that even when a person has fulfilled his duties as a citizen, there are questions he would do well to engage that transcend the realm of law and politics. The realm of law, political justice and economic efficiency do not provide answers how European citizens should live their lives, nor should they. *But the idea of autonomy and human dignity underlying the political ideal of free and equal citizens is better served in a social world and public culture in which citizens are encouraged to reflect and grapple seriously with questions about how to live their lives, than a world where everything is geared towards the reinforcement and consumptive gratification of their base desires.* Most citizens with regard to most questions of any concern to them do not simply have preferences. They see themselves as facing hard questions and difficult choices with regard to what they devote their lives to and what they spend their time doing. Whether they conceive of themselves as flourishing or wasting their lives depends to a large extent on how and what they chose to prefer and not merely on whether the legal and political system helped to create an

²² See KARL HEUSSI, *KOMPENDIUM DER KIRCHENGESCHICHTE* (8TH ED., 1988), particularly concerning the period between 1878 and 1914, 448-454. For comparable developments in the Protestant tradition, see PEREZ ZAGORIN, *HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST* (2003).

²³ In the U.S., this would hardly seem worth mentioning. Most Americans are both religious and constitutional patriots. Many are constitutional patriots and not religious and some are illiberal religious zealots. For the claim that the necessary theological resources also exist within the Muslim tradition, see the discussion in NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* (2003).

environment in which their preferences can be satisfied. *The idea of thick constitutional patriotism is intimately connected to an ideal of a European civilization in which the social world and public culture encourages serious engagement with and autonomous choices made in the awareness of the rich tradition of experiments in living that is Europe's heritage.* Alongside the heritage of classical antiquity, the history of Christianity provides a rich treasure chest of questions, examples and narratives that deserve public appropriation. It is not surprising that - notwithstanding internal battles with its own demons - the Catholic Church today has become probably the most influential political and spiritual voice speaking in the name of human dignity against the dehumanising effects of market fetishism, commoditization, consumerism and a public culture fostering thoughtlessness in Europe.

As far as nationalism is concerned, how can it not be a central theme in any European history? The century and a half from the 1789 to 1945 has to be a core part of a European history that serves as a reference point for European citizens. There is no good reason to give priority or even equal weight to classical antiquity or the Middle Ages. But the focus of that history would not simply be the rise of nationalism and a description of an era of nationalism. Such a focus, no matter how critically motivated, would merely replicate the focus of much nationalist historiography. To focus, instead, on the time between the 18th and 20th centuries provides the opportunity to explore the connections, both empirically and normatively, between Political Liberalism and nationalism as they engaged each other across Europe. The focal point could be on the conflicts between a liberal nationalism that has in fact understood itself as an embodiment of Enlightenment ideals,²⁴ an ethnic nationalism,²⁵ that has dismissed these ideals, and liberal

²⁴ See ERNST HAAS, NATIONALISM, LIBERALISM, PROGRESS (1997); Yael TAMIR, LIBERAL NATIONALISM (1993).

²⁵ For a remarkable example of anti-universalist ethnic historiography that was apparently mainstream in Germany at the time, cf., the following excerpt from the introduction to a history book used in German "Gymnasien" (higher than high schools) just before WWI: The author underlines that his book is not political in the ordinary sense of party politics and that it instead reflects commitments that no reasonable person would interpret as biased: "Stolz auf unser deutsches Volkstum und die zahlreichen Übermenschlichen, die es hervorgebracht hat, die Überzeugung von der Notwendigkeit einer starken Staatsgewalt, die Überzeugung, dass wir nur dann gross und stark bleiben, wenn wir unsere *deutsch-nationale Eigenart* erhalten und pflegen, die Erkenntnis, dass es nichts Ungleicheres gibt als die Menschen, dass nichts mehr zu bekaempfen ist als die Nivellierungssucht underer Zeit, welche alle Unterschiede zwischen den menschen, *Nationene und Rassen* beseitigen möchte. Die Plutokratie, die zunehmende Demokratisierung und der Universalismus bilden die grössten Gefahren der Gegenwart." HEINRICH WOLF, ANGEWANDTE GESCHICHTE: EINE ERZIEHUNG ZUM POLITISCHEN DENKEN UND WOLLEN VI (1913). We refrain from a literal translation and have instead italicised some notions which have become world famous. The problem with translating this type of text is that the language used is, fortunately enough, no longer existent. And there are no real equivalents for sunk ugliness in German or

movements that have competed with and transcended nationalism. Such a historical focus would illuminate discussions on the European constitution and competing ideals and forces that animate it: Sovereigntist or Intergovernmentalist ideals that leave as much as possible of national political practice untouched, Eurofederalism that seeks to establish a strong state in Europe as least as an animating ideal for the future (perhaps as a mid-way stop to a world state) and supranationalism, that sees the European Union as a community whose core purpose is to civilize what Weiler has referred to as the 'erotic forces of nationalism',²⁶ without substituting or dissolving them.

III. Some Remarks on Methodology and Bias

Yet, the suggestion to write this kind of history is likely to be met with scepticism or even to be ridiculed. This is not so much because such an endeavour seriously overstretches any scholar's capacities. The hard source-based work to provide the kind of historical narrative suggested here, has, for the most part, already been done. Innumerable monographs dealing with specific aspects of such a story are already in existence. It is unlikely, then, that an attempt to write such a synthesizing account would encounter difficulties because of the lack of research upon which to build. The novelty would lie only in the arrangement and organization of the narrative. In this sense, the ambition to write such a history, though considerable, is not outrageous.

The charges such a conception of European history would face are likely to be of a different kind. The claim would be that writing history using the kind of prism suggested amounts to an ideological abuse and a political instrumentalization of history – a kind of European propaganda. It would resemble the kind of historiography characteristic of nationalist or Marxist historiography, just with a Europeanist ideology, so the claim could go. But such charges would be misdirected. They confuse the *choice of focus* – the development and understanding of basic constitutional ideals – with a bias that undermines the intellectual integrity of the narrative.²⁷ Why should the focus on the intellectual, political and legal

English. So let us just restate the message, which is very clear: universalism, democracy and equality are cast as the great moral enemy of the strong German *Volk*.

²⁶ Joseph H.H. Weiler, *To Be a European Citizen: Eros and Civilization*, in: THE CONSTITUTION OF EUROPE (1999).

²⁷ Kant's proposed account of world history may in fact be prone to such charge. Unlike the proposal here, he suggested reading history as if the purpose of world history were to bring to fruition globally human capacities and liberal ideals. In this sense his account of history was pre-committed to a progress narrative. The kind of historical writing suggested here would not be grounded in such a premise. The very idea of constitutional patriotism, is however, under girded by the *hope and desire* for of an ever-more

development of these ideas be ideological and the choice of any other topic, the history of a nation, a biography of a medieval monk, the history of aviation etc. not? All historians has their own reasons to engage in the inquiry she is engaged in and it may be hoped that those reasons do not undermine the care with which they perform their work. (In the same way, readers have their own reasons to read a particular history, yet the author of the text may hope that these reasons will not undermine, but encourage, the serious engagement with what is actually written, rather than merely seeking confirmation of pre-established understandings.) It is undeniably true that the more strongly historical narratives are connected to contemporary political disputes and identities, the greater the dangers of cognitive bias and temptations to scholarly integrity. There have certainly been terrible national and Marxist historiography and there may well be terrible European histories. But the fact that these dangers exist should not cast a general cloud of suspicion over the enterprise. There are, after all, excellent nationally focused historians and there is first rate historiography by Marxists.²⁸

Furthermore, the focus suggested here has nothing to do with self-celebration and a whitewashing of European history. Nor does the idea of general history advocate the historiographical equivalent of the Preamble to the Draft Constitutional Treaty, as originally drawn up by the Convention. Instead of celebrating a continent "that has brought forth civilization", as the original Preamble declared, there would be ample space for the "bitter experiences" that the revised Preamble refers to. *A history that obtains its focus from human rights, democracy and the rule of law in Europe is to a significant extent the history of the fight against these ideals, their hypocritical abuse or their complacent misunderstanding.* Both the ideals themselves as well as histories that focus on them are more likely than not to give support to the self-reflective political and legal culture that these ideals have, over time, fostered in Europe. They do not invite a glib, flat and self-congratulatory *hubris* but counsel moderation and a thoughtful tone. Undoubtedly, any history will be and deserves to be contested and criticized with regard to what it leaves out, and with regard to what it emphasizes. But, on the whole, the enterprise of writing European histories that obtain their perspective from the constitutional ideals of human rights, democracy and the rule of law is likely to spur the kind of debates and engender the kind of disagreements

perfect understanding of the basic principles of justice and their ever more perfect realization in the polity. But this is a political hope. The rhetorical invocation of such a hope is an integral part, for example, in American political rhetoric at Party Conventions or Presidential Inaugural Addresses – in the idea of a more perfect and inclusive Union.

²⁸ A stellar example for this is Eric Hobsbawm, whose major work includes, *THE AGE OF REVOLUTION* (1962), *THE AGE OF CAPITAL* (1975) and *THE AGE OF EMPIRE* (1987) which became a defining work of his chosen period, the "long 19th century", from 1789 to 1914. See, also, *THE AGE OF EXTREMES* (1994) extending his coverage to the 'short 20th century'.

that are likely to foster the development of a variety of rich and complex European identities that crystallize around the appropriation and interpretation of constitutional ideals. Teaching what would then emerge as the settled view in textbooks in schools all over Europe could make a valuable contribution to educate loyal European citizens critically.

IV. From European History to European Legal History

In order to provide a more concrete idea of what such an account might look like, the following provides a brief outline of the core structure of a possible European *legal history* that is committed to such an approach. The history proposed could also be called the HISTORY OF LEGAL THOUGHT AND PRACTICE, to distinguish it from other, more positivist conceptions of law and legal history. By the History of *European* Legal Thought and Practice, I mean a history of the basic legal institutions and the basic legal categories that were thought to be central for mapping and subdividing the world of law as well as the basic ideas that supported these institutions and categories.²⁹

Clearly, *legal history* is more narrowly focused than political and social history, and is less apt to play a role in the development of thick constitutional patriotism for EU citizens generally. In legal history, many of the great political battles and social transformations appear only in the cold and pale form of the sediments that they have left in the form of legal institutions and basic legal categories. But the focus on legal history here is not just because of relative expertise: after having taught a course with such a structure for some years, I have gained some confidence in the utility of the approach. Instead there are two more substantial reasons for focusing on European legal history here.

First, legal history has an important role to play for the development of a common legal culture that shapes the identity of European jurists. Europe's constitutionalization – the development and gradual acceptance of the doctrines of direct effect, supremacy, human rights, etc., is to a significant extent the work of European jurists. It may be a mistake to imagine a role for lawyers in Europe that replicates Savigny's idea of the legal scholar as the embodiment of the legal community. But, in a social and political world in which constitutional patriotism is the social and cultural cement, jurists are likely to continue to play a central role in

²⁹ The approach to legal history described here has much in common with the approach to Comparative Law developed by William Ewald, *Comparative Jurisprudence (1): What was it like to Try a Rat?*, 143 PENNSYLVANIA LAW REVIEW 1889 (1995). In important respects it merely defines the object of study (Law) in terms of a non-positivist account of law along the lines of those developed by RONALD DWORKIN, *LAW'S EMPIRE* (1986).

the future. It would be a failure of European historiography if European lawyers in the future thought of European history as the history of the European Union and its law, plus a disparate number of national legal histories (call this the '*sui generis*' approach to European legal historiography: The European Union not as an integral part of a common tradition of political and legal practices, but as a peculiar add-on that does not quite fit any mould).

Second, outlining the structure of any kind of European history is generally full of dangers. It may seem to border on the ridiculous to attempt to do so in a few thousand words. The impression of flatness, due to a combination of lack of detail and sweeping generalizations may give further support to those who are sceptical about such an endeavour in the first place and may earn the scorn of many a self-respecting historian. The focus on Germany, France and Britain may confirm the suspicions of those who can see nothing in such a choice but an exercise to silence less powerful voices in the name of great power cultural hegemony. What will be offered here is little more than a list of themes and how they are related – much like the syllabus of a course on the history of European Legal Thought and Practice. Even as such there is a great deal missing in this outline, which, some would insist, should be included, just as some may be surprised at what has been included. *If this brief structural outline is presented here nonetheless, it is because, all inadequacies and contestable idiosyncrasies notwithstanding, I hope it will at least suggest one important point to those inclined to read it in a spirit of generosity: much can be gained by taking the perspective suggested here.* At least an initial scan of the English language accounts of European legal history seems to suggest that the fruits of the history of legal thought and practice hang sufficiently low, for even the most basic structural outline to be suggestive of what can be gained once the real work begins and scholars adopt the approach suggested.

The core problem is that traditional 'grand synthesis' European legal history, as good as it sometimes is as a matter of historical craftsmanship and lucidity, is too often constrained by ideas, basic concepts and disciplinary divisions of approximately a century ago: an age of high legal positivism across much of Continental Europe, strongly shaped by the dominance of private law as the paradigm of law, with clear cut divisions between private law and public law, national law and international law. Furthermore, the history of European Law is too often equated with the history of private law³⁰, very much in line with late 19th

³⁰ See, for example, RAOUL C. VAN CAENEGEM, *EUROPEAN LAW IN THE PAST AND FUTURE* (2002), which, contrary to what the title suggests, focuses exclusively on private law, with the exception of references to the American constitution as a holy book of law, comparable to the *Corpus Iuris* and the *Code Civil* as understood by the School of Exegesis. This is all the more surprising given that the author has also written a book a *HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW* (1995); see hereto the

century preconceptions of the primacy of private law. Frequently, it is unhelpfully focused on questions of little significance for contemporary purposes: For the most part, the core focus is Roman law, Feudal Law, the Glossators, Commentators, Canon Law, the Law Merchant, the *Ius Commune*, the Common Law in England, the Enlightenment and Codification as core themes and then, under headings such as 'new trends in law' the discussion of a host of developments in various areas of law - including public law - in the 19th and 20th centuries, topped off with some EU Law.³¹ There are some Histories of International Law of course, and even European histories of Constitutional Law.³² Very much in line with a positivist conception of legal scholarship, there are very few synthesizing narratives of European legal histories that focus on the historical contingency of these divisions and illuminate their normative significance in light of the social context in which they arose.³³

It is not clear why these kinds of narratives should be assigned as compulsory reading for the education of contemporary European jurists. Naturally, there will be students who delight in emerging themselves in radically different worlds or they may simply take an antiquarian's fancy for things old and venerable or enjoy the arcane of tracing concepts, doctrines or legal institutions through history - all respectable qualities. But, as valuable as contributions of this kind may be for the purpose of enriching the treasure-chest of historical knowledge, they are not the kind of narratives that could plausibly become the focal point of a common European identity, or even the identity of the professional caste of European jurists. As they do not aspire to such a function, this is not a criticism. It merely suggests that a different approach is required if historiography is to have such a function.

C. Some Ideas on a Structure for European Legal History

What, then, could the basic structure of an outline of an account that aspires to such a function look like? As a *legal* history, it focuses on public institutions, the basic ideas that legitimate and guide their practices, as well as the basic legal categories that are used to map the world of law and to define the discipline's sub-divisions.

insightful comments by Morag Goodwin, in 1:2003 ANNUAL OF GERMAN & EUROPEAN LAW 593 (RUSSELL MILLER/PEER ZUMBANSEN EDS. 2004).

³¹ See, for example, O. ROBINSON/T. FERGUS/WILLIAM GORDON, EUROPEAN LEGAL HISTORY (3rd ED., 2000).

³² See, for example, Raoul C. van Caenegem's history of western constitutional law (note 30).

³³ There are some exceptions, of course. One remarkable exception is HAROLD BERMAN'S, LAW AND REVOLUTION (1983), which establishes the common roots of 'western' legalism in the Gregorian revolution of the 11th century and the 'legal science' taught in Bologna and other early universities. Other examples include HANS HATTENHAUER, EUROPÄISCHE RECHTSGESCHICHTE (1999).

This approach to legal history is, in some sense, not positivist: it suggests an intimate connection between legal practice and the normative ideals that animate it. It would be the historiographical equivalent of what, in jurisprudence, would be called a 'law in context' approach. It connects the description of formal legal structures with the normative ideals underlying it and the political and social forces that give rise to it, shape it and sustain it.

Such a historical account needs to exhibit two features. First, it would have to address the legal implications of the great ideological and political battles against those who challenged the enlightenment political liberal tradition and its commitment to human rights, democracy, and the rule of law. Second, it would have to provide an account of how those who saw themselves as committed to these ideas translated these ideals into concrete institutional arrangements and basic legal categories in their respective social and political contexts. This implies, of course, that a commitment to human rights, democracy, and the rule of law does not simply translate into a particular constitutional blueprint or a set of basic legal categories, just as it does not immediately translate into a particular set of policies. Instead, there have been extensive and deep changes in the dominant understanding of the institutional and categorical implications of a commitment to political Liberalism. European legal history does well to focus on these transformations.

Perhaps, a plausible starting point for such a narrative might be the early Middle Ages and the Gregorian Revolution with its violent separation between the ecclesiastical and secular polity. As Harold Berman argues, it is after the Gregorian Revolution that the core characteristics of the Western Legal Tradition are all in place.³⁴ The principle characteristics of this tradition are "a relatively sharp distinction between legal institutions (including legal processes such as legislation and adjudication as well as the rules and concepts that are generated by these processes) and other types of institutions",³⁵ legal professionals as a *corps* of individuals charged with administering the law, the institutionalization of legal analysis in institutions of higher learning guided by the idea of law as a coherent whole – a *corpus iuris*, a system, and the "co-existence and competition within the same community of diverse jurisdictions and diverse legal systems."³⁶ The focus of this part of the story would be the development of specifically legal concepts and techniques that are the necessary ingredients for any conception of 'the rule of law'.

³⁴ HAROLD BERMAN, *LAW AND REVOLUTION* (1983). See, also, MAURIZIO LUPOLI, *THE ORIGINS OF THE EUROPEAN LEGAL ORDER* (1999).

³⁵ *Id.*, 8, 9.

³⁶ *Id.*, 10.

The central focus for such a narrative, however, is provided by the Enlightenment. The American and French Revolutions are the political and legal *Big Bang*. Locke, Rousseau and – most of all – Kant,³⁷ along with the authors of the Federalist Papers, are the intellectual protagonists of the modern constitutional tradition and of Political Liberalism. The radical nature of this revolution for the understanding of what law is about is not always appreciated. The very foundations and purpose of law were newly defined in a way that still resonates today and that reshaped the understanding of even those parts of the law that are of more ancient origin.

The central revolutionary tenets are captured in the opening of the second paragraph of the American Declaration of Independence as well as core passages of the French Declaration of the Rights of Man.

The relevant paragraph in the Declaration of Independence reads:

“We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness-That to secure these Rights Governments are instituted among Men , deriving their just powers from the consent of the governed...”

The core passages of the French Declaration of the Rights of Man read:

Art. 1: Men are born and remain free and equal in respect of their rights. Social distinctions, therefore, may only be founded on common utility.

Art. 4: Liberty consists in being able to do anything which does not injure another: therefore the exercise of the natural rights of each man has no limits other than those which assure the other members of society the enjoyment of the same rights. These may be determined only by the law.

Art. 6: The law is the expression of the general will. All citizens have a right to concur personally, or by their representatives, in its formation....

³⁷ It has to be noted, however, that the focus of Immanuel Kant's practical philosophy has generally been neglected among legal and political thinkers. Until the 20th century the reception of Kant's practical philosophy had been focused on his *moral* philosophy (the “GRUNDLEGUNG DER METAPHYSIK DER SITTEN” in particular) and not his legal and political philosophy. The golden age of the productive reception of kantian *legal and political* philosophy were the last 30 years of the 20th century.

Here, there are three core ideas that are both complex in themselves and stand in a complicated relationship to one another. They have been the subject of political, legal and intellectual struggle ever since. The first concerns individual rights (or, as Kant insisted, the one foundational human right) and defines the limits and purpose of government: The purpose of government is to secure the rights of individuals, understood as a general right to liberty whose limits need to be circumscribed with regard to other individuals. Lines should be drawn in a way that maximizes the general welfare. The second concerns the idea of the rule of law: All infringements of liberty – all the line-drawing exercises between competing rights by public authorities in the general interest – have to take the form of law. The third concerns democracy: all laws must be enacted in a procedure that allows for the adequate participation of citizens, generally through elections or referenda.

A further characteristic is the absence of both God and religion (or any other perfectionist ideal) as a point of ultimate reference for legal and political life. Many will find it plausible that the ultimate roots of these rights lie in the fact that god has created persons in a certain way, and that rights are instrumental to human flourishing. Indeed the *invocatio dei* was still a common feature in 18th century constitutionalism. But when the authors of the Declaration of Independence declared the foundational principles of Political Liberalism as self-evident, it created the possibility of thinking of Political Liberalism as the focal point of a consensus that, for the purposes of organizing public life, *avoided* deeper questions of theological foundations and ultimate purposes. It is the kind of public philosophy that does not require deep theological or metaphysical support for its elaboration *in public life*, even if all kinds of competing theological and philosophical accounts exist that can provide such grounding³⁸ and do provide such grounding for individual citizens. The tradition of Political Liberalism as a *public* philosophy, then, can be regarded as the most celebrated and politically potent historical example of what Cass Sunstein has called an ‘incompletely theorized agreement’.³⁹

³⁸ The best known account of Political Liberalism as a focal point of an overlapping consensus between reasonable comprehensive doctrines is presented in JOHN RAWLS, *POLITICAL LIBERALISM* (1993). John Locke’s and Immanuel Kant’s account of Political Liberalism are both anchored in a comprehensive philosophy. For a recent study on Locke in this regard see JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE’S POLITICAL THOUGHT* (2003). An influential contemporary account grounds rights in the transcendental presuppositions of speech, see JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* (1990) and Robert Alexy, *Diskurstheorie und Menschenrechte*, in: *RECHT, VERNUNFT, DISKURS* 127 (1995).

³⁹ CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

To an important extent the next two hundred years are all about how these basic ideas were digested and their institutional and conceptual implications assessed. They were resisted and denounced as shallow, incoherent and corrupt. But they were also embraced, interpreted, challenged and then reinterpreted. Painting with a very broad brush and the with the usual *caveats* with regard to periodization it is helpful to distinguish between three periods in order to highlight the structure of an account that uses the foundational political and legal values of right, democracy and the rule of law as its focal point.⁴⁰ The first is from 1789-1919, the second is from 1919-1992 and the third, which we still live in today, started in 1992 with the ratification debates concerning the Treaty of Maastricht. Each period is differentiated from the previous one by the specific opposing ideology, political and social force that challenges the political liberal tradition wholesale,⁴¹ and a specific understanding of the tradition of Political Liberalism as reflected in the basic constitutional ideas and basic legal categories, which were developed as a response to these challenges.

I. 1789-1919: The Ancien Regime vs. Classical Legal Liberalism

The first period extends roughly from the French Revolution to the end of World War I. The enemies of Political Liberalism during this time were the forces of Restoration. The monarchs, the nobility and the clergy fighting were all fighting for their privileges in the name of historically grounded and religiously sanctioned legitimacy. The political battles fought by the liberals were against the monarchy, the privileges of the aristocracy and the church. The specific nature of the battles could be revolutionary, as was the case with France going through a number of revolutions and constitutional regimes in the 19th century before achieving relative stability in the Third Republic. They could also take the form of a more gradual development, as was the case in Britain, where Dicey (still a staple reference in much of contemporary British scholarship)⁴² articulated the mature constitutional law of the 19th century at a time when the position of parliament against the crown had solidified while the franchise had gradually been extended. Germany, on the other hand, produced a failed and feeble attempt at a liberal revolution in 1848 and was late to establish a modern liberal constitution in the form of the ill-fated Weimar constitution in 1919. By the end of World War One, the old European

⁴⁰ For a different periodization focused on transformations of law and legal thought see Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 SUFFOLK UNIVERSITY LAW REVIEW 632 (2003).

⁴¹ For an illuminating analysis of the range and structure of these attacks see STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* (1993).

⁴² ALBERT V. DICEY, *THE LAW OF THE CONSTITUTION* (1885).

world – the *ancien regime* – seized to be a significant political force strong enough to resist the tide of political liberal ideas.

The basic understanding of human rights, democracy and the rule of law which developed in this period are familiar enough. Characteristic for this period are the constitutional struggles for the recognition of the people's consent rather than the sovereignty of the monarch as the basis for political authority, expressed in the process of constitution-giving. Other constitutional themes included the recognition of the centrality of the role of parliament (as opposed to the monarchically dominated executive branch), the strengthening of the first – popularly elected – parliamentary chamber against the second more aristocratic chamber (be it the British House of Lords, the French *Senate* or the German *Bundesrat*) and the extension of the franchise (to those without property, to women and by lowering the age requirement, often from 25 to 21).

Attempts to generally constrain executive authority by law's formalities and the emergence of a field of administrative law were also characteristic of this period. Despite this, citizens failed to obtain the kind of protection from courts for acts against officials as they obtained in case of actions against private individuals. On the continent, the judicial control of the executive was underdeveloped, as the executive branch insisted on control over the executive review process and, with few exceptions and civil courts were excluded from reviewing official actions. In Britain and the United States, it had long been the pride of the common law tradition to insist that, under 'the rule of law' the distinction between private citizens and officials (or public and private law) was not relevant for the kind of protection that courts afforded citizens. But to some extent doctrines of sovereign immunity, official immunity as well as limitations on the kind of remedy that court's would award against officials had a similar effect.

Public law, being so closely connected to struggles against the ancient regime during most of the 19th century in many jurisdictions, was regarded as closely aligned to politics. It could only get a foothold in universities and share in the prestige of the legal discipline, if it positioned itself as above the fray of ideology – something that could be done only by adopting a clear positivist focus. The positivist focus also allowed jurists more generally to share in the prestige of the 'natural sciences' that were very much focused on classifying and systematizing observable phenomena.

In such a political and social context, *constitutional law* lagged behind other disciplines. There was no practice it could latch on to. To the extent that a constitutional text made reference to rights at all, these were not generally susceptible to judicial enforcement but merely directives to the legislator (mainly of

symbolic significance, if at all). Perhaps the core issue of *International Law* in the increasingly positivist climate in the 19th century was how it could exist at all given the lack of an international sovereign, though a less conceptually driven positivism soon found its basis in the fact that states did in fact engage in Treaty making and had use for the kind of expertise that lawyerly exegesis can provide.

This was the time of triumph, however, for private law. The study of law at the continental European faculties was primarily the study of private law with freedom of contract, property and torts at its core. Private law was the domain of legal reasoning properly so called – whether it took the form of the common law splicing precedent or debates concerning codification. Private law provided for a sphere in which private individuals governed themselves – with the common law and the codes functioning as something akin to the constitution of an autonomous civil society. With the move from status to contract, here, at least the revolutionary ideals could find their firm foundation in the work of legal scholars. There was much methodological debate about what made private law so susceptible to juristic reasoning. Was it the principles of natural law at work that provided the necessary background consensus? Was it the work done by Roman Jurists and their historical successors, the Glossators and Commentators? Was it the conceptual structure of the field? Furthermore, there was a significant divide between the common law and the civil law with regard to the kind of institution that should best be trusted to develop and work out the law. Though the case of the *Code Napoleon* in particular is more complicated, scholars would do much of the work on the Continent, sanctified by legislatures in the form of enactment of a code. In the common law world, the courts were in charge of developing and refining the common law. The courts on the Continent, on the other hand, manned by career judges rather than senior members of the bench, were to be the mouthpiece of the law and nothing more. In France, in particular, the idea that everything had to be traceable to a legislative act was strong. Here, the judicial branch was, as Montesquieu put it, *en queque facon nulle* and Napoleon was to have exclaimed ‘the code is lost’ when he heard about the first commentary that was published on it.

But there was a consensus across the common law-civil law divide on one thing. Legislative intervention in private law – if it did not take the form of establishing a code – was regarded with suspicion and presumed to be undue political intervention. Outside of the code, the legislators should stick to legislating public law and perhaps help provide the transportation and communication infrastructure which allowed markets and the private law society to flourish. This *ethos* was not restricted to Continental Europe and the idea that the code provided a complete statement of the private law. In common law systems a similar *ethos* pervaded legal practice. Legislative intervention that established rules deviating from

common law baselines were frequently struck down in the US as unconstitutional or interpreted narrowly by British courts by the late 19th and early 20th century.

More generally, great significance was attached to the distinction between (1) law (grounded in authoritative pronouncements ultimately traceable to a sovereign) and politics (assertion of will), (2) private law (reason, best left to legal experts) and public law (result of political choice enacted by the relevant authority) and (3) national law (grounded in a constitution through which people govern themselves) and international law (a code of conduct for a world of sovereign states in the limited domain of foreign affairs grounded in state consent). In conjunction with a constitutional ideal of parliamentarianism (often compromised by a constitutional status for monarchs), these distinctions and preoccupations are the characteristics of what I call *Classical Legal Liberalism*. Classical Legal Liberalism, then, describes a particular constellation of ideas that spelled out how the abstract principles of Political Liberalism were translated into a concrete institutional order and basic legal categories. Among private lawyers, in particular, a great many of these ideas still exert influence in Europe even today.

II. 1918- 1992: Totalitarianism vs. Liberal-Democratic Constitutionalism

In World War I the *ancien régime* had committed political suicide. At this point, however, different anti-liberal forces that Hannah Arendt was the first to group together and call 'totalitarian' were on the rise and overthrew many liberal democracies in Europe. Fascism and Communism were the greatest challenges to Political Liberalism during this period and tore Europe apart in what has been called a European civil war, with German Nazism playing the most devastating role. Political Liberalism was chastised once again, this time by those speaking in the name of the two strongest political forces of the time: nationalism and socialism. Political Liberalism was now scolded as the ideological superstructure of the bourgeoisie, a Jewish invention grounded in a psychology of deracinated nomads, not compatible with the honour and glory of the nation. Whereas fascism was discredited after the destruction and atrocities of World War II, dictatorships lingered on in parts of Southern Europe until the 1970s. Communism was a force that, in Western Europe after World War Two was either non-existent (UK), weak and prohibited (West Germany), or parliamentarily tamed (as in France and Italy). However, it remained the reigning ideology and political practice in Eastern Europe until 1989 – in part enforced on the Eastern European Peoples by the Soviet Union as exemplified by the Soviet intervention in Hungary in 1956 and in Czechoslovakia in 1968.

The confrontation with the social, economic and political challenges that brought forward the ferocious political energies that made fascism and communism

possible also changed dominant ideas about the institutionalization of the ideals of human right, democracy and the rule of law. Political Liberalism - when it ultimately prevailed - no longer resembled Classical Legal Liberalism. Both nationalism and socialism left deep traces in the legal imagination and found their imprint in a constellation of ideas that I will refer to as Liberal-Democratic Constitutionalism.

The most important politically salient transformation of this time period is the radical expansion of state regulation by the legislature, a massive expansion of the administrative capacities of the executive branches (the rise of the administrative state), used primarily to manage the economy and redistribute wealth (the social welfare state). Besides the remarkable expansion of administrative capacities and institutions, the perhaps most interesting institutional change for legal historians is the advent of constitutional courts and the rise of judicially enforceable constitutional rights. In the following, I will restrict myself to a brief account of how the understanding of rights changed the dominant understanding of Political Liberalism and helped undermine many of the basic categories of Classical Legal Liberalism .

After World War One, the idea that property rights and freedom of contract were the pillars for an apolitical social sphere that was free from regulatory intervention - subject to many early challenges, but exhibiting great staying power - became obsolete. Instead, the classical liberal state was transformed into what Carl Schmitt - describing political practices in the pre-Fascist late Weimar republic - called a total state. A total state was a state in which a 'motorized legislator', propelled by various interest groups, enacted antitrust law, labour law, public health law, *etc.*, to address economic and social concerns. This shattered the idea of the autonomy of private law as the self-constitution of an apolitical civil society. It also undermined the idea of a nightwatchman state in favor of a state whose task was to help ensure the social welfare of its citizens. By the 1960s, the question was no longer whether it was acceptable for public authorities to regulate markets. The only relevant question that constitutional lawyers in some jurisdictions squabbled over was whether the general socialization of the means of production was compatible with a commitment to property, contract and the freedom to pursue a profession, or whether these guarantees amounted to an institutional guarantee to some form of a market economy (however it was regulated).

As a corollary of the radical expansion of public policies generally and the regulatory authority of the executive branch (and not just the experience of fascism from 1933-1945), the idea of the protection of rights would take on a radically different form after World War Two. In Germany - with a constitutional tradition perhaps as influential in the 20th century as its private law tradition has been in the

19th - the dangers of the total state, it seemed, could only be tamed by what might be called a *total constitution*. This is a constitution that not only immunizes core structural features of the constitution from political challenge by entrenching them, while authorizing the criminal and political persecution of the enemies of the constitution. Of greater practical importance is that it incorporates a comprehensive system of constitutional rights. In German constitutional law, the scope of constitutional rights is as expansive as it can be. It includes a general right to liberty and a general right to equality. A great many politically salient issues would become the subject matter of constitutional disputes resolved ultimately by a constitutional court. Judicially enforceable rights, then, were no longer the rights guaranteed by private law or the whim of the ordinary legislator as a matter of public law. Instead a comprehensive system of rights would enable any individual adversely affected by actions of public authorities to seek a legal remedy by means of a constitutional complaint that her constitutional rights have been violated.. Besides bringing a new judicial actor into play that had the authority to set aside acts by parliament - a constitutional court as first conceived by Kelsen and institutionalized in Austria in 1920 - this also had far-reaching implications for the understanding of two core distinctions central to Classical Legal Liberalism.

The first concerns the relationship between law and morality. Rights contained in national constitutional rights catalogues in Continental Europe are widely understood as abstract principles. When courts are enforcing rights they are not perceived by citizens to enforce the terms of a bargain between powerful groups who originally negotiated them. Nor are rights generally well understood as specific guarantees that respond to and seek to avoid the repetition of specific historical experiences (though of course there are specific guarantees of that nature, too). Instead, constitutional rights in Continental Europe are widely believed to be the codification of rights that all people can make a claim to in virtue of their humanity or in virtue of being a citizen in a democratic polity. These rights are not a limited set of hard and fast rules. Instead they are often highly abstract principles covering large areas of life and requiring some form of proportionality analysis on application. Proportionality analysis as it is understood in much of Europe, however, is little more than a structure that helps assess whether, all things considered, the reasons given for a particular infringement of a constitutionally protected interest can be considered good reasons in a liberal democracy. With a constitutional court charged, at the behest of an affected individual, to assess whether a measure is reasonable, the relationship between law and political morality shifts. Instead of a clear divide between law and political morality, constitutional adjudication brought general practical reasoning (political morality or simply politics) to the heart of adjudication. Not surprisingly, perhaps the most influential legal theorists reflecting on the jurisprudential significance of this

practice, Ronald Dworkin⁴³ and Robert Alexy,⁴⁴ defend a conception of law that establishes a deep connection between law and political morality. Both derive their conclusions by focusing on the practice of adjudication of rights. Both radicalize the positions adopted by early post-World War Two legal thinkers – Lon Fuller⁴⁵ and Gustav Radbruch⁴⁶ being perhaps the most prominent among them – who sought to establish a weak link between law and political morality. This is a clean break with the positivism that characterized mainstream scholarship and the self-understanding of legal practitioners in the world of Classical Legal Liberalism.

This *normative turn in jurisprudence* challenged and became the main competitor to the ‘high positivism’ exemplified by Hans Kelsen⁴⁷ and H.L.A. Hart,⁴⁸ which followed or survived the jurisprudential burst of creativity exemplified, for example, by the Weimar debates about method (*Methodenstreit*)⁴⁹ or Scandinavian Realism⁵⁰ in the first half of the century. Both the practice of constitutional rights enforcement and the normative turn in jurisprudence were supported by a public climate in which ideological conflict was constrained by the political liberal vocabulary that was used to make claims. Not only was fascism dead as an ideological movement and political force, subtle continuities in the interstices of legal practice notwithstanding.⁵¹ Communism, too, by the early seventies, had lost its appeal in many western countries. Intellectuals no longer lionized the USSR after its intervention in Prague in 1968 and the publication of Solzhenitsyn’s novel on the ‘*Gulag Archipelago*’, which was awarded the Nobel Prize in 1970. Furthermore, there was a general sense that the economic model of central planning was unlikely to be superior to a market economy if the latter was socially tamed and heavily regulated (the Third Way as it was understood then).

⁴³ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), *LAW’S EMPIRE* (1986).

⁴⁴ ROBERT ALEXY, *THEORIE DER JURISTISCHEN ARGUMENTATION* (1978) (engl. *Theory of Legal Argumentation* [1989]), *THEORIE DER GRUNDRECHTE* (1986) (english: *A Theory of Constitutional Rights* [2002]).

⁴⁵ LON FULLER, *THE MORALITY OF LAW* (1963).

⁴⁶ GUSTAV RADBRUCH, *GESETZLICHES UNRECHT UND ÜBERGESETZLICHES RECHT* (1945).

⁴⁷ HANS KELSEN, *REINE RECHTSLEHRE* (2nd ed., 1960, 1st ed., 1928).

⁴⁸ HERBERT L.A. HART, *THE CONCEPT OF LAW* (1960).

⁴⁹ See the useful compilation of materials contained in: *WEIMAR: A JURISPRUDENCE OF CRISIS* (ARTHUR JACOBSEN / BERNARD SCHLINK, EDs., 2000).

⁵⁰ See, for example, ALF ROSS, *TOWARDS A REALISTIC JURISPRUDENCE IN LAW* (1946).

⁵¹ See *DARKER LEGACIES OF LAW IN EUROPE* (CHRISTIAN JOERGES / NAVRAJ S. GHALEIGH, EDs., 2003).

Furthermore, the death of all competitor ideologies was hastened by the fact that as the communists marched into a Prague where reformist students celebrated a new culture of freedom in the Spring of 1968 only to be crushed by Soviet tanks, in liberal democracies constitutional courts frequently protected the liberties of demonstrators and 'deviants'. With the successful reformist channelling and blunting of the student movements by the early seventies, support for courts authorized to strike down public legislation if it infringed individuals interests without support by good reasons was strong. But public reason did not just flourish in the reasoning of constitutional courts. More generally, the last three decades of the 20th century were conducive to an intellectual environment in which philosophers and political theorists rediscovered the 18th century tradition of practical reason.⁵² In addition to political and constitutional theories about rights in the 1970 and 1980s, deliberative democracy begins to replace Schumpeterian Democracy and other theories of Parliamentarianism as the most prominent paradigm for thinking about democracy by the early 1990s.

The second implication of the expansive conception of rights described above concerns the relationship between private and public law. Whereas the turn to what Schmitt called the total state had revealed private law to be as much a subject of political decision-making as public law, now constitutional rights –through doctrines such a '*mittelbare Drittwirkung*' or 'horizontal effect' – were increasingly understood to be applicable as a standard for assessing not only public law, but also the legislation and interpretation of private law. Not only have both public and private law been subject to political intervention since the first part of the 20th century. In the second part, private law norms and their interpretation by civil courts have both been subjected to constitutional rights scrutiny by a constitutional court whose work is the focus of constitutional lawyers. Questions of the landlord-tenant relationship or debtor-creditor relationships are ultimately decided by a constitutional court on constitutional grounds. The salience of the public law/private law divide then, still central to the organization of the legal faculties and courts in Continental Europe, has been further undermined and the private law establishment challenged.⁵³

⁵² The normative turn in jurisprudence was supported by the rehabilitation of practical reason and political philosophy following the hugely influential publishing of JOHN RAWLS, *A THEORY OF JUSTICE* in 1971 and a slew of major monographs on political philosophy ranging from ROBERT NOZICK, *ANARCHY STATE AND UTOPIA* (1974) to JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG* (1992). The dominant strand of this philosophizing, perhaps exemplified by Rawls and Habermas, is strongly influenced by Kant.

⁵³ See hereto Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 Mich. L. Rev. 387 (2003); for an account of the different state/society and public/private narratives that inform the evolving doctrines of horizontal effect: see hereto Peer Zumbansen, *The Law of Contracts*, in: INTRODUCTION TO GERMAN LAW CH. 6 (MATHIAS REIMANN/JOACHIM ZEKOLL EDS. 2005); *ibid.*, *Quod*

More generally, the 20th Century saw private law replaced by public law – and constitutional law more specifically – as the master discipline in law. The great legal debates of the 19th Century that resonated beyond the halls of the law faculties are the struggles surrounding the major codes, worked out to a large extent by scholars and ultimately adopted by parliaments. The greatest focus of legal attention in the 20th Century has been the constitution as a legal document, the constitutional judiciary as an institution and the struggle for an understanding of constitutional rights and their relationship to democracy as a theoretical challenge. Together with the rise of the administrative welfare state, these changes mark the transformation from Classical Legal Liberalism to what could be called Liberal-Democracy Constitutionalism.

These transformations and preoccupations, in conjunction with the dark shadow of the Cold War, helped to perpetuate and to further strengthen the traditional nationalist and statist understanding of the world of law. Notwithstanding some deep theoretical debates among international lawyers in the first decades of the 20th century, the growth of International Law did nothing to shake belief in the basic nature of the distinction between national and international law.⁵⁴ Nor did International Law become a required subject of study, the way that Constitutional Law became a required subject of study in most places by the 1980s. International Law did develop and shed its ontological anxieties, as the ILO, the League of Nations to the UN, the establishment of the World Bank, the IMF and the GATT, as well as important human rights Treaties (such as the ECHR and the ICCPR) provided legally trained professionals texts and decisions to engage. International Law flourished, but it flourished as a specialized discipline. It was still animated by an *ethos* to fulfil International Law's bright future.⁵⁵ Clearly, the European Communities provided a remarkable supranational framework for the legal integration of EC Members after WWII. But it was not widely perceived as a politically relevant actor during most of this time. From the early seventies until the mid eighties, those who discussed the EC most likely would discuss what was then

omnes tangit: Globalization, Welfare Regimes and Entitlements, in: THE WELFARE STATE IN AN ERA OF GLOBALIZATION 135-173 (EYAL BENVENISTI AND GEORG NOLTE EDS. NEW YORK 2003).

⁵⁴ Characteristically neither in the general jurisprudential account provided by Ronald Dworkin or Robert Alexy addresses International law, unlike their positivist predecessors Hans Kelsen and Herbert L.A. Hart, that devote special chapters to International Law. Notably both Kelsen and Hart's jurisprudence are not especially grounded in constitutional law – they were writing before the adjudication of rights had become an important phenomenon in Europe. In addition Kelsen, at least, formed his major ideas during the inter-war period, in which International Law flourished. Not surprisingly his account of International Law is the least sceptical.

⁵⁵ See David Kennedy, *Tom Franck and the Manhattan School*, 35 N.Y.U. J. INT'L L. & POL. 397 (2002)

called the problem of *Eurosclerosis*. Even if the European Court of Justice (ECJ) had staked its claim that EU Law is the supreme law of the land in the early sixties, this was something of interest and enthusiasm for the International lawyers that specialized in EC Law. Even though the subtle and deep transformation of Europe⁵⁶ - the process of constitutionalization of European Law- had already occurred by the late eighties, it was something the wider public would wake up to only later. It occurred only when the Treaty of Maastricht threatened to take away people's national money and give them European citizenship in return.

III. Post 1992: Bread and Circus vs. Constitutionalism Beyond the State

With the fall of the Berlin Wall and the end of the Cold War, it seems that all the major ideological competitors to Political Liberalism and the master discourse of human rights, democracy and the rule of law have exhausted themselves. We are all Political Liberals now. Fundamentalist Islam, though a political challenge as a matter of domestic and foreign policy, and a security issue as far as it is linked to terrorism, is unlikely to become a politically potent force across Europe to seriously challenge Political Liberalism. Nor is it likely that a new nationalism or a new Christian religious fundamentalism will be able to threaten the basic commitments of Political Liberalism in Europe. But the political liberal tradition does face a serious threat. By perfectly tracing Hegelian dialectics, it is becoming apparent that the absence of a real enemy has unleashed intellectual and political forces that suggest that the days of grand political narratives, including the narratives surrounding human rights, democracy and the rule of law, are over. There are two mutually supportive trends that undermine the public salience of the liberal political tradition and hinder the development of a meaningful identity which is focused on constitutional patriotism.

First, if, as is frequently claimed in Europe, the contemporary constellation is a post-statist, post-national, post sovereign one, is it not only fitting that the basic ideas of the political liberal tradition, developed to tame and guide the exercise of public authority within the framework of the state, have also run their course? Is it possible for a post-statist world to exist, that is not also postmodern? Are there not an irreducible plurality of communities, identities and spaces for political and legal intervention? Should not the pretensions of grand narratives - even the grand narratives involving human rights, democracy and the rule of law - give way to contextual, local engagement that is appropriately sensitive to difference? Grand narratives and the master vocabulary they insist on are bad, because they tend to

⁵⁶ The authoritative account of this process remains Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

do violence to the colourful variety of legitimate claims that the social, political and legal world should be designed to respond to.

Second, this critical discourse emphasizing the local and contextual nature of all legal conflict, as well as pluralism and diversity more generally, dovetails nicely with economic and utilitarian neo-liberal ideologies, in which there are only preferences and institutions - preferably markets - that need to be designed to maximize their realization. Here, the Marxist prediction that a *bourgeois* society will commodify all relationships and subject everything to market rules seems remarkably on point. The legal profession, certainly, is today conceived and regulated merely as a provider of services. Rather than guardians of public reason or the lawyer statesmen, the shrewd and appropriately specialized corporate lawyer is becoming the guiding ideal underlying legal education. On the other hand, the public sphere is increasingly trivialized as it is governed by economic imperatives that make it increasingly unsuitable as a medium for serious political deliberations.

From the Treaty of Maastricht to the Constitutional Treaty, the language of constitutionalism - citizenship, right, democracy, constitution - has been fully appropriated by the European Union. Yet, there is a temptation to see this as an unsuccessful cover up, a somewhat helpless attempt to downplay the fact that European electoral politics plays practically no role on the European level. The relationship between European citizens and their polity is not defined by the idea of citizens as a *zoon politicon*, but the double image of a *rationalist homo oeconomicus* (bread!) and a *post-modern homo ludens* (circus!). The recent European parliamentary election in June produced the historically lowest turnout, the one interesting phenomenon being the success of anti-European movements and parties, now well represented in the European Parliament. Though the low turnout was duly lamented, very few people know who the majority in the new Parliament is and even fewer could provide information as to what difference it makes. Yet, the European Union emasculates national political processes, by imposing a straightjacket on them. This straightjacket operates in part through the impositions of the common market, either through harmonizing legislation, or negatively through the ECJ's adjudication of the four freedoms. In part, it operates through a European monetarist policy and the Stability and Growth Pact. The European Central Bank as master of the new currency is more politically insulated than the German *Bundesbank* ever was and is constitutionally committed to monetarist policies. Member States are forced to cut back their social expenditures in order to meet the EU's Stability Pacts requirements on limits to the national deficit, facing the threat of litigation and significant penalties if they refuse to comply. The European Union functions as a straightjacket for national political processes, while at the same time failing to give European citizens the capacity to hold European

decision-makers collectively electorally accountable – there is no government that can be voted out of office.

What European citizens gain they gain as a breadwinner and consumer. According to the new Art. 3 ECT, spelling out the Union's objectives, "the Union shall *offer* its citizens...a single market." The language is suggestive of markets as institutions that are established and managed by experts, responsible for designing an all-inclusive product providing opportunities simultaneously for citizens as breadwinners and consumers. Joseph Weiler was first to call such a conception of European citizenship 'bread and circus'.

With this in mind Ulrich Haltern suggests - tongue in cheek? - that the Union should come to terms with the market citizen, rather "thrust upon him the *pathos* and *patina* of stories related to shared values and historically situated commonality".⁵⁷ In a historical perspective, such defeatism is merely a new variation of an old theme: That the tradition of Political Liberalism is either meaningless, too weak or outdated to be of significance and its aspirations have exhausted themselves was a core theme during much of the short 20th Century.

But for those who insist on the continued relevance of the political liberal frame of reference, the challenges are significant. The great challenge posed by the European Union both in its present and its future form is to *reconceive the political liberal tradition without the statist framework that originally served as its frame of reference*. The question is what the guarantee of human rights, democracy and the rule of law will amount to and what concrete legal and political form it will take in Europe at the beginning of the 21st century.

With European integration and globalization, electorally accountable institutions have been the great losers, whereas the executive branch, courts and transnational bureaucracies have been the great winners. Decisions about what is to be the law of the land are ever more frequently made on the transnational level. The mainstream response to this challenge has been to insist on the vocabulary of constitutionalism to describe decision-making on the European level. *One central aspect of the contemporary transformation of legal thought and practice in Europe is the now dominant belief that it would be a mistake to think of national constitutional democracy as the exclusive locus of the institutionalization of human rights, democracy and the rule of law*. The ECJ started to refer to the Treaties as Europe's Constitutional Charter as early as 1991. At the same time, it is evident that the European Union, even if the new Constitutional Treaty is enacted, is not comparable to a traditional state. What

⁵⁷ Ulrich Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination*, 9 EUROPEAN LAW JOURNAL 14 (2003).

lawyers have referred to as the European Union's *sui generis* character is affirmed in the Constitutional Treaty, not transcended. The respect of national identities is one of the core values hardwired into the European Union and the establishment of a European nation nowhere mentioned as a political goal. With the maturation of the European Union comes the recognition that it will not be a federal state in the foreseeable future. European constitutionalism as a form of constitutionalism beyond the state raises a number of basic questions about the adequate institutional embodiment of political liberal ideals in transnational legal and political practices. Is the language of that tradition really little more than 'pathos and patina' to an economistic consumer society? Grappling with these questions is relevant not only for struggles over Europe's legal and political form. They raise many issues that mirror and foreshadow debates about the basic concepts and concerns relevant to assess and guide the development of global institutional practices.

As has been the case in previous periods, the engagement with and integrative appropriation of opposing intellectual currents – here, those that I have referred to as bread and circus – is very likely going to colour any dominant conception of constitutionalism beyond the state that may emerge. Traces of such colouring are already apparent in the virtually uncontested embrace of markets as constitutionally mandated institutions on the one hand and the ubiquitous rhetoric and sensibilities relating to pluralism on the other hand. Any successful account of constitutionalism beyond the state then, is likely to embrace markets as a central institution within the overall constitutional framework and will emphasize the normative significance of pluralism, be it along the dimension of identities or political and legal practices. A great many other things, however, remain unclear. A great deal may depend on whether the Constitutional Treaty is ratified and, if not, how that failure will be interpreted and what movements, if any, it will give rise to.

At this point the historical account must end as the stage is cleared for the jurisprudential, legal and political debates that have accompanied European Union Law ever since it was catapulted from the niche of specialists into the glaring limelight of public scrutiny in the context of the ratifications of the Treaty of Maastricht in 1992. But it is already possible to identify what will be, in the perspective taken here, the four core conceptual and institutional *challenges* of European constitutionalism – and of constitutionalism beyond the state more generally. Only once these challenges have been met and a new account has gained widespread acceptance is it possible to describe the substantive terms of a new settlement. For now it must suffice to articulate the challenges.

First, the issue of *constitutional supremacy* is likely to be debated with new intensity in the context of the Constitutional Treaty. Whereas in legal practice there was little dispute that in liberal democracies in Europe the national constitution was the

supreme law of the land, things in Europe today are more complex and will remain complex even if the Constitutional Treaty is ratified. The Constitutional Treaty includes a clause that established the primacy of EU Law, but does not require ratification by a European constituent power, but makes do with the ratification according to national constitutional requirements. Furthermore, it contains a clause that seems to authorize states to protect their respective national constitutional and political identities. Is this sufficient to settle the supremacy issue? Can there be a supreme constitution without a constitutive act of 'We the People'? What exactly is required for a legal text to successfully claim that it is the supreme law of the land? Is it even desirable for the supremacy issue to be settled? Could it be more desirable to give up the idea of a legal world constituted by a hierarchy of norms with a supreme rule grounding the whole practice? What are the range of relevant considerations? Is the conceptual world that ties together the ideas of supremacy (or an ultimate legal rule), popular sovereignty and the idea of a historically first constitution established by an original constituent power adequate to address the issue? If not, how would an alternative conceptual framework look like and how should the relationship between national law and EU Law be managed? On the most general jurisprudential level: How can law be conceived without reference to an ultimate source of authority (we the people) or an ultimate text (a constitution). Answering these questions is likely to require deep rethinking of the basic categories which the liberal tradition has traditionally used as a frame of reference.

The second issue is the issue of *democracy* and the much discussed 'democratic deficit' in the European Union. The literature on whether such a democratic deficit exists, what exactly it consists in and what, if anything can be done to remedy it, is too rich even to summarize here. The central question is: how is it possible to remain faithful to democratic values in the context of supranational decision-making? What can be done about the sad state of affairs in the European Union as far as electoral decision-making is concerned? The core issue is that decision-making on the level of the European Union cannot convincingly be attributed to any specific actor that could then be held accountable in elections for the result. Yet, the requirement to have electorally accountable institutions at the heart of the political process is exactly the minimal consensus on what democracy has been about both in the period of Classical Legal Liberalism and the era of constitutional democracy. But does it make sense to insist on such a requirement for the European Union or transnational legislation more generally?

In the European Union, there is a complex process of negotiation and deliberation involving the Commission, the Council voting under a qualified majority regime and the Parliament. The European Parliament as the only directly representative institution is a force of some influence, along with other institutions. It does not take charge of the legislative agenda and won't be in a position to take charge of the

legislative agenda even if the Constitutional Treaty is ratified. With regard to basic constitutional issues, such as the Membership of Turkey, for example, Parliament does not even have a meaningful say. Nor is the Commission meaningfully described as genuinely accountable to Parliament. In this respect, too, the EU's decision-making process is still very much held hostage by the qualified majority of Member State governments in the Council. The great issue relating to democracy is how to evaluate this state of affairs. To what extent is it necessary that directly representative institutions are at the heart of the political process? To what extent is it desirable to maintain the current level of control by Member States governments, given the current scope and depth of EU decision-making? Is a genuine European democracy even possible, given the current underdevelopment of a European public sphere and a lack of social cohesion on the European level? Or is the very absence of electorally accountable institutions at the heart of the European political process the reason why a robust European public sphere has not yet developed? Can the necessary social cohesion be generated by the right kind of institutional practices? Even if it can, is it desirable to perpetuate the *status quo*, given the corrosive effect some claim this may have on national social cohesion? Or is the establishment of meaningful electoral politics on the European level important only if and to the extent the European Union will become a more central actor in the areas of taxation, social welfare and security – issues of sufficient political salience to mobilize large constituencies?

This connects the discussion of democracy to the third core challenge. It relates to competencies and could be called the *subsidiarity challenge*. Given the problems of institutionalizing electoral politics on the transnational level, the allocation of decision-making authority and the protection of national prerogatives gains in importance. The nineties were the times of debates about subsidiarity, *Kompetenz-Kompetenz* and the Maastricht judgment of the German Constitutional Court. Subsidiarity has to a large extent replaced 'sovereignty' as the key term used to defend the prerogatives of the nation. There is a general legal and political consensus today that the allocation of decision-making authority between the national and European level should be governed by the principle of subsidiarity. The idea of subsidiarity is in the process of taking the place that the term 'sovereignty' has traditionally occupied in order to defend national communities against undue infringements of their capacity to govern themselves. The basic idea is simple. For a whole host of reasons – including greater sensibility to local preferences, enhanced participation and respect for national identities – *prima facie*, decisions should be made on the level of Member States rather than the EU. Only when there are specific reasons of sufficient weight in specific circumstances – relating to such things as externalities, race to the bottom concerns, interest group politics or the expression of common values – should measures be taken by the EU rather than Member States.

The problem is that there is no consensus on what exactly the political implications of a commitment to subsidiarity are. What should the role of the Union be concerning redistributive politics, taxation and security, for example? And how can meaningful lines be drawn, once the European Union is committed to establish a Common Market? Is not every possible area of regulation arguably connected to the Common Market? Furthermore, there has been a lively debate that is not likely to subside completely on how the principle is best constitutionalized. Here the Constitutional Treaty does include some interesting procedural innovations involving national parliaments. But it remains an open question how the principle should or will be operationalized and interpreted by EU institutions, including the ECJ. And if the principle of subsidiarity helpful also to think about constraining and guiding the development and practice of global institutions, such as the WTO, the ICC or the UN, what would the implications be?

Finally, there is what could be called the *human rights challenge*. The relatively simple arrangement by which national constitutions establishes a set or even a system of basic rights to be enforced by a constitutional judiciary is substituted by something significantly more complicated in contemporary European practice. Basic Rights catalogues can now be found on the national level, the level of the European Union, the European Convention of Human Rights, as well as general International Human Rights Treaties (most prominently the ICCPR) and specialized human rights agreements. How should the interrelationship between all these guarantees be institutionally managed? To what extent should national courts take into account any or all of this in their adjudication of national constitutional rights norms? To what extent should discretion be accorded to national institutions in determining the protections afforded to their citizens (the ECHR uses the term 'margin of appreciation' in this respect⁵⁸), to what extent should the guarantees of the European Union's Charter be applicable to Member States at all, rather than just to EU institutions?⁵⁹ What does it mean for the understanding of human rights on the European level that, both with regard to their sources⁶⁰ and their interpretation,⁶¹ the ECJ has to take into account the determinations made by a

⁵⁸ See *Handyside v. U.K.*, 7 December 1976, 1 E.H.R.R. 737.

⁵⁹ For example, would the ERT line of jurisprudence still be law of the land after the ratification of the Constitutional Charter, Art. II-51 notwithstanding?

⁶⁰ The Constitutional Treaty mentions the Charter of Fundamental Rights as well as the traditional formula first used by the ECJ "Fundamental rights as guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States as general principles of the Union's law", while opening up the prospect accession to the ECHR in addition to all of this, see Art. II-7.

diverse set of institutional actors? What, if any, conception of rights can make sense of such a convoluted practice?

D. Conclusion

This article is a defence and a further development of the idea of a thick constitutional patriotism and enlists a particular conception of legal history in its service.

Thick constitutional patriotism is an attractive conception of European identity for at least three reasons. First, it is a public identity which is rooted in an open, confident but *self-reflective universalism*. It does not need to identify an 'Other' to exclude as a means of self-stabilization. Second, it is not an identity tied slavishly to the European Union and its institutions but to European constitutional practice seen as a whole, as it developed over time. Its *commitment is to constitutionalism and the ideals that animate it, not to a particular constitution*. Such a focus has several advantages. It allows for more critical distance to the actual institutional practices on the European level. A European constitutional patriot can be for or against the Constitutional Treaty, for example, depending on the extent to which he understands it as a fitting embodiment of constitutional ideals. It also provides constitutional patriotism with a grounding that is deeper than an exclusive focus on the institutions of the European Union could provide. And it means that a European identity is not in conflict with, but enriches and deepens the understanding of various nationally focused identities, as well sharpening the awareness for Europe's common specificity. Third, a European identity focused on constitutional patriotism remains *open to contestation and difference*. The idea of constitutional patriotism merely provides a basic focal point for a plurality of identities that can challenge, complement and enrich one another. The ideas of human rights, democracy and the rule of law remain contested, both on the level of abstract ideas and the concrete institutional and practical implications to be derived from them. It is the very fact that political and legal conflicts, when they get serious, are contested using the vocabulary of the tradition of constitutionalism that makes it a unique focal point for a common identity.

To some extent, the actual development of such identities depends on and focuses on the availability of rich historical narratives that can help foster and sustain it. The bare bone structure of one such a narrative, more narrowly focused on legal

⁶¹ Art. II-52.3 prescribes that rights corresponding to rights in the ECHR shall have the same meaning as scope as defined therein, and Art. II-52.4 states that 'insofar as this Charter recognizes fundamental rights as they result from the constitutional tradition common to the Member States, those rights shall be interpreted in harmony with those traditions.'

history, served to provide an illustration of the kind of phenomena that would come into view. The conception of legal history it exemplifies exhibits three core features. First, and most obviously, it takes a *European* rather than a national frame of reference. Even national historiography does well to contextualize its narrative and situate it in a European context. Second, *the structure of the narrative is provided by the focus on the legal and intellectual struggles connected to Political Liberalism: The tradition of human rights, democracy and the rule of law and its implications for the design of legal institutions and the basic categories of law.* Third, *it places the evolution of the basic institutions and categories of the law in its social and political context.* It analyzes the basic institutions and legal categories in light of the normative ideals that underpin them and the social and political forces that sustain them. In this sense, the subject matter of its inquiry is not understood in positivist terms. The specifics even of this bare bone outline can and should be subject to dispute. The core point of this article would be successfully made, if it became clear that much can be gained by adopting a conception of European legal history illustrated here.

Without doubt, the development of thick constitutional patriotism in Europe depends on more than the *availability* of rich historical narratives that can sustain it. To some extent, it depends on a *proactive politics of memory* that members of civil society as well as public institutions at the national and European level support. There are a number of ways that the EU is already engaging in such politics. Why should the European Commission not, for example, provide funding for courses taught on European legal history at law faculties? But even if the politics of memory matters, it would amount to little more than shallow brand management if not supported by a political practice which connects memory to joint political action. It is the political process at the European level that has to provide citizens with an opportunity and an incentive to engage meaningfully with these ideals and narratives in the course of an ongoing political practice. Much would have to be said in this respect about current political practices, the constitution-giving process and the institutional reforms included in the Constitutional Treaty, but this is not the place to do it.