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## **Europe: Political, Not Cosmopolitan**

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Abstract

## **Europe: Political, Not Cosmopolitan**

by Alexander Somek

The article challenges the established view according to which the authority of the European Union is inexplicable in terms of collective self-determination. Contrary to this widely held belief, it explains the condition under which it is plausible to impute the current shape of the Union to the collective self-determination of European citizens. This condition is met if citizens approach the Union with a cosmopolitan attitude. The article then goes on to explain that while the Union may not appear optimal under this condition it looks quite disastrous when approached from the perspective of political self-determination. The argument makes an appeal to European citizens. They have to come to grips with their own self-understanding. Should European citizens come to realize that they are, after all, political beings because they care about sustaining a form of life at specific place of the world, they will have to re-appropriate Europe for themselves.

*Keywords: European Union, collective self-determination, European citizens, cosmopolitan, political self-determination*

## Palingenesis Now

The following is an exercise in revisionism.

An interpretive intervention is revisionist if it claims to recover an original meaning vis-à-vis entrenched interpretative conventions that are suspected of rendering this meaning obscure.<sup>1</sup> The writing of history is the major site of encounters with revisionism. Historiography is also a wellspring of examples demonstrating that not all instantiations of revisionism are equally palatable.

The intervention to be made here does not concern, however, the interpretation of past events; it wishes to reassert, rather, the relevance of the original political language of modern constitutionalism vis-à-vis the legally predominant mode of characterizing the European Union.

The point of the exercise is as straightforward as it is topical. The political language of constitutionalism is essential to addressing the potentially terminal stage of the Union in the wake of the loan-, banking and fiscal crises.<sup>2</sup> As is well known, there is reason to believe that both the responses by the “troika” (International Monetary Fund, European Central Bank, European Commission) and the “six pack” of EU regulations concerning economic governance will exacerbate the already existing self-subversive tendency of an integration project that has committed itself, at the heyday of neoliberalism, to monetarism and liberal market homogenization. One consequence of this commitment is, indeed, the pressing necessity to assuage financial markets by adopting cleverly designed emergency measures.<sup>3</sup> This is consistent with the behaviour of an organization that taps on crisis as an opportunity for growth and consolidation. In fact, conceiving of collective choices as adjustments to challenges is very consistent with a form of “constitutionalism” that conceives of authority with an eye to extant problems.

By contrast, modern constitutionalism placed political self-determination, rather than concerted crisis-management, at the heart of the body politic. It also conceived of

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<sup>1</sup> Instructive examples are various revisionist interpretations of the English revolutionary history. See, J.D.C. Clark, *The Language of Liberty 1660–1832: Political Discourse and Social Dynamics in the Anglo-American World* (Cambridge: Cambridge University Press, 1993).

<sup>2</sup> For a rough sketch, see Fritz W. Scharpf, ‘Monetary Union, Fiscal Crisis and the Preemption of Democracy’ (2011) 11 *MPfG Discussion Paper* at 25–26.

<sup>3</sup> I am indebted, not only on this point, to Colin Crouch, *The Strange Non-Death of Neoliberalism* (Cambridge: Polity, 2011) at 118.

constitution-making as an act, rather than an incremental process to which courts as well as governments intermittently make more or less intelligible contributions. Most importantly, modern constitutionalism saw public liberty dependent on political engagement rather than the widespread cosmopolitan detachment of citizens from complex issues of “governance”.

It is submitted, therewith, that for the crisis not to become the kiss of death for the Union much more is required than one or the other ad-hoc amendment, which is notoriously likely to be tarnished with questionable pedigree. In the spirit of modern constitutionalism, Europeans have to confront their self-understanding as citizens and to ask what, if anything, accounts for their communion. More precisely, the issue is whether Europeans should conceive of themselves either as cosmopolitan individuals or as members of a polity for which they share common responsibility. If they were to adopt the latter perspective they would perceive Europe not as a “playing field” prepared for their mutual advantage but rather as a space for realizing a distinct form of life. As a polity, Europe cannot be boundless, neither geographically nor substantively.

In the spirit of modern constitutionalism, the intervention seeks to reconstruct the authority of Europe from the perspective of collective self-determination. In order to succeed, however, it needs to remove a major obstacle. The obstacle consists of the widely held belief that any talk of collective self-determination, unless it involves governments, is out of place in the case of the Union. There is no “We the People” in Europe.<sup>4</sup> The intervention needs to show, therefore, that what purports to defy the vocabulary of collective self-determination, i.e. Europe’s new path of constitutionalism, is merely a particular—and particularly unusual—version of the old path.

According to established discourse, the constitution of the European Union originated from a process of “constitutionalization”, which involved a variety of agents, in particular the judiciary.<sup>5</sup> This view implies that the constitution of the Union is normatively not susceptible to reconstruction from a point of view that would involve the collective self-determination on the part of a European demos<sup>6</sup> (even though the Union may well be

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<sup>4</sup> See merely, Miguel Poiates Maduro, ‘Europe and the constitution: what if this is as good as it gets?’ In J.H.H. Weiler & M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge, Cambridge University Press, 2003) 74-103, at 81.

<sup>5</sup> See below note 17.

<sup>6</sup> See J.H.H. Weiler, ‘Does Europe need a Constitution? Demos, Telos and the German Maastricht Decision’ (1995) 1 *European Law Journal* 219-258.

characterized as a “demoicracy”).<sup>7</sup> The constitution is the result of a more complicated process of interaction among a variety of actors, and its authority does not depend on collective authorship by Europeans.<sup>8</sup>

The established view may appear to be commendable since it no longer accords sovereignty a central role for the foundation of public authority. This seems to be good. Arguably, sovereignty is unreasonable because it is inconsistent with deliberative democracy. Sovereignty is also dangerous because it grants recognition to violence as a cause of authority.

But the established view, in spite of its ostensible gentleness, creates a danger of its own. It removes the collective responsibility for the European constitution from an active citizenry, and perceives Europeans basically as the passive carriers of an “output legitimacy” that accrues from matters such as market-building, value-commitments or mutual tolerance. Recurring laments of the “democracy deficit” are an element of the picture. They grant symbolic recognition to disempowerment without making an effort to change it.

What is more, the established view fails to realize that its perception of the lack of a demos merely is an epiphenomenon of another form of collective self-determination, which can be very plausibly attributed to European citizens. More precisely, the established view is possible only on the ground of two related incapacities. First, it fails to envisage a form of collective self-determination that is not political. It is incapable of coming to grips with another form of collective self-determination that is cosmopolitan in its orientation. Second, it cannot realize that the idea of an authorless constitution and the non-demos thesis are reflections of the first incapacity.

It will be argued that once this alternative to political self-determination is taken into consideration the European Union can be perceived as based on cosmopolitan self-determination. Actually, the argument appeals to the self-understanding of European citizens. Should citizens realize that they approach the Union with a cosmopolitan attitude then they have reason to regard themselves as the collective authors of its laws. Moreover, should the conceivable reasons for endorsing the Union be consistent with the

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<sup>7</sup> See Kalypto Nicolaidis, ‘The New Constitution as European “Demoi-cracy”?’ (2004) 7 *Critical Review of International Social and Political Philosophy* 76–93.

<sup>8</sup> Other examples of this view can be found in Neil Walker, ‘Post-Constituent Constitutionalism? The Case of the European Union’ In M. Loughlin & N. Walker (eds.), *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2007) 247–268; Armin von Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform* (Baden-Baden: Nomos, 1999); Christoph Möllers,

cosmopolitan attitude they can be held responsible for the shape of the Union even if it never occurred to them that they had acted for these reasons.<sup>9</sup> They have to confront their cosmopolitanism by neglect.

Burning in hell for sinful thoughts aside, responsibility does not arise from mere thinking. It presupposes some connection between reasons and action. Hence, it is submitted that the cosmopolitan attitude is manifest in what can be called—paradoxically perhaps—authority-conferring inaction. It is possible to point out to citizens that the authority of the Union is, normatively speaking, a product of their civic interpassivity, which is a specific cosmopolitan equivalent of political action by an active citizenry.<sup>10</sup> Just like nations or the people historically reveal themselves in constituting procedures, interpassive individuals write history through robust acquiescence.<sup>11</sup>

Linking the authority of a constitution with collective autonomy is intrinsic to the constitutionalist project. The established view is oblivious to the fact that, since its inception in the revolutions of 1776 and 1789, modern constitutionalism has conceived of constitutions primarily as instruments of emancipation, and not of consolidation. Constitutions originate from, and are designed to facilitate, collective self-determination.<sup>12</sup> The subject underlying such self-determination has been called either a “people” or a “nation”. At any rate, until the end of colonialization,<sup>13</sup> these entities were deemed to be the media for enacting a universal program of liberation from bondage and oppression. Constitutions are consistent with the idea of freedom in that they are deemed to be neither applications of natural law nor the incremental outgrowth of processes of adjudication. They are human artefacts, that is, charters of power created by liberty.<sup>14</sup>

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‘Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung’ In A. v. Bogdandy (ed.), *Europäisches Verfassungsrecht* (Berlin: Springer, 2003) 1–58.

<sup>9</sup> Should citizens, alternatively, be surprised by such a finding, then they have either reason to reconsider their self-understanding or to change their behaviour.

<sup>10</sup> This is not to say that all cosmopolitan self-determination is necessarily mediated by civic interpassivity. Rather, it can involve mutual respect for polities. For an exposition in German, see my ‘Über kosmopolitische Selbstbestimmung’ (2011) 50 *Der Staat* 329–351.

<sup>11</sup> Interpassivity, as a practice, explains normatively the authority of the current Union vis-à-vis its citizens. An explanation of this type seeks to answer certain questions, such as what type of a person one would have to be in order to make sense of one’s acceptance of the Union or what vision of the good life might suit a devoted European citizen.

<sup>12</sup> See Gordon S. Wood, *The Creation of the American Republic 1776–1787* (Chapel Hill: University of North Carolina Press, 1969) at 62.

<sup>13</sup> See Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Harvard University Press, 2010).

<sup>14</sup> See the quotation from Madison in Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Harvard University Press, 1967) at 55.

The following analysis begins with an examination to the established view according to which the basic laws of the European Union are the result of a process of constitutionalization. This view can be recast as a surface manifestation of cosmopolitan self-determination. The article then explains the distinction between political and cosmopolitan self-determination and tries to sketch how basic characteristics of the Union fit the latter mould. The cosmopolitan outlook of the Union is further reinforced by three negative forms of political self-determination: absorptive representation, regulatory disarmament and guardianship in the case of Monetary Union.

The analysis then explains that European citizens are responsible for the current shape of the Union. This responsibility confronts them with a question. The question is either to continue to muddle through with the cosmopolitan outlook or to enact a version of political self-determination that would be as post-nationally enlightened as it would likely be unique.

## **Constitutionalization**

It is a truism that the European Union has given rise to a remarkable transformation of constitutionalism.<sup>15</sup> It is epitomized by a turn from constitution-making, which claims to have a subject,<sup>16</sup> to constitutionalization, whose authorship is notoriously and gloriously unclear.<sup>17</sup> It seems as though Europe has been the trailblazer of a new path of jurigenesis.<sup>18</sup>

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<sup>15</sup> Most broadly understood, constitutionalism is the project of making any exercise of public power abide by legal norms. Narrowly understood, constitutionalism views constitutions as instruments that are adopted in order to serve three objectives. First, public action ought to respect or even to enliven the enjoyment of certain basic goods, preferably through the protection of rights. Second, public power has to be brought into a position where it can engage in intelligent and efficient problem-solving. Finally, we want constitutions to facilitate collective self-determination. See Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633-729. For a locus classicus, see John Locke, *Two Treatises of Government* (ed. P. Laslett, Cambridge: Cambridge University Press, 1960) §§ 97-98, 132.

<sup>16</sup> See, most recently, Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (London: Routledge, 2010) at 22-23. For a sophisticated exploration of the paradox of the constituent power, see Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' In M. Loughlin & Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press 2007) 9-24.

<sup>17</sup> The standard story told by Stein und Weiler has it that the European Constitution is in large part the work of a court. See Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of Public International Law* 1-27; see J.H.H. Weiler *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999). Yet, the Court merely claimed to make explicit what had already been implicit in the Treaty. For phenomenological accounts of constitutionalization, see Klabbers in Jan Klabbers & Anne Peters & Geir Ulfstein, *The*

On a phenomenological plane, constitutionalization is constitution-making by inference. It does not involve an act of will, but merely the “right” grasp of the teleology of certain arrangements. As a gradual matter, it is potentially universally applicable and based on a cancellation of the distinction between fundamental and constitutional law.<sup>19</sup> It results in the recognition, by courts, of higher law. This higher law usually is invested with a fundamental rights dimension and is in principle capable of overriding domestic law.

Constitutionalizations are deemed to be the hallmark of constitutionalism beyond the nation state,<sup>20</sup> for the very reason that they do not presuppose a constitutional subject, neither qua author nor qua constituted entity. This explains why a process of constitutionalization can be easily associated with a cosmopolitan understanding of constitutional law.<sup>21</sup> As a process, it has a number of things going for itself, since it

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*Constitutionalization of International Law* (Oxford: Oxford University Press, 2009) 19-25; Martin Loughlin, ‘What is Constitutionalization?’ In M. Loughlin & P. Dobner (eds.), *The Twilight of Constitutionalism: Demise or Transmutation?* (Oxford: Oxford University Press, 2010) 47-69.

<sup>18</sup> It should be clear, at the outset, that the term “constitutionalization” that emerged in the European context has nothing to do how it is used in an American context, where the “constitutionalization” of a field of law means that it becomes subject to scrutiny pursuant to norms of constitutional law. In marked contrast to the European usage, this does not mean that the field of law undergoes a metamorphosis and grows itself into a some form of constitutional law.

<sup>19</sup> Fundamental law is manifest in the principles that lend formal or substantive coherence to whole field of law. For example, the most fundamental principles of private law are private property, freedom of contract and responsibility for harm done to others. In the context of legal reasoning such fundamental principles are necessary do deal with anomalies and to close the gaps in the system. Constitutionalization also involves reasoning from fundamental principles for the purpose of eliminating anomalies, but it does in a manner that simply equates “fundamental” with “higher” law. In order to see the difference that is thereby lost one merely has to imagine that constitutionalization discourse would proudly present freedom of contract, private property and responsibility for harm as the three “constitutional” principles of private law. Not that this has not happened in the history of constitutional law—the substantive economic due process jurisprudence of the US Supreme Court the classical example for it—but it has later been recognized as a mistake. See Stephen A. Siegel, ‘Lochner Era Jurisprudence and the American Constitutional Tradition’ (1991) 70 *North Carolina Law Review* 1-110 at 80-81. I explain this point at greater length in my forthcoming ‘Constitutionalization and the Common Good’.

<sup>20</sup> See Mattias Kumm, ‘Democratic Constitutionalism Encounters International Law: Terms of Engagement’ In S. Choudry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2008) 256-293.

<sup>21</sup> For a first full-blown statement of constitutional cosmopolitanism, see Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ In J. Dunoff & J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009), 258-325. As is well known, the category of constitutionalizations has long outgrown its sphere of application to the European model case and been extended, in particular, to the system of public international law. For an overview, see Bardo Fassbender, ‘The meaning of international constitutional law’ In N. Tsagourias (ed.), *Transnational Constitutionalism* (Cambridge: Cambridge University Press, 2007) 307-328; for a more nuanced application with regard to the WTO, see Deborah Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trade System* (Oxford: Oxford University Press, 2005).

provides transnational regimes with access to three sources of out-put legitimacy. First, participating governments can reap the arbitrage that flows from expanding the reach of effective regulatory intervention beyond territorial bounds;<sup>22</sup> second, ordinary people benefit from regulatory services; third, constitutionalized regimes are heeded of fundamental rights.<sup>23</sup> As a result, what emerges in constitutionalized systems of transnational co-operation are systems of “good administration”<sup>24</sup> or “good governance”. Constitutionalized regimes, such as the European Union, confront us with a puzzle. Unless one adheres stubbornly to some narrow dogma<sup>25</sup> or broad adaptation<sup>26</sup> of delegation, their genesis as well as their operation appears to be entirely severed from a self-determining body politic. This is disturbing, since, as pointed out above, modern constitutionalism anchors the constitution in, and functionally ties it to, acts of political self-determination. Nonetheless, this disconnect is also welcomed as a sign of progress. Of the three core expectations regarding constitutional performance—enjoyment of rights, problem-solving and self-determination<sup>27</sup>—the third is notoriously the most difficult to apprehend. Not infrequently, belief in collective self-determination is alleged to presuppose a dangerous faith—völkisch, at its worst—in the existence of some numinous collective subject.<sup>28</sup>

## Collective Self-Determination

The concept of collective self-determination, however, loses its seemingly mystical air once it is raised to a more general level. Any self-determination involves, on the part of

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<sup>22</sup> They and their constituents are better off when they participate. See Fritz W. Scharpf, ‘Demokratie in der transnationalen Politik’ In U. Beck (ed.), *Politik der Globalisierung* (Frankfurt aM: Suhrkamp, 1998) 228-253 at 236-239.

<sup>23</sup> This is an effect that Weiler frequently refers to as legitimation by accomplishment. See J.H.H. Weiler, *Ein Christliches Europa: Erkundungsgänge* (trans. F. Reimer, Salzburg & Munich: Anton Pustet, 2004) at 124; note 17 at 335. – Imagine international freight law constitutionalized. It would involve some higher law that recognizes certain fundamental principles (e.g., “free on board”), which are adjudicated by some body, and a structure that facilitates standard-setting by public and private actions. Possibly, this same body might adopt a charter of consumer rights.

<sup>24</sup> See, notably, Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (New York: Oxford University Press, 2010). See also my ‘Administration without Sovereignty’ In *Twilight of Constitutionalism* note 17.

<sup>25</sup> On the German Federal Constitutional Court, see *infra* note. See also Ingolf Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?’ (1999) 36 *Common Market Law Review* 703-750

<sup>26</sup> See Lindseth, note 24 at 48, 266 .

<sup>27</sup> See above note 15.

<sup>28</sup> See Weiler note 23 at 124. See the perceptive critique of the rhetoric to be found in the Maastricht decision of the Federal Constitutional Court in Weiler note 17 at 225-231.

the determining self, an active as well as a passive component. The active component consists of identification. One is self-determining when one invests and encounters oneself in what one chooses to do. If one did not, one would rather suffer from some strange affliction. The passive component consists of allowing oneself to be determined by what one identifies with. This involves, interestingly, always a partial loss of control.

The key to understanding processes of collective self-determination is this passive dimension. One is collectively self-determining when one has reason to adopt, in cases affecting one's own conduct, the will of others as one's own; in one way or another, the reasons depend on what one shares with these others.

In this vein, the rise of constitutionalization can be explained with reference to a type of collective self-determination<sup>29</sup> that is different from its political mode. Much more profoundly different than merely falling short of democratic legitimacy, processes of constitutionalization reflect a shift in the mode of collective self-determination.<sup>30</sup>

In order to understand this shift, two different understandings of collective self-determination need to be distinguished. The first, which is inherently political, is associated with living permanently amongst others and ultimately concerns what it takes to determine one's own will by yielding to the determinations made by those others. The second, which is typically, but not necessarily, cosmopolitan, is manifested in rational deference to various sites of governing authority and can be called "collective" only insofar as each individual does as all others do. In the case of the first, one encounters the will of others. In the case of the second, one has to deal with knowledge.

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<sup>29</sup> This link has been recently disinterred by Dieter Grimm in his study on sovereignty. See Dieter Grimm, *Souveränität: Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin: Berlin University Press, 2009) at 121-123.

<sup>30</sup> I suggest that the true significance of constitutionalizations can be more thoroughly appreciated from the broader perspective on collective self-determination rather than by the usual focus on the notorious democracy deficit. A shortcoming of the latter variety may not even raise a concern for steadfast adherents to a liberal constitutionalism which sees constitutions generally as safeguards against democratic majorities. See, for example, William Riker, *Liberalism against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (San Francisco: Waveland Press, 1982).

## Political Self-Determination

Political self-determination presupposes sharing a place peacefully with others.<sup>31</sup> Citizens live amongst those who, like them, have a long-term interest in a polity.<sup>32</sup> This explains why citizens are supposed to possess not only, borrowing Rawlsian parlance, the capacity to adopt and to revise a private plan of life,<sup>33</sup> but, more importantly, the capacity to exercise political judgement.<sup>34</sup> That is, they are capable of assessing the acceptability of common choices from the perspective of the actual people and the real groups that might be affected. Political selves will therefore seek to establish conditions for common action even if this requires compromise. They aspire to act in communion with others despite the fact that the media thereto—social perceptions, interests, resources, and human motivation—are marked by difference and plurality.<sup>35</sup>

Sharing a place with others<sup>36</sup> is a necessary condition for political self-determination. More than a demos, political freedom presupposes a polis. This may sound idyllic, while in fact it is not. The violence with which, during modernity, rulers removed local principalities and quashed special authorities<sup>37</sup> helped to consolidate comprehensive state power in a manner that made it susceptible to appropriation by an active citizenry.<sup>38</sup> On that basis, it was possible to transform the exercise of sovereign authority into a means for collective bodies to be acting upon themselves.

The experience of permanent common submission to effective authority also left its mark on what is substantively at stake in political self-determination. In contrast to a regulatory

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<sup>31</sup> The experience of otherness is absent in a conception of sovereignty that sees all state acts authored by its subjects. See Thomas Hobbes, *Leviathan* (ed. J.B. MacPherson, London: Penguin, 1971) II. 18 at 233.

<sup>32</sup> Originally, this long-term interest was seen to be anchored in the private ownership of some land. See Rainsborough during Putney Debates (1647), reprinted in *Divine Right and Democracy* (ed. D. Wootton, London: Penguin 1986) at 189.

<sup>33</sup> See John Rawls, *Justice as Fairness: A Restatement* (ed. E. Kelly, Cambridge, Mass.: Harvard University Press, 2001) at 19.

<sup>34</sup> See Hannah Arendt, *The Life of the Mind*, vol. 2: *Willing* (San Diego: Harcourt, 1978) at 269; Ernst Vollrath, *Die Rekonstruktion der politischen Urteilskraft* (Stuttgart: Klett Cotta, 1977) at 44.

<sup>35</sup> See Hannah Arendt, *The Human Condition* (2d ed., Chicago: University of Chicago Press, 1998) at 8, 57, 157.

<sup>36</sup> In Rawls' extreme formulation, this is society as a system of co-operation, which is entered at birth and left with death. See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) at 4.

<sup>37</sup> See Anthony Giddens, *The Nation-State and Violence* (London: Polity, 1987) at 49-53.

<sup>38</sup> See Dieter Grimm, *Die Zukunft der Verfassung* (Frankfurt aM: Suhrkamp, 1991) at 37. See also Ernest Gellner, *Nations and Nationalism* (Oxford: Basil Blackwell, 1983) at 37-38.

focus on fleeting exchanges and encounters (e.g., border controls or instances of deviant behaviour), it is individual lives over the span of a whole life in relation to one another that provides the ultimate point of reference of political self-determination. Hence, its recurring implicit theme is the form of life, or a certain cluster thereof, that is to obtain amongst those sharing a place with others.

Paradoxically, this focus the result of reversing the cold administrative gaze of sovereign authority into a medium of collective self-determination.

## **Cosmopolitan Self-Determination**

Transnational social space, by contrast, differs as to what is the relevant primary social experience. Cosmopolitans do not live in communion with others. They engage in contingent exchanges, even if only in the civilised manner countenanced by *doux commerce*. They do not draw on common memory. Everyone is at least potentially on the move. The lives of others matter not in a biographically significant sense, but rather in the aggregate size of consumer demand, labour cost, birth rates or incidences of illness. The challenge posed to collective self-determination is not the trouble involved in living with others. What matters, instead, is how aggregate factors of social interaction might adversely affect individual experiences and opportunities. The holistic background of political self-determination disappears. The lives of others are not experienced as giving rise to legitimate demands, addressed to an already “encumbered self”,<sup>39</sup> but rather to aggregate effects translating into externalities. They require some regulatory response. Rational yielding to regulations tackling such externalities is the key to understanding cosmopolitan self-determination.<sup>40</sup>

As a category, “externality” transforms public problems, which affect participants in a common form of life,<sup>41</sup> into calculable and discrete instances of harm whose probability is susceptible to calculation and aggregation. Its career bespeaks a perspective on the social sphere that attributes the major role to private law rather than the constitution of political action. Whatever happens among people happens, so long as it is legal, as an exercise of individual rights. By definition, the enjoyment of rights is *prima facie* free to disregard

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<sup>39</sup> See Michael Sandel, *Liberalism and the Limits of Justice* (2d ed., Cambridge: Cambridge University Press, 1998) at 178-179.

<sup>40</sup> I cannot explain here why per my observations above I merely address only the “pure”, and not the “mixed” form of cosmopolitan self-determination.

<sup>41</sup> See John Dewey, *The Public and its Problems* (Chicago, Swallow Press, 1954) at 64.

aggregate effects or other unintended consequences. It is the confluence of externalities that constitutes the social space addressed by regulations and interventions. The “social” and the “public” are the sum total of side-effects.<sup>42</sup>

Not by accident, in such a realm of experience, “risk” and “crisis” occupy a central place.<sup>43</sup> Risk signifies what is man-made, and hence contingent, and yet also at its core unavoidable. The same is true for most crises. A cosmopolitan world is perceived to be at risk because the decentralised constitution of society confronts its subjects with seemingly unmanageable complexity. A risk society, thus understood, is a social world where regulation is restricted to addressing the unplanned consequences of conduct while the rules underlying its constitution are more or less immune to change.<sup>44</sup>

It says something about the difference between political and cosmopolitan self-determination that while the power of the former has been symbolised by the codification of private law, the effectiveness of the latter seems to be vested in a variety of “sites” devoted to risk-assessment, risk-management, and risk-regulation. Consequently, the relative apriori vis-à-vis which collective self-determination establishes itself in the cosmopolitan case is not the state, as a corporate body whose power of agency can be appropriated by the people, but by various processes that respond to an anonymous and uncontrollable field of interaction.<sup>45</sup> The space of human encounter does not satisfy the condition of permanent co-presence. It is the platform for a permanent in and out. Using facile images, instead of the city (with markets as well as a town hall) the airport (with WiFi and full-body scanners) comes to epitomize the paradigmatic site where people with common concerns “gather”. Everyone wants to be safely on the move. Human conduct is channelled by interaction-facilitating regulation whose substance originates from a variety of transnational multilevel networks. Their claim to legitimacy is based on the generation and implementation of expertise.

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<sup>42</sup> See Ulrich Beck, *Cosmopolitan Vision* (trans. Ciaran Cronin, London: Polity Press, 2006) at 36.

<sup>43</sup> See Ulrich Beck, *World at Risk* (trans. Ciaran Cronin, Cambridge: Polity, 2009) at 6–8.

<sup>44</sup> When the potentially adverse consequences of human activities are deemed to be either inevitable or desirable then it is only possible to deal with them as risks.

<sup>45</sup> For an attempt at a phenomenology, see, notably, Ann-Marie Slaughter, *The New World Order* (Princeton: Princeton University Press 2001).

## Rational Deference and Morality

In a knowledge-based society, people are aware that whatever could be known by them is already known with greater credibility by someone who has been certified to know better.<sup>46</sup> The exercise of rational agency—self-determination in the sense of making oneself into the cause of an end<sup>47</sup>—becomes thus utterly dependent on rational deference to technical, legal, economic, administrative, medical and psychotherapeutic expertise.<sup>48</sup> This deference is exercised simultaneously because people need to rely for their own deference on the deferential behaviour they observe in others. When one does not submit one's thoughts to the scrutiny of arguments and discussion, one can examine one's reasoning only by being heeded of what is done by others whom one regards to be at least as reasonable as oneself. Deference is based on the self-reassuring working of communis opinio. Weber's cage of obedience<sup>49</sup> is woven of trust in the rationality of others.

But nobody can tell who that trustworthy individual really is. By definition, no one can be this individual because each needs to rely on the judgment of others. Hence, practicing deference presupposes an imaginary knowledgeable other in whose judgment everyone reasonably trusts. This is, as will be explained below, the core of civic interpassivity.

By emphasizing rationality it is not suggested that cosmopolitan selfhood is egotistical and immoral. On the contrary, a cosmopolitan self, in order to comprehend herself correctly, needs to see herself occupying a potentially boundless social space, which is always universal and thus always and already inhabited by anyone. If anything may be applied to anyone, then universal principles. Consequently, cosmopolitan selves have morality rather than political judgment. They use moral principles without paying regard to the distinction between compatriots and strangers. In fact, there is no reason for this morality to stop at the threshold of humanity. Since people are notoriously in close contact with what they eat, the ethics of ingestion understandably becomes of greater relevance to cosmopolitans than the lot of indigent compatriots whom they never see.

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<sup>46</sup> For an introduction, see Nico Stehr, 'Moderne Wissensgesellschaften' *Aus Politik und Zeitgeschichte* 36 (2001) 7–14 (<http://www.bpb.de/files/K318AX.pdf>).

<sup>47</sup> See Christine M. Korsgaard, *Self-Constitution: Agency, Identity and Integrity* (Oxford: Oxford University Press, 2009) at 96.

<sup>48</sup> The rise of Raz' service conception of authority has a real social background. For an elementary exposition, see Joseph Raz, 'The Obligation to Obey: Revision and Tradition' In his *Ethics in the Public Domain: Essays in the Morality of Politics and Law* (2d ed., Oxford: Oxford University Press, 1995) 341–354.

Cosmopolitan morality lacks the power to change the globe. But it also discourages sacrificing global ambition for the sake of bounded political projects, for this would raise the spectre of ethnic or racial bias. Not surprisingly, the most noticeable effect of cosmopolitan morality often is simple individual ethical posturing. A useful intellectual technique for its enactment is utilitarianism, however in its post-Benthamian form that admits of no sovereign powerful enough to enact high-minded postulates. As cosmopolitan selves suffer immense disempowerment, they not infrequently turn their aggressive moral instincts against themselves and invent all kinds of ascetic exercises allowing them to reassure their cosmopatriots of the seriousness of their commitment. Remarkably, this is paired with the narcissistic overconfidence that voluntary private acts, such as riding a bike rather than driving a car, have an impact on the world at large. I am afraid that Ulrich Beck, even though quite perceptive in his diagnosis of individualization, was wrong when he suggested that the experience of risk gives rise to politicization.<sup>50</sup> Rather, it results in the moralisation of administrative action. The zeal with which it usually comes about indirectly reveals something about the profoundness of the underlying disempowerment.

### **The Passive Side of Self-Determination**

Both political philosophy and constitutional doctrine have traditionally highlighted the active side of collective self-determination. They explored matters such as giving voice to minorities<sup>51</sup> or the number of legal obstacles that a political movement would have to climb in order to attain the power to write political transformations into the stone of higher law.<sup>52</sup> For the purpose under consideration here it is of far greater interest, however, to explore the passive side. Being collectively self-determined hinges essentially on the reasons that one might have to have determinations made by others count as one's own. From the outset, the problem to which conceivable reasons respond is different for political and cosmopolitan self-determination.

Political selves are confronted with the task of reconciling their own will with the will of others. The key to finding reasons for making room for the will of others is, first, viewing

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<sup>49</sup> See Max Weber, *Staatssoziologie* (ed. J. Winckelmann, 2 ed. Berlin: Duncker & Humblot, 1966) at 47-48.

<sup>50</sup> See Ulrich Beck, *The Reinvention of Politics: Rethinking Modernity in the Global Social Order* (trans. Mark Ritter, London: Polity, 1997) 162-170.

<sup>51</sup> See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

one's own life as a component of a larger context and, second, valuing the existence of one's life in this context more than any political preference one happens to see defeated in a vote. Both the social perception and the valuation presuppose minimal acts of individual transcendence. One needs to see oneself as one person amongst others who think and reason differently. One merely shares the place with them.<sup>53</sup> The medium that permits people to establish reciprocity under this condition is the legal relationship, for law is the manner in which one expresses respect for the choices made by those whose reasons of choice one does not find convincing or simply irrelevant.<sup>54</sup> Outward conformity with norms is the mode of being loyal to a community which is one's own, even though one is, within it, among strangers.

For cosmopolitan selves, by contrast, the question is not whether one should yield to the volition of others with whom one shares a place. The point of self-determination is to deal with knowledge claims, that is, the reasonableness of expertise that addresses itself to the complexity of life in the aggregate. It feeds into modes of channelling individual conduct under complex conditions of risk, either through rules or incentives. Cosmopolitan subjects need to make sense of the knowledge claims underpinning problem-solving. When life is not experienced under circumstances of political self-determination, one cannot but rely on administrative services whose task is to facilitate or even to optimize processes of exchange and consumption. Such services are trustworthy as long as they incorporate rationality and do not unduly interfere with fundamental rights. Their origin does not matter. It is immaterial, in particular, whether their genealogy involves public regulators or self-regulating markets.<sup>55</sup>

The different conceptions of collective self-determination are thrown in even sharper relief when one considers what principles might make submission to authority reasonable. In the case of political self-determination, the reasons concern the conditions of access to basic goods which allow one to lead a whole life amongst others. In the case of cosmopolitan self-determination it is principles of rational problem-solving, such as

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<sup>52</sup> See Ackerman, note 15.

<sup>53</sup> Even though their view of the world may strike one as strange, the place is nonetheless familiar. The others are difficult to read, but they belong to oneself because they are part of the place where one lives. Under such a condition of estrangement from others one can only be self-determining by conceiving of oneself as a stranger for others. Seeing oneself through the eyes of others one realizes that, as a member of a community, one is a stranger to oneself.

<sup>54</sup> See Immanuel Kant, *The Metaphysics of Morals* (trans. M. Gregor, Cambridge: Cambridge University Press, 1996) at 47, 51.

<sup>55</sup> For a remarkably insightful analysis, see Galf-Peter Callies & Peer Zumansen, *Rough Consensus und Running Code* (Oxford: Hart Publishing, 2011).

accountability, transparency, responsiveness or susceptibility to deliberation. The first concern questions of political justice, the second questions of adequate and responsive risk-management.

Accepting administrative claims to rationality also involves self-transcendence because it presupposes sharing indulgence with others. When it comes to rational deference towards claims of rationality, one is taking one's cue from the conduct of others. The reliance on the good judgement of others who rely on the same is what mediates cosmopolitan self-determination. It involves the indefinite deferral of political action that relies on the prudent abstentions by others. But since nobody actually has such good judgement that somebody has in fact to be collectively imagined.

### **Civic Interpassivity**

Generally, on the level of cultural practices, interpassivity<sup>56</sup> can be encountered whenever individuals concurrently forbear from doing or enjoying something on the basis of the tacit fiction that someone else will do or enjoy it for them. That someone may be an imaginary I or, even more intriguingly, an imaginary other. Even though in either case it is, indeed, nobody, its imaginary role is sustained against the facts. For example, heavy art books are produced and bought in order to be shelved. TV programs are often recorded and only very rarely watched. In some instances, books become accumulated but almost never read. In each of these cases, the active enjoyment of a thing is tacitly delegated to a nonexistent delegate—and imaginary I, in this case—who is imagined to exist objectively in order to make forgoing opportunities either bearable or beyond reproach. People share this tacit belief in the imaginary person, for otherwise their common practice would not make sense. The market for art books exists. Collecting books is a respectable social practice, which nobody would dismiss as stupid. Recording and copying in lieu of listening and watching are widely shared techniques of coping with scarce leisure. But these practices make sense if an another person is tacitly imagined who is capable of doing the reading, the watching and the listening.

Such an imaginary I or other is not tantamount to what pragmatist social behaviourists call the “generalized other”, which stands for the organized attitudes that a group takes

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<sup>56</sup> I am borrowing the term from Robert Pfaller, *Die Illusionen der anderen: Über das Lustprinzip in der Kultur* (Frankfurt aM: Suhrkamp, 2002) at 27–41.

towards individuals.<sup>57</sup> The generalized other represents the systemic perspective of the set of norms governing the conduct of the group. Each individual is in principle capable of adopting this perspective by speaking for “us” in saying “we”. In other words, even though the generalized other provides guidance and thereby constrains individuals, it does so from the perspective of an ordinary individual. With regard to its abilities, it is in no manner superior to them. By contrast, the imaginary person who reads all the books, watches all the movies and enjoys photography of art works has capacities that are superior to the individuals whose passivity it facilitates. This does not, however, put this person into the chair of the superego. Quite the contrary, by virtue of an imaginary I individuals obtain the tacit licence to underachieve, even if the underachievement concerns—as it often does—pleasurable experiences.

Interpassive citizens abstain from exercising their political judgement and will. They defer, rather, to the authority of an imaginary other who is supposed to understand what is going on and in whom they may comfortably trust. Like owners of art books who may not even take the plastic wrapping off their bulky works, they save activity for an opportunity that will never come to pass. Interpassive citizens are in fact passive, for they always postpone protest for some later time. They may complain about this or that and even profess their profound alienation from governing institutions, but they would never take any action, for doing so would undermine the tacit authority of the imaginary other whom to presuppose makes a perfectly private life possible.

Much of the authority of the imaginary other is a consequence of ducking and conformism. If one does not want to appear strange in the eyes of all others one does not put into question what these others seem to accept as a given. The fact that nobody wishes to be in the position of the weirdo explains, indeed, why matters can so easily appear to be taken for granted.

Less dramatically put, the practice of interpassivity benefits from the circularity of acquiring and sustaining belief without the exchange of arguments. In order to see one’s reasoning and reasonableness reconfirmed one needs to take one’s cue from the behaviour and attitudes of others. The behaviour of others is, of course, no good reason for holding fast to a particular belief but it is a good reason for making out instances in which deference may be most appropriate. One does not want to rebel against things one does not have a stake in. One rather goes with the crowd.

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<sup>57</sup> See George Herbert Mead, *Mind, Self, and Society from the Standpoint of the Social Behaviourist* (Chicago: University of Chicago Press, 1934) at 154.

## Good Reasons

Quite disturbingly, however, there are also good reasons for participating in civic interpassivity and tacitly accepting the authority of the imaginary other.

As a device for coping with complexity, interpassivity can be easily rationalized in a society that is predominated by market rationality. Interpassivity has the structure of believing in the beliefs of others as long as the second-order beliefs promise to pay off. Financial markets embody this structure.<sup>58</sup> In this context, the value of a security is determined without a close analysis of the underlying risk but rather on the basis of another's willingness to pay. Likewise, the belief in the fictive beliefs of the imaginary other can easily be sustained as long as societies reap a dividend of gullibility. One can go on as long as one has reason to be confident that everything will be fine. As had once been observed by Vaihinger, fiction is what makes practice possible.<sup>59</sup>

Moreover, civic interpassivity becomes even more distressingly plausible in the face of the enormous practical difficulty involved in attempting to be a non-gullible Razian individual. An individual of this type would accept the practical authority of another person or institution only if it could establish that the person or institution knew better what is best for this individual or were in a superior position to bring about a desirable result.<sup>60</sup> The application of this "service conception" of authority presupposes not only that people would find it easy to distinguish between what they confidently know themselves and what is better for them to have known by others, but also that the meaning and scope of the conception could be easily ascertained. The roughly forty densely argued pages that Raz recently spent on elaborating the conception must make this appear doubtful.<sup>61</sup> Indeed, in addition to calibrating the service conception, distinguishing between what one knows and what one had better known for oneself by others is such an arduous task that its successful dispensation seems to presuppose invariably the imaginary other of

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<sup>58</sup> See Crouch, note 3 at 98, 118.

<sup>59</sup> See Hans Vaihinger, *Die Philosophie des Als-Ob: System der theoretischen, praktischen und religiösen Fiktionen der Menschheit aufgrund eines idealistischen Positivismus* (9th ed., Leipzig: Meiner, 1927).

<sup>60</sup> For a brief statement that is even more abbreviated in the text above, see Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (2d ed. Oxford: Oxford University Press, 1994) at 347. An alternative way of looking at the same matter is to say that individuals behave like "rationally passive shareholders" of a corporation who are intuitively aware that they would make things worse if they decided to take control. On the concept, see Joseph W. Yockey, 'On the Role and Regulation of Private Negotiations in Governance' (2009) 61 *South Carolina Law Review* 171-219 at 177-178. I owe this observation to Maya Steinitz.

interpassivity. There is no reason to be confident that one can be a Razian individual without deferring to an imaginary other. It remains unclear, at any rate, whether it takes an ordinary or an imaginary individual to draw the line between instances of self-reliance and reliance on others. There is even reason to suspect that the very conception of the Razian individual is a rationalization of the belief in the imaginary other and, in this respect, a mere intellectual proxy for it.

With that we are ready to turn to the European Union.

### **Europe: The No-Polis-Thesis**

As is well known, the European Union has always lent itself to competing legal descriptions,<sup>62</sup> chief amongst them the contrast between the Union as a regulatory state,<sup>63</sup> on the one hand, and as a special case of a federal system,<sup>64</sup> on the other. It is assumed, usually, that while the Commission and Agencies provide us with strong indicia in favour of the first description, the second is supported by the combined working of the Council and Parliament. The Lisbon Treaty suggests that the latter view is correct in the new Article 10 EU Treaty, which talks most contentedly about the Union's bicameral system of representation in Parliament and Council.

On the basis of the ideal-typical contrast developed above, I would like to offer an alternative description. One may want to call it, tongue in cheek, the "no-polis-thesis". According to the cosmopolitan outlook,<sup>65</sup> collective self-determination is about guessing what is best for each, individually considered, regardless of community bounds. The cosmopolitan world is flat. Constituencies are gone. States enter the picture, if at all, in their capacity as custodians of business opportunities. They cater to individual interests inasmuch as they provide safety, infrastructure, human resources and basic laws. But this

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<sup>61</sup> See Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009).

<sup>62</sup> I shall leave aside, for the moment, intergovernmentalism as mode with which political scientists have explored the Union.

<sup>63</sup> See, of course, Giandomenico Majone, 'Europe's 'Democracy Deficit': A Question of Standards' (1998) 4 *European Law Journal* 5-28 at 15-17.

<sup>64</sup> For a useful sketch of this alternative, see Renaud Dehousse, 'European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?' (1998) 35 *Common Market Law Review* 595-627.

<sup>65</sup> In contrast the interpretation put forward by Beck and Grande the following sketch is not at all interested in the question in which respect the European Union might be an "empire". But see, Ulrich Beck & Edgar Grande, *Cosmopolitan Europe* (London: Polity Press, 2007).

does not mean any of their functions could not be transferred to another body whose authority is not linked to control over a territory.

From that perspective, it is possible to take seriously the claim of European Union law to be self-standing. Union law, using the European Court of Justice as its *bouche*, claims to possess authority regardless of its pedigree from any national or popular *pouvoir* constituent.<sup>66</sup> It is a major shortcoming of established orthodoxy<sup>67</sup> not to tie this claim of autonomy to a different, non-political form of collective self-determination, which is constitutive in a normative sense, for it explains how individuals can conceive of themselves as the authors of European Union law.<sup>68</sup> This constitutiveness is reflected in the very reasons—or the reasoning mode—with which the origin and scope of the Union’s authority are constructed by the European Court of Justice. While the origin is rather obscurely rendered as a consequence of non-discrimination on the grounds of nationality,<sup>69</sup> the interpretation of the Union’s competence severs its links to acts of delegation, should they have ever existed at all. Consequently, the elimination of discrimination on the grounds of nationality and the creation of opportunities across national bounds comprise the normative core of the Union. This core provides good reasons for cosmopolitan individuals to endorse the Union as their form of association. Within a limited sphere, the Union creates a world without boundaries. This world is not a place where people live together and care about their criminal codes, their public schools or their urban development. This world is a template that facilitates and stabilizes self-interested interaction within the bounds of reciprocity. The public support for the institutions committed to this core mission is mediated by civic interpassivity and sustained at least as long as it pays a gullibility dividend (see above p. 17), which is also known as “output legitimacy”.

Core institutions of the European Union can be accounted for from this perspective (see the next section). But the view becomes even more plausible when taking into account how the Union incorporates political self-determination in three negative forms: first, in the vicarious form with which governments act on behalf of their people, second, in the

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<sup>66</sup> A demystified understanding of the constituent power does not perceive it as some unfathomable *cause* of the constitution but as *reasons* that make it authoritative for a particular people in the sense that they can regard it as “theirs”, as authored by them.

<sup>67</sup> See the introduction to this article.

<sup>68</sup> On the following, see my *Individualism: An Essay on the Authority of the European Union* (Oxford: Oxford University Press, 2008).

<sup>69</sup> See Case 6/64, *Flamino Costa v. ENEL* [1964] ECR 585.

increasing antagonism brought about by regulatory disarmament, and third, as an effect of Monetary Union.

## **Problem-Solving and Rights**

For cosmopolitan European citizens it is prudent to have the functioning of the internal market and the management of risks addressed by a body that can legitimately claim to be a repository of technical, economic and legal expertise. So long as standards of accountability and transparency are observed and so long as States qua providers of infrastructure participate, it is rational to be self-determining in the form of the interpassive deference to the Commission bureaucracy and its surrounding belt of satellite agencies. It is also smart to allocate rational problem-solving to a level where it promises to reduce complexity for a large number of people. Contrary to Scharpf's suggestion that international co-operation is legitimate on the ground of expanding the reach of democracy,<sup>70</sup> the allocation of powers to the Commission and Council is consistent with cosmopolitan sensibilities for the reason that a greater degree of constructive problem-solving capacity among states promises greater overall rationality. Transnational problems require transnational solutions. Any diversity of conflicting approaches is likely to fall short. In a similar vein, one can even conceive of the European Parliament in a cosmopolitan manner if one dims provisionally any semblance to political representation. One merely needs to re-conceive Parliament in proto-constitutional terms<sup>71</sup> as a bulwark for the rights of European citizens. This is a role in which Parliament has scored a number of goals, especially considering its standoff with the Commission and the Council over Bolkenstein's Service Directive or its more recent successful resistance to the agreement on the transfer of airline passenger data. Thus understood, even Parliament fits an understanding of the Union that presents it as a product of cosmopolitan constitutionalization, that is, under the auspices of exactly the transformation of constitutionalism which is associated with pushing the constitution beyond the nation

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<sup>70</sup> See above note 22.

<sup>71</sup> The proto-constitutionalism that I have in mind is, of course, the proto-constitutionalism of the first English revolution in the course of which Parliament acted as the defender of the rights of Englishmen. Quite remarkably, a similar role has been attributed to the European Parliament by the Federal Constitutional Court as early as in *Solange II*. See *Wünsche Handelsgesellschaft* [1987] 3 *Common Market Law Reports* 225 para. 45.

state. The underlying authorising power is manifest in the interpassivity<sup>72</sup> of self-reliant individuals who concurrently believe in the judgement of that imaginary other who knows that everyone is better off when the Union is taking the helm. Conceiving of the Union on the basis of the formula of “rational-problem-solving-plus-fundamental-rights-protection” might actually encourage the German Federal Constitutional Court to scrap its hapless invocation of delegation and representation of Member State interests in the Council as the Union’s legitimating factor.<sup>73</sup> It would have to confront openly, rather, that the *irregulare aliquod* which it finds so terribly disturbing is indeed an *aliud* when compared with national partisan democracy.

### **Absorptive Representation**

This cosmopolitan attitude is confirmed by the prevalence of three negative forms of political self-determination. One concerns co-operation among Member States and is, more precisely, the exercise of political self-determination externally at the cost of its negation internally; the two others is manifest in the manner in which the European constitution forces these same states to compete and to subordinate public liberty to the stabilization of the value of money.

From a citizen’s perspective, political self-determination is achieved vicariously by governments interacting in the Council. While it is true that international co-operation broadens the scope of action and that, thus understood, participating agents are able to influence what would remain beyond their reach if they acted alone, the reduction of constituencies into states—the condensation of plurality into oneness—disowns citizens of their political self-determination. While governments representing their economic infrastructure may very well do their best in order to support certain national groups—usually businesses—they thereby make trade-offs that would ordinarily require some internal participatory process, at the end of which contending parties might settle on some agreement. In a transnational context, however, this process is taken out of the hands of the people and their representative assemblies. Foreign relations render societies more homogeneous than they really are. Plurality is given the appearance of unity. It turns out, therefore, that collective political self-determination among states involves only the

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<sup>72</sup> See note 56.

<sup>73</sup> See *Brunner v. European Union Treaty* [1994] 1 Common Market Law Reports 57 para. 37; *Lisbon Decision*, BVerfG 2 BvE 2/08 at paras. 231-236.

vicarious political self-determination of their peoples. Political judgement is not exercised by the people and their representatives, but rather by governments in and on their behalf. Since this implies an absorptive relation of representation, it also entails negation. Paradoxically, political self-determination is realized among states at the cost of its negation within states. Put positively, it is sustained through its abdication.<sup>74</sup>

In systems availing of a lively political process at the federal level, the representation of peoples through governments can play an important role in the overall process of representation. While citizens are by law identified with their locality, local governments have to engage in debates and negotiations in a context in which citizens are also fully politically represented, for example, in a house of representatives. This is a mode of managing dual membership which reconciles negative political self-determination with its positive counterpart. It allows people to confront and to transcend their local identity. Nothing of this kind, to be sure, is taking place where intergovernmental negotiating predominates and the representation of people plays the secondary role.

## **Regulatory Disarmament**

The second negative form of political self-determination concerns its increasing de facto impossibility in the area where it really matters.<sup>75</sup> The situation is a confluence of the latest enlargements and of the ambition on the part of the Commission and Court to advance from passive regulatory competition to active regulatory disarmament.<sup>76</sup>

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<sup>74</sup> The negativity may extend even further than is sketched in the text. Member States negotiate policies in the Council and in various committees. But they hardly do this in view of a common life that they would like to sustain, but rather with the awareness that participation is to the advantage of their constituencies. They do not share their reasons with other Member States. They rather see the other states as obstacles that need to be removed or circumvented in negotiations. Their conduct is not based on common sympathy but rather on the neutralization of common antipathy. See Christine Korsgaard, *Self-Constitution: Agency, Identity and Integrity* (Oxford: Oxford University Press, 2009) at 191-193.

<sup>75</sup> On negative politicization, see Claus Offe, 'Demokratie und Wohlfahrtsstaat: Eine europäische Regimeform unter dem Stress der europäischen Integration' In W. Streeck (ed.), *Internationale Wirtschaft, nationale Demokratie: Herausforderungen für die Demokratietheorie* (Frankfurt aM: Campus, 1998) 99-136 at 113.

<sup>76</sup> On the enhanced role of both institutions in the post-enlargement situation, see Martin Höpner & Armin Schäfer, 'Grenzen der Integration – wie die Intensivierung der Wirtschaftsintegration zur Gefahr für die politische Integration wird' (1/2010) *Integration* 1-20 at 10-11.

Narrowly understood,<sup>77</sup> one is confronted with a situation of regulatory competition where through the experience of differences in product prices and factors of production the Member States have an incentive to alter or to fine-tune the rules governing production and distribution. The challenges that confront them are basically of an economic nature, even though addressing them successfully may require adaptations of their legal background. The requisite medium of communication is prices.

Regulatory disarmament, by contrast, infuses substantive economic due process into a transnational context.<sup>78</sup> The medium thereto are legal challenges, the resolution of which involves the proportionality principle. Disarmament moves a country's exposure to different regulatory regimes beyond the level of economic challenges and restricts the freedom of choice of the Member States with regard to how they influence their economy's competitive edge through their legal system. The basic idea is that, as soon as an economic activity leads to an encounter between the overall social background regimes of a home and a host state, the rules or practices of the host state can be submitted to strict proportionality scrutiny when they are comparatively more restrictive. Consequently, businesses established in a home state are in a position to target their own system of industrial relations,<sup>79</sup> labour laws,<sup>80</sup> workforce participation<sup>81</sup> or taxation<sup>82</sup> by making them interact with the systems of their neighbours.

Regulatory disarmament is perfectly cosmopolitan. It forces Member States (and private parties) to reflect on the rationality of their laws without regard to the broader social context from which they have originated. Regulatory disarmament dramatically increases the competitive vulnerability of Member States whose social systems are marked by a high

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<sup>77</sup> I am aware that ordinarily regulatory disarmament is treated as a special case of regulatory competition. For reasons having to do with the medium of competition I believe it makes sense to distinguish between competition, which uses the price mechanism, and disarmament, which relies altering the legal conditions giving rise to price competition.

<sup>78</sup> For a sketch, see my 'Idealization, De-Politicization and Economic Due Process: System Transition in the European Union' In B. Iancu (ed.), *The Law/Politics Distinction in Contemporary Public Law Adjudication* at (Utrecht: Eleven, 2009) 137-167 at 151-154.

<sup>79</sup> See, the notorious suspect, Case C- C-341/05 *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

<sup>80</sup> See Case C-346/06, *Dirk Ruffert v Land Niedersachsen* [2008] ECR I-01989.

<sup>81</sup> This is an issue that arises for corporate governance in particular after the demise of the seat theory in *Überseering* and *Inspire Art*. See Case C-208/00, *Überseering BV and Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919; Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam and Inspire Art Ltd* [2003] I-10155.

<sup>82</sup> See Case C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837.

degree of de-commodification.<sup>83</sup> So long as it was limited to facilitating the free flow of commodities, it remained, arguably, a means of heightening regulatory competition.<sup>84</sup> Once extended to the establishment of companies and to service provision, it begins to divest Member States of the means to sustain the bonum commune created by their specific mode of organising capitalist production and exchange. Countries with high social standards find themselves no longer in a position to fend off easily competition from low-standard countries by forcing foreign operators to comply with their laws on their territory. Indeed, the principle of regulatory disarmament, if applied consistently, demands that any existing regulation that is comparatively more business friendly be prima facie available to anyone everywhere in the internal market.<sup>85</sup> Member States are therefore potentially always under pressure to justify, in the terms of strict proportionality scrutiny, isolated obstacles that arise in cases of collisions with more liberal regimes.<sup>86</sup> This situation provides economic liberalism with a head start.<sup>87</sup> Not surprisingly, therefore, negative political self-determination has a dynamic of its own.<sup>88</sup> Instead of giving rise to a productive revival of the left-right opposition and reinvigorating a debate over the limits of economic liberalism in Europe, it reinforces divisions among the Member States.<sup>89</sup>

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<sup>83</sup> The term “de-commodification” stands for a bundle of measures that help to establish and to sustain a certain degree of market-independence. See Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton: Princeton UP, 1990) at 37.

<sup>84</sup> One may find this development warranted by the postulate of doctrinal consistency, for it merely extends the obstacle approach from free movement of goods to other freedoms, such as freedom of establishment or freedom of services. The same postulate, however, reveals what is truly at stake. The rules governing product characteristics go into the product. In sense, they become reified and are then allowed to travel freely in a common market. The extension of the obstacle approach to establishment and services reifies whole packages of economic and social legislation. They travel freely in the Community. Member States no longer have a territory. Political self-determination could not be more blatantly negated.

<sup>85</sup> This idea is prefigured in Case C-212/97 *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459 para. 27.

<sup>86</sup> An epitome for this development is the application of strict scrutiny to acts of international trade unions solidarity. See Case C 438/05 *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP* [2007] ECR I-10779 at para. 89.

<sup>87</sup> Martin Höpner & Armin Schäfer, ‘A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe’ (2007) 07/4 MPIfG Discussion Paper at 8: “Liberal market economies and organized economies are no longer equally valid production regimes but the institutions of the latter are seen as barriers to Economic Union.”

<sup>88</sup> See Höpner & Schäfer, note 76 at 19.

<sup>89</sup> See Liesbeth Hooghe & Gary Marks, ‘Politisierung und nationale Identitäten’ In M. Höpner & A. Schäfer (eds.), *Die Politische Ökonomie der europäischen Integration* (Frankfurt aM: Campus, 2008) 197–201; Höpner & Schäfer, note 76 at 19;

## Guardianship

The third form of negative political self-determination is a consequence of Monetary Union. As is well known, the current efforts not only at managing the Greek sovereign debt crisis but at sustaining the viability of the common currency as such have increased the powers of surveillance and sanction by Commission and Council. The strengthened position of the former in the preventative context (e.g., “reverse majority vote” on a finding of non-compliance) lends the revised Stability and Growth Pact a more authoritarian touch.<sup>90</sup> The future European Stability Mechanism, aside from reflecting the IMF’s oligarchic allocation of votes,<sup>91</sup> is characterized by a high degree of entanglement among its Board of Governors, the Commission, the International Monetary Fund and the European Central Bank. The governance of public debt and economic policy under the auspices of conditionality<sup>92</sup> is supposed to result from co-operation among a number of different bodies. For example, if the Board of Governors decides to grant “in principle” financial assistance to an ESM member, the details of a “memorandum of understanding” are to be negotiated by the European Commission “wherever possible with the IMF, and in liaison with the ECB”.<sup>93</sup> Such vagaries of cooperation disperse responsibility (which is with regard to its effect very similar to privatization).<sup>94</sup> One can put up with opacity, of course, so long as the interaction among these institutions promises to pay rewards.

The significance of current events cannot be understood, however, without reconstructing the meaning of Monetary Union in the terms outlined above. By its very design, the Monetary Union is a method of depoliticizing a core part of economic policy. Above all, following the model of the German Bundesbank, it confers on an expert body the task of macroeconomic management.<sup>95</sup> In the spirit of monetarism, the function of the bank is to guarantee price stability and to calibrate a money supply that facilitates non-inflationary economic growth. From the perspective of political accountability to voters this approach

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<sup>90</sup> See merely the summary of the as of yet unpublished “six pack” published by the Council of the European Union, Press release of October 4, 2011. See also Amartya Sen, ‘Let’s wrest democracy back’ *The Guardian*, June 24, 2011.

<sup>91</sup> See Article 4(6) of the Treaty Establishing the European Stability Mechanism.

<sup>92</sup> See *ibid.* Article 13(2)(2).

<sup>93</sup> *Ibid.*

<sup>94</sup> See Sharon Dolovich, ‘How Privatization Thinks: The Case of Prisons’ In J. Freeman & M. Minow (eds.), *Government by Contract: Outsourcing and American Democracy* (Cambridge, Mass.: Harvard University Press, 2009) 128-147.

<sup>95</sup> The following observations are deeply indebted to Scharpf, note 2.

to macromanagement offers a great advantage over its Keynesian counterpart, which requires aggregate demand management by fiscal means, such as taxation and public investments. The Keynesian instruments are politically risky. Long-term economic steering is constantly vulnerable to short-term retribution by disappointed voters. Raising taxes, which may well be necessary in an overheating economy, is never a popular measure. Voters, as well as trade unions, are always likely to counteract macroeconomic strategies. By contrast, using the supply of money as the basic lever of macroeconomic policy is a technical affair. Concrete choices made by a bank are far less likely to become politicized than under Keynesian conditions. The success of monetary governance, however, depends vitally on the readiness on the part of government and trade unions to stay within the parameters defined by the bank.<sup>96</sup> The whole system is based, then, in the belief in the wisdom of the central bank and the readiness to comply with its demands. Someone knows that the bank knows best. It is in this someone in whom everyone trusts. The transposition of the German model to the European level was based on the assumption that public deficits are the major challenge to prize stability.<sup>97</sup> They were to be contained on the basis of so-called convergence criteria, over which there was no political discussion.<sup>98</sup> Pragmatically, the whole point of the monetary union has been to provide transnational businesses with an environment in which they are no longer exposed to currency fluctuations.<sup>99</sup> Even though it has been widely assumed that a common currency—given its importance for the overall shape of social and economic policy—would presuppose some form of “political” union,<sup>100</sup> the common currency was introduced as though monetary policy were an isolated issue that was to be dealt with sufficiently by institutions with relevant technical expertise.<sup>101</sup> Therefore, Europe’s Monetary Union is remarkable in two respects.

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<sup>96</sup> As Scharpf, note 2, at 7, explains, this system worked in Germany because wage leadership was exercised by trade unions that respected monetary constraints. Countries with more decentralized wage-setting by a variety of unions are not able to contain inflationary pressures.

<sup>97</sup> See Article 127 FEU Treaty.

<sup>98</sup> See Alexander Schubert, *Der Euro: Die Krise einer Chance* (Frankfurt aM: Suhrkamp, 1998) at 104-107. The criteria introduce a relatively tight budgetary discipline in order to guarantee the stability of the European currency. They are part of primary EU law through Art 126 (2) FEU Treaty, which refers to the protocol on the excessive budget deficit procedure.

<sup>99</sup> See Schubert, note 98 at 89, 91, 112, 117-119, 164.

<sup>100</sup> See Paul Krugman, ‘The Euro Trap’ *New York Times* 30 April 2010.

<sup>101</sup> For a very perceptive analysis, see Schubert, note 98 at 120-121.

First, it is a unique experiment in stabilizing a currency without backing by a state.<sup>102</sup> This has turned out to be its major weakness. Owing to uneven economic growth and the inability on the part of the Union to effect inter-regional transfers in order to respond to “asymmetric shocks”, the Union has never been an optimal currency area.<sup>103</sup> Rather, the European Central Bank’s uniform monetary policy amplified the already existing unevenness of economic growth. After the introduction of Monetary Union, low growth countries with low inflation experienced an additional depressing effect from relatively high interest rates, whereas fast growing economies with higher than average rates of inflation benefited from nominal interest rates that were too low for them.<sup>104</sup> Pursuant to monetarist principles, the problems of the former countries were only to be solved by the Member States on the basis of “supply-side” measures, such as labour-market liberalization and flexibilization, whereas the problems of the latter required fiscal measures for containing the boom, such as higher taxes. Both strategies were neither popular nor, as the cases of Spain and Ireland demonstrated, effective. These countries were unable to contain the boom that was triggered by cheap capital.<sup>105</sup>

Second, Monetary Union has a profoundly disarming effect on participating domestic economies. Countries with different growth and inflation rates find themselves divested of currency fluctuation and interest rate calibration as tools of economic stabilization. What they still can do is to resort to social retrenchment or restrictive wage policies.<sup>106</sup> The tight connection established by the convergence criteria between price stability and fiscal policy leaves Member States with too little room to manoeuvre. Without monetary policy and confronted with severe shackles on deficit spending, what remains for domestic policy in order to influence their competitiveness are the stagnation of wages and the creation of a flexible business environment.<sup>107</sup>

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<sup>102</sup> See Schubert, note 98 at 119; Paul Krugman, ‘A Money Too Far’ *New York Times* 7 May 2010.

<sup>103</sup> See Scharpf, note 2 at 11-12.

<sup>104</sup> See *ibid.* at 12-13.

<sup>105</sup> See *ibid.* at 18, 22.

<sup>106</sup> Outside of a monetary union, countries could simply adjust the exchange rate vis-à-vis other states in order to avoid cutting their wages.

<sup>107</sup> For a more detailed analysis, see Henrik Enderlein, ‘Wandel durch den Euro: Wie die Währungsunion die nationale Fiskal- und Lohnpolitik verändert’ In M. Höpner & A. Schäfer (eds.), *Die Politische Ökonomie der europäischen Integration* (Frankfurt aM: Campus Verlag, 2009) 415-448. The situation is exacerbated by the fact that a transnational economy devalues work at the expense of capital since the highest revenues are expected from the least labour-intensive forms of production. See Schubert, note 98 at 60-61, 79. Transnational capitalism not only destroys jobs “at home”, but in the long run it also destroys jobs “abroad”.

The international financial crisis of 2008 demonstrated that the overheated national economies were extremely vulnerable to disturbances originating from international financial markets.<sup>108</sup> The necessity of bank bailouts along with the general economic downturn (with foregone tax revenues and increased transfer payments) brought about the sovereign debt crisis that has since been on the headlines of the world press.

Its negative effect on political self-determination is quite obvious. If countries like Greece are not sent into bankruptcy and thereafter released from the Eurozone, the only remaining alternative appears to be the establishment of some fairly authoritarian economic government that, in the words of Scharpf, represents the worst of three possible worlds.<sup>109</sup> Instead of either allowing countries to stand monetarily on their own feet again after suffering from hardship<sup>110</sup> or, alternatively, establishing the institutions necessary for realizing common solidarity, the current rescue-cum-retrenchment process appears to put affected governments into the position of receivership vis-à-vis European and international institutions while simultaneously leaving them fully vulnerable to political retribution by their peoples. Governments, even though demoted to the status of wards, will be held responsible for austerity and retrenchment when following the diktat of a number of supranational and international institutions, which they have to abide by in order to sustain the common currency. They will actually bear the costs of sustaining the Euro just as much as the Eurozone countries paying into the Stabilization Fund or Mechanism. While, however, in the case of the supporting countries parliamentary majorities retain formal control over the amounts that go into the rescue fund, the receiving countries, politically considered, get the raw end of the deal. Most likely, the voting populace that cannot change austerity and retrenchment policies through elections will lose its faith in democracy, reject the Union or, worse still, straightforwardly regress into nationalist strife.<sup>111</sup> People will realise that they have ceased to matter in a global economic context where financial markets have long attained priority over politics. They will understand that what really matters, at the end of the day, is how their sovereign debt performs on the scoring sheets of rating agencies. They will observe how a small class of players benefits from financial capitalism while an increasing number of members of

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<sup>108</sup> See Scharpf, note 2 at 25.

<sup>109</sup> See *ibid.* at 33.

<sup>110</sup> See *ibid.* at 27.

<sup>111</sup> There were some indications, recently, that this might happen in Greece, as resentment against Germany, of all countries, appears to be on the rise. For a succinct historical analysis of the European

society becomes economically more vulnerable to shifting market demands.<sup>112</sup> It will dawn upon them that transnational economic integration works systematically to the detriment of an ever growing number of ordinary people that are threatened with exclusion owing to their low level of productivity. They will comprehend, finally, that they will be forever dependent on exactly that domestic social system which is about to erode continuously as a result of fiscal stabilization.

It is obvious what other conclusion they are going to draw from this.

## **The Core Question**

The current Union appears to be right for people whose chief interest is to do well on markets and to be offered a solid and stable business background by reliable expert bodies. The predominance of this type of interest is an indication of oligarchy.<sup>113</sup> If it were not for the second and third type of negative political self-determination it could be argued that the overlaying of national democracy with a market-competitiveness oriented discipline is a characteristic of a mixed polity and that the Union would be an instantiation thereof.<sup>114</sup> But disarmament and disempowerment tilt the construct in favour of dictated austerity and against the collective rights of labour. The current Union is modern version of oligarchy. The cosmopolitan vision of leading an autonomous life, which finds its most general expression at the Union level, betrays how private ambition is able to colonize political self-determination in the context of a multilevel system.<sup>115</sup> Apparently, Europeans experience themselves as too busy for, too distracted from, and too discouraged to, engage in political affairs, not least because an engagement of this kind seems to have become increasingly pointless in an age where global interdependence has become another name for the inevitable. Hence, the oligarchic Union appears to be the most adequate

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compromise between capitalism and democracy that arrives a similar perspective, see Wolfgang Streeck, 'The Crisis of Democratic Capitalism' (2011) 71 *New Left Review* 6-29 at 27-28.

<sup>112</sup> For an intriguing analysis, see Crouch, note 3 at 120-121.

<sup>113</sup> See Aristotle, *Politics* 1280a 28 (trans. B. Jowett, Cambridge: Cambridge University Press, 1996) at p. 73.

<sup>114</sup> For such a perspective, however, for different reasons, see Giandomenico Majone, 'Delegation of Regulatory Powers in a Mixed Polity' 8 (2002) *European Law Journal* 319-339.

<sup>115</sup> For quite prescient observations regarding the colonization of our life-world, as a result of which the complexity of world markets and the world economic system can no longer be accounted for on the basis of domestic cultures and thus begins to rule over them with the foreign authority of a colonial ruler, see Jürgen Habermas, *Theorie des kommunikativen Handelns*, vol. 2 (Frankfurt aM: Suhrkamp, 1981) at 522.

institutional reflection of what goes on inside their conflicted souls. In a very sobering sense, it appears to be right for them.<sup>116</sup>

Of course, whether or not it is indeed right for them depends on whether it is reasonable to have one's collective self-determination mediated by the judgement of an imaginary other. This imaginary other has authority, to be sure, in the sense that reliance on the trust in him by others constitutes interpassive practical reason.<sup>117</sup> The reasonableness of this imaginary, however is called into doubt as the second and third form of negative political self-determination introduce into the European integration process a strong propensity to self-subversion, not least because they might trigger a mighty resurgence of Member State parochialism.<sup>118</sup> Regulatory disarmament and growing divide between a perceived profligacy in others and ascription of frugality to oneself undermine the European project.

The ball is the court of European citizens. All that the interpretations offered on these pages attempt to do is to make them aware of their responsibility. From the perspective of modern constitutionalism, at any rate, the current state of the Union reflects the prevalence of cosmopolitan collective self-determination. That which claims to have authority over European citizens would have rightful authority over them only if it were the effect of their own interpassivity. It is submitted, therefore, that citizens had better ask themselves a simple question: Do we choose our own personal good and rely for its realization on the judgement of that unknown person suggesting that whatever the Union does for us is also good for us? But even if their answer to this question turned out to be positive, as it may likely be, they would still have to ask themselves whether they should not reconsider their form of collective self-determination in the face of the new administrative authoritarianism, for it may destroy the form of life that they cherish as Europeans.<sup>119</sup> More precisely, if they discovered that they share a concern for the form of life that is distinctly European they would have already taken the step towards political self-determination. The question before European citizens is not, therefore, whether they should choose one form of self-determination over the other. The question is, rather, what

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<sup>116</sup> Or this is what I have argued before; see my *Individualism: An Essay on the Authority of the European Union* (Oxford: Oxford University Press, 2008).

<sup>117</sup> For analogous observations, see Pfaller, note at 70-71.

<sup>118</sup> See Höpner & Schäfer, note 76 at 19-20.

<sup>119</sup> For a salutary reminder, see Paul Krugman, 'The Hole in Europe's Bucket', *New York Times*, October 24, 2011.

they already care about, for this would already indicate whether the Europe that they want would have to be either cosmopolitan or political.

Indeed, the last two negative forms of political self-determination point to the core of a European commitment that historically precedes integration. It is about exercising common control over markets.<sup>120</sup> Markets are the enduring feature of modern life. Hence, the key issue of giving shape to various forms of life is how a society embeds the operation of markets into various strategies of coping with social risk constitutive of their operation, in particular, but not exclusively, the risk that arises from a lack of ability to participate in exchanges.<sup>121</sup> Historically, Western European democracies have been remarkably successful at arriving at a great variety of solutions. The current drift towards regulatory disarmament and authoritarian monetarism, by contrast, threatens to universalize the neo-liberal categorical imperative according to which equality means approximation of social standards to the lowest sustainable level.<sup>122</sup> This threat concerns the heart of political self-determination, for it affects the form of life—or a cluster of such forms—that is to be sustained among Europeans.

## **Europe's Political Mission**

Obviously, effective political self-determination by the European peoples would presuppose powers proportionate to this more holistic task. They would require, at the very least, increased central control over economic and fiscal policy and a system of taxes and transfers. It is equally obvious that such a radical change could be effected legitimately only by moving Europe ever more closely into the direction of an ordinary constitutional democracy. It would be too early, therefore, to close the book on the founder's vision. And it goes without saying that Europe cannot become politically active without a vigorous Parliament. This is the place where the ball needs to be picked up.

Luckily, the push for a political Europe does not have to break the taboos that emerged at the heyday of neoliberalism when Europe was imagined to be "sui generis", an

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<sup>120</sup> For a salutary and timely reminder, see Tony Judt, *Ill Fares the Land* (New York, Penguin: 2010) at 46-50.

<sup>121</sup> See Fred Block, 'Towards a new understanding of economic modernity', in: Ch. Joerges et al (eds.) *The Economy as Polity* (London: ULC Press, 2005) 1-16.

<sup>122</sup> In a free market regime for health insurance and medical services agonizing rationing questions would never arise, for it would be understood that scarce goods and services are only available to those who are able to pay for it. Markets are ways of relinquishing responsibility.

“unprecedented experiment” or an exercise of some meta-constitutionalism.<sup>123</sup> Since nobody is able to pin down what it takes to have a “real” federal system or a “real” state, Europe could be turned into common political space while repeating the well-known mantras that this would not entail—of course not—the creation of a federal state. The reason why the old mantras could be replayed endlessly is that both federalism and statehood denote indeterminate degrees of centralization whose presence can be always denied by pointing to one or the other missing element.<sup>124</sup>

The challenge is a substantive one. Institutions have to match the task of sustaining a relatively highly de-commodified<sup>125</sup> form of life—or clusters thereof—in the face of the global ascendancy of more authoritarian varieties of capitalism. When it comes to meeting this challenge, Europe has one particular advantage over other regions, for its post-war history bears testament to the fact that peoples are capable of rising above the sphere of necessity in a sustainable manner.<sup>126</sup> What the Britons refer to as “Europe” is in the unique position to draw on collective memory.<sup>127</sup> Even in those places where the relevant social experiments were unfortunate the longing for a more de-commodified life seems to persist to this day, even if mostly in the form of “ostalgia”.

Of course, any suggestion that Europeans had better realize that there is a cluster of forms of life they share must deal with two objections. First, there exists a great diversity of national traditions with regard to organizing capitalism and providing a safety net; and it is almost hopeless to imagine them to converge in the future.<sup>128</sup> Second, common efforts at de-commodification only can succeed within the culturally homogeneous space of a nation where an elusive sense of commonality instils in people the readiness to make sacrifices for others.

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<sup>123</sup> For an inspiring piece, see Neil Walker, ‘Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe’ G. de Búrca & J. Scott (eds.), *Constitutional Change in the European Union* (Oxford: Hart Publishing, 2000) 9–30.

<sup>124</sup> See Hans Kelsen, *Introduction to the Problems of Legal Theory* (trans. B. L. Paulson & S. L. Paulson, Oxford: Clarendon Press, 1992) 101–103.

<sup>125</sup> “De-commodification” designates a variety of strategies to lift human life above the relentless nexus of the market. At a most elementary level, compulsory insurance schemes create solidarity among a group of people. See Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press, 1990) 21–22.

<sup>126</sup> See Karl Marx & Friedrich Engels, *Die Deutsche Ideologie*, MEW vol. 3 (Berlin: Dietz, 1978) at 76.

<sup>127</sup> For a remarkable exemplification, see Tony Judt, *Postwar: A History of Europe since 1945* (New York: Penguin Press, 1995) 777–792.

<sup>128</sup> For a balanced assessment see, Stefan Leibfried & Herbert Obinger, ‘Nationale Sozialstaaten in der Europäischen Union: Zukünfte eines “sozialen Europas”’ in *TranState Reprints* (Bremen 2008).

The first objection is difficult to refute, even though one may wonder why it would remain impossible to attain in the social sphere what was possible to bring about in the sphere of Monetary Union. Undoubtedly, long-term convergence would be impossible without a strong commitment to more uniform conditions of life.<sup>129</sup>

The second objection can be addressed more easily by challenging the suggestion that it all turns on homogeneity. Political self-determination within a nation state is usually associated with fairly homogenous communities. Cosmopolitan self-determination, by contrast, is assumed to operate outside “thick” communal contexts. But this is a false contrast. In particular, the lack of liberality that is supposed to be the downside of high homogeneity could beset both types of self-determination. Cosmopolitan self-determination, in particular, cannot be an antidote to the moral homogeneity of traditional societies. Choices in the context of risk-regulation necessarily implicate evaluations of risk. These are likely to reflect the normative conventions entrenched in the social stratum of those engaged in the choosing.<sup>130</sup> This explains why controversy over risk can be a medium for status competition.<sup>131</sup> Since cosmopolitan self-determination does not provide relevant conflicts with a political outlet it is likely to result in unmitigated alienation. Political self-determination, rather than requiring homogeneity, is capable of making its absence explicit.

What matters, instead of homogeneity, is what Rousseau hinted at in his enigmatic reflections on civil religion. Rousseau remarked that citizens must have religion in order to be obligated to love their duties.<sup>132</sup> The paradoxical idea of a loving your duty suggests a longing and readiness to outgrow oneself. Religion, evidently, is one way to nurture this longing, but so is nationalism. It exercises so much sway over people because it emancipates those who belong to a nation from the pains of individuation. It anchors life in something larger and greater than individual existence.<sup>133</sup> As a member of a national community, one can take pride in the achievements of others for the sole reason that these others are compatriots. Merit or contribution plays no role. However, nationals also have to make sacrifices in order to sustain this bond. One can lay claim to the fame of others also if, as a matter of reciprocity, one is ready to merge with the larger whole. Citizens

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<sup>129</sup> See Jürgen Habermas, ‘Rendons l’Europe plus démocratique!’, *Le Monde* October 27, 2011.

<sup>130</sup> See See Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, ‘Fear of Democracy: A Cultural Evaluation of Sunstein on Risk’ (2006) *Harvard Law Review* 1071-1109.

<sup>131</sup> See, more recently, Dan Kahan, ‘The Cognitively Illiberal State’ (2007) 60 *Stanford Law Review* 115-153.

<sup>132</sup> See Rousseau, *Social Contract* at IV.8.

need to love their duties. No transcendence without commitment. In motivating sacrifice, nationalism functions as a civil religion.

The usual icons of nationality—the grave of the unknown soldier, the monuments erected for martyrs—are the idols of this civil religion. Nationalism unmistakably is analogous to religion in that it affirms that what a given form of life regards as good reasons for belief and action really are authoritative reasons.<sup>134</sup> Whereas religion endorses authoritativeness with appeal to myths or divine revelation, national communities tell stories about how their form of life has come to be what it is in the course of victory and defeat.<sup>135</sup> These stories are told, not with the aim to relativize, but rather to underscore the authority of arrangements. They are about heeding what one has inherited from prior generations. Their point is to provide individuals with reason to seek their self-realisation in communion with others. Indeed, similar to religion, nationalism is a realm of experience where we encounter awe and transcendence, and in extreme cases even the equivalents of the effervescence that Durkheim associated with religious practice.<sup>136</sup> The nationalist promise of transcendence is enticing and risky. Religion and nationality are fascinating because they encourage good people to do very bad things. Nothing is less banal than the banality of evil.

Old-fashioned nationalist constitutionalist theory, as captured in the work of Paul Kahn<sup>137</sup> and his disciple Ulrich Haltern,<sup>138</sup> highlights the temporal aspect of transcendence. It thereby, unwittingly or not, plays the card of the dark side. Soldiers give their lives. Their sacrifice bears testimony to the binding force of something that is more eminent than an individual. Apparently, that is what liberal individualists yearn for, at any rate in aesthetically transfigured form, in the disenchanted world of global commerce. Nothing of this kind, however, is relevant to European integration.

By contrast, in their post-national situation, Europeans are in the unique position. They are able to choose on rational grounds what nationalism presents as a fateful inheritance. It is in the hands of Europeans to assert freely, if they want, a form of life that promises to

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<sup>133</sup> See Charles Taylor, *A Secular Age* (Cambridge, Mass.: Harvard University Press, 2007) at 231.

<sup>134</sup> See Terry Pinkard, *Hegel's Phenomenology: The Sociality of Reason* (Cambridge: Cambridge University Press, 1994) at 221.

<sup>135</sup> See See Ross Poole, *Nation and Identity* (London: Routledge, 1999) at 69–71.

<sup>136</sup> See Emile Durkheim, *The Elementary Forms of Religious Life* (trans. C. Cosman, Oxford: Oxford University Press, 2001).

<sup>137</sup> See Paul Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (New Haven: Yale University Press, 1987) at 85.

assert the priority of justice over the good of volatile markets. They could draw on a common memory, not for reasons of authorisation but as a confirmation that what they are aiming at is not an idle utopian dream. Unlike in the case of nationalism, it is not a mere legacy that is at stake here, but a legacy that can be endorsed on universal grounds of social justice. The assertion of the European form of life is not a question of fate, it is a matter of informed and reasonable choice.

## Conclusion

The cluster of forms of life that is likely to be of concern to Europeans is distinguished by the aspiration to create socially embedded markets.<sup>139</sup> Against this background emerges, generally, a vision of human life to which Germans can relate just as much as the Greeks. It bears witness to a long history of questioning the importance of labour in life and the sense that life in its full-blown human form begins, according to Marx's late realisation, with leisure.<sup>140</sup>

More radically, that Europe will be dealing with a cluster of forms of life rather than one single vision reflects underlying historical currents. Since industrialization, and long before the designation was appropriated by Giddens<sup>141</sup> and trivialised by New Labour, European intellectual and political history has been witness to a variety of attempts to find a "third way" over and against the alternative between unbridled capitalism on the one hand and authoritarian socialism on the other. Contrary to Giddens, the "third way" has never been understood as the middle way, but as an alternative to both. Those contributing to the genre were either socialists or defenders of a corporate view of society. It bears

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<sup>138</sup> See Ulrich Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Union' (2002) *European Law Journal* 19-38.

<sup>139</sup> Judt links it even to a strong role of the state in the provision of services and social security. See Tony Judt, *Reappraisals: Reflections on the Twentieth Century* (London: Penguin Books, 2008) 421-425. The usual markers of a successfully inclusive society are, amongst other things, health care for everyone without the risk bankruptcy, employment that is not "at will", extended vacation and leisurely bliss, a strong system of public education avoiding the perils of a steep hierarchy of opportunity, the presence of trade unions, working time regulations etc., all of which invests human life with a certain dignity vis-à-vis the potentially all-consuming dominance of professional life. The relative lightness of life in Europe (and I am aware of enormous regional differences) or, at any rate, the aspiration to create it perhaps explains other features of the human soul, for example a casual attitude towards sexual pleasure and an estimation, not shared by too many, of playful and experimental art.

<sup>140</sup> On Marx's indebtedness to Aristotle on this point, see Alan W. Wood, *Karl Marx* (2d ed., London: Routledge, 2004) at 37.

<sup>141</sup> See Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (London: Polity Press, 1998).

emphasis, in this connection, that at least some Ordoliberals, whose views of the political economy have left a trace in the law of the common market,<sup>142</sup> were self-conscious defenders of a “third way”.<sup>143</sup> The “social market economy”, to which the EU Treaty makes a strange (and questionable)<sup>144</sup> profession de foi in Article 3(3), is an offspring of this quest.<sup>145</sup>

In any event, this should serve as a reminder that we should not get past the point at which the Monnet method ought to be retired.<sup>146</sup>

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<sup>142</sup> See at David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Oxford University Press, 1988) at 261-265.

<sup>143</sup> Walter Eucken supported the Third Way. But he was not the only Ordoliberal doing so. See Alexander Rüstow, ‘Der dritte Weg’ In his *Die Religion der Marktwirtschaft* (ed. Sibylle Tönnies, Münster: Litt Verlag, 2001) 41-100.

<sup>144</sup> See Christian Joerges & Florian Rödl, ‘Social Market Economy’ as Europe’s Social Model? (2004) 8 *EUI Law Working Paper*.

<sup>145</sup> See Andreas Müller-Armack, ‘Das Konzept der Sozialen Marktwirtschaft – Grundlagen, Entwicklung, Aktualität’ In D. Grosser et al (eds.), *Soziale Marktwirtschaft* (2d. ed., Stuttgart: Kohlhammer, 1990) 1-33 at 10 (quoting Alfred Müller-Armack).

<sup>146</sup> See Habermas, note 129.

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