Principles of European Constitutional Law

Second Revised Edition

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I. Entangled Discourses on Finality

On Finality

ULRICH HALTERN

The Schuman declaration left the question of Europe’s ends unanswered; a space where ‘war ... becomes not merely unthinkable, but materially impossible’ was utopia, a focus imaginarius worth pursuing but impossible to reach. The famous ‘ever closer union among the peoples of Europe’ from the Preamble of the Treaty establishing the European Community was lofty in its aspirations, even though it later became the foundation of a whole strand of supranational thought.1 To be sure, it was widely felt that ‘ever closer union’ was needed to avert war and create prosperity, but could that be all? There seemed to be a cold modernist void, a spiritual absence at the heart of the European integration project.2 The Treaty on European Union tried to fill this void with values, hopes, rights and cultural artefacts. With the difficult ratification process, however, and a growing lack of popularity it provided little guidance as to the Union’s finality. The same holds true for the Constitutional Treaty and its demise. If we do not know who we, as Europeans, are, and if we cannot even be sure of the gestalt of the Union, how will it

be possible to say anything of import about its finality? If we do not know what it is, we cannot know what it is for.

However, the process of European introspective turns out to be challenging. Even basic categories such as space (territory) and time (history) remain notoriously elusive. Geographically, Europe has no clear boundaries in the south or in the east. Its eastern borders are neither organic nor natural, but are contingent upon political agreements. When Peter I of Russia opened up Russia people migrated from the Don to the Volga, whereas the cold war shifted them back into the opposite direction. Europe’s southern borders are just as hard to pin down, and President Sarkozy’s Union for the Mediterranean is a recent reminder of their obscurity. The Mediterranean Sea was more of a link than a border, with ‘Mediterranean’ meaning mid-landish and denoting the countries bordering the Mediterranean Sea both on the north and the south. Europe, Asia and Africa were bound together as a unit, and it was only the recent decolonisation that turned the Mediterranean Sea into a marker of division.

Like space, time and the past are social constructions. Of course, history is often used to form emblematic identities and political ideologies, and the past takes on the form of a chronological progression with linear narrations linking the past and the present. Such narrations are usually the result of a filtering process designed to legitimate the current state of affairs. The way we understand the past is less dependent on facts and events than on selective interpretations attributed to them. We construct the past not in the past, but in the context of the present; whatever meaning we obtain from such constructions is more eloquent with respect to the present than to the past. Little wonder, then, that we are basically clueless as to where to start when we think about European history.

Moreover, the narratives we use to find out about ‘us’ as Europeans overlap, cut across and contradict each other, and reflexively refer to each other. We are facing a network of meanings that is hard to decipher. Europe is a forest of ideas, symbols and myths; it is a mirror that reflects the image of a multitude of concepts and meanings, rather than a prism that concentrates the minds and hearts of people around a single theme.

Political identity, under these conditions, is difficult to develop. What we mean by politics entails a commitment to both history and territory. This is precisely what marks the difference between politics and morality. Only the latter can appear timeless and universal.

In this light, and in the face of the staggering deficit in the Union’s social legitimacy, it is little surprise that we are facing a host of entangled discourses on European political identity and the finality of European integration. They draw on different empirical and analytical resources and point into different normative directions.

On the one hand, there is a narration of progress that sees deepening and enlargement—from enhanced co-operation via political community to constitutional treaty and European Federation by way of a deliberate political act of re-founding Europe—as a necessity and the fulfilment of a historical vision. While the trajectory is always the same, the vectors leading there range from politics (peace), economy (prosperity through the Common Market), history (learning from history) and ethics (solidarity among European citizens) to law (‘ever closer Union’), and leave little room for alternatives (transnational problems requiring transnational solutions). This discourse expands seamlessly towards the ‘European dream’ (Rifkin) of a global community under law in which cultural, economic and political differences are overcome in a process of global constitutionalisation, in which people will define themselves as Weltbürger and in which national institutions will work on preparing and negotiating the globe-spanning contrat social.

3 Sallust called it *Mare Internum*, and other names include Mesogeios, Greek for inland.
On the other hand, there is a eurosceptic discourse that emphasises the local, narrows the
(moral, economic, political or legal) virtues of integration and introduces dichotomies:
common market gains are tempered by painful processes of adaption and ‘victims’ of
globalisation, a community of solidarity is to be weighed against unreasonable demands of
virtuosity, a community under law is pitted against communities defined by anything but law,
such as culture, language, interests, religion, etc. A shared European identity finds itself in
opposition to collective, mostly national, memories, and all the metaphors differ: instead of
charging ahead, Europe should take a breather; instead of reform, consolidation; instead of
action, deliberation; instead of decision, discussion. This discourse places a premium on the
organic, natural, grown, immobile and earthy, and discounts the created, projected, mobile and
liquid. Its impression is often that of being conservative and critical of contemporary culture,
emphasising substance rather than function, values rather than purposes, fate rather than
design, and the difference between surface/depth or thin/thick rather than networks.

Both discourses feed on experience and praxis. The progress narration is informed by struc-
tures best described by theories of transnational governance, and includes elements such as
global trends of state transformation, governance networks, multiple actors in law-making,
heterarchy, polycentricity, interlegality and the re-formation of boundaries between national
and international, formal and informal, public and private, centre and periphery, or inside and
outside. The eurosceptic discourse is informed by the widening gulf between the Union and its
citizens, and the ensuing alienation many Europeans feel. The tensions introduced by this
discourse lead directly to the ambivalence of what the Union has to offer: Union citizenship
and free movement of persons and services are both promising and terrifying. To move means
to arrive somewhere as well as to leave something behind; to win new insights into the Other
means to lose firm beliefs and particularisms; old, and cherished, identities are under siege. The
Union has turned, from a response to post-war angst, to a replicator of post-modern angst.7

In this light, it is hardly astonishing to find a discursive hotchpotch in European Union
documents. One of the best examples is surely the Draft Constitutional Treaty as it was handed
to the President of the European Council on 18 July 2003. It tries for an Aufbruch as well as a
Schlusstrich. Its Preamble aspires to put an end to the self-deprecating doubts about the idea of
Europe. Many people have ceased to believe in such ideas as the civilising power of European
modernity because they remember that the idea of Europe embodies prejudices that lie deep in
the history of Europe. Delanty writes that ‘the idea of Europe cannot be disengaged from the
atrocities committed in its name’, reminding us of Benjamin’s famous dictum that ‘there is no
document of civilisation which is not at the same time a document of barbarism’.8 European
history does not lead from culture to civilisation. The Preamble, however, does away with this
insight. In the Convention’s Draft, it even claims that ‘Europe is a continent that has brought
forth civilisation’ and that ‘its inhabitants, arriving in successive waves from earliest times, have
gradually developed the values underlying humanism: equality of persons, freedom, respect for
reason’. The Preamble promises the dawning of Europe’s future: Europe is now ‘united in its
diversity’ and thus a ‘special area of human hope’, a space where the peoples ‘transcend their
ancient divisions’ and ‘forge a common destiny’. Europe intends to ‘continue along the path of
civilisation, progress and prosperity’, and to ‘strive for peace, justice and solidarity throughout
the world’. The future delineated by the Preamble is a horizon of good possibilities and inten-
tions. At the same time, the Preamble asserts continuity. The historical trajectory leading to the
Draft Constitution is a great arc that reaches from antiquity to the twenty-first century.
Portraying European integration as a project that spans time and generations is perhaps the
Preamble’s most ostentatious claim. In the Convention’s Draft, we have the Thucydides quote,
successive waves of arrivals of inhabitants, earliest times and gradual development of values, all

7 Weiler, above n 1, 330–1.
in less than five lines. Europe draws inspiration from its varied ‘inheritance’ and believes in
values still present in its ‘heritage’. Thus, the arc that is to circumscribe European identity,
gestalt and finality is an arc with invisible ends, something that, like a parabolic curve, tends
towards infinity. The past reaches back to foggy ‘earliest times’, the future is utopia: a ‘great
venture’ and a special area of human hope even for the ‘weakest and most deprived’ committed
to virtually everything good, like peace, prosperity, culture, knowledge, social progress,
equality, justice, solidarity, learning, transparent democracy and respect for law and reason.

Europe wants to ‘continue’ as well as ‘remain’, to ‘forge’ a future as well as to accept a
‘destiny’; it is already ‘reunited’ and at the same time strives for being ‘united ever more
closely’. What are we to make of this? What of the stringing together of good aspirations,
hopes and values, without any hint at priorities? And what, finally, of the breathtakingly
shameless Thucydides quote? There is no satisfactory answer to the question that vexes
Europe today: who are we, and where are we going? The Draft promises, in its garrulity, a
revelation, but reveals too much (all those values) and leaves out too much (all those messy
ambiguities) to be more than idle chatter. With the parabolic arc of Europe’s projected
trajectory tending toward infinity, it is impossible to see the ends; how can we talk of finality
if there is no fin?

The rift following the Constitutional Treaty’s demise could hardly have been more osten-
tatious. Europe, in June 2007, wanted three things: enhanced efficiency, democratic
legitimacy and coherence of its external action. This is the sobering language in the first
paragraph of the IGC 2007 mandate.9 The presidency, in its conclusions, uses language
very different from the Constitutional Treaty, too. No more mention of Europe as a ‘special
area of human hope’, rather a ‘resolve that only by working together can we represent
our interests and goals in the world of tomorrow’. As examples of recent positive results, we
find

the Roaming Regulation which reduces the cost of modern communication in Europe, the creation of
the European payment area which makes travelling and living together easier in the EU and the con-
stant improvement of consumer rights which guarantee citizens the same high standards across the
entire European Union.10

The Union, it seems, turns from its global sense of mission and its teleological understanding of
history to travel, trade, consumption and its own interests. If one wanted a cheap punchline, one
might conclude that Union citizens get not a polity that brings forth civilisation, but cheap cell
phone charges.

Of course, this does not exhaust the Union’s finality. Suffice it to mention the Union’s values
as listed in Article 2 of the EU Treaty of Lisbon (TEU-Lis) (respect for human dignity, freedom,
democracy, equality, the rule of law, respect for human rights, pluralism, non-discrimination,
tolerance, justice, solidarity and equality between women and men), its fundamental principles
of Article 6 TEU-Lis and the sanctioning mechanism of Article 7 TEU-Lis. Moreover, Article 4
TEU-Lis presumes that legal and administrative power lies in the first place with the Member
States; they stand at the centre of the Union, and the Union has to respect their core functions
and national identities.

Still, this is an important shift in tone. None of these values or principles talks up the Union
as a new political community. Rather, they avoid the constitutional hubris of the Constitutional
Treaty.11 As the IGC 2007 mandate laconically has it, ‘the constitutional concept, which

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on 9 February 2009).
consisted in repealing all existing Treaties and replacing them by a single text called “Constitution”, is abandoned'.

While no discussion of the Union’s finality can disregard this important shift, we will have to bear in mind that none of the texts mentioned have legal force. In order to find answers we must also look beyond the Constitutional Treaty and the Treaty of Lisbon—but where? As jurists, we are tempted, if not doomed, to look to the law as it stands. That makes little sense, at first glance, when investigating ‘finality’. Finality seems to have to do with political action, is future-oriented and is part of a promise of novelty. Law, in contrast, is inevitably turned to the past. Law’s rule is an exercise in the maintenance of political meanings already achieved. It links the future to the past in that the future of the political order should be the same as its past.12 Can the past, and law as its maintenance project, tell us anything serious about the promises of future European horizons?

I submit that they can. Law has been the major leitmotiv of European integration. Above all, law deserves attention from a cultural perspective, which is able to yield insights into the possibilities and promises of a Union to come. Law is not just a body of rules; it is a social practice, a way of being in the world. A social practice is not merely a set of prescribed actions, but rather a way of understanding self and others, and thus a way to make actions meaningful. To live under the rule of law is to maintain a set of beliefs about the self and community, time and space, authority and representation. Law’s rule is a system of beliefs—a structure of meaning within which we experience public order as the rule of law.13 If there is any merit to this suggestion, law is a marker that points not only to a community’s past and memory, but to its future and hopes as well. A polity imagines itself in part through law. More often than not, such a legal imagination also yields a political imagination.

The Union’s political imagination today is very different from nation-state imaginations. If citizens are mostly indifferent towards the Union, that is because EU law is not ‘theirs’. EU law fails in its attempt to create and maintain a collective identity. It carries forward not rooted meaning, but a precarious form of post-politics (see section II).

However, things may be changing. Europe has begun an urgent search for its own political imagination.14 The Constitutional Treaty is but the visible sign of this search; its demise and the shift in tone in the Treaty of Lisbon are but visible signs of its contested nature. Europe is about to decide whether, for the Union, the political signifies the market, humanity or a self-narrative that reaches back to the symbolic arsenal of cultural mythology so well known from nation-state political rhetoric. We see this everywhere, not simply in the overused cultural artefacts of flag, anthem, Europe day, motto and Jean Monnet prizes, but also in documents such as the EU Charter of Fundamental Rights, the Constitutional Treaty and, above all, the jurisprudence of the European Court of Justice (ECJ) in the fields of human rights and Union citizenship. These artefacts and documents have proved unsuccessful in forging a political imagination. I will use consumer aesthetics to explain this failure in section III. There is much potential, however, especially in the Court’s jurisprudence. It is, above all, the Court’s changing human rights and citizenship discourse that is indicative of a major shift in law’s role in the quest for European identity. I will explain the recent change of heart and its consequences in section IV.

The political has entered the European stage and will not easily go away. Today, we find ourselves in a legal, psychological, and discursive universe different from the one 15 years ago.

13 This cultural approach to symbolic meaning goes back to Ernst Cassirer, Clifford Geertz, Charles Taylor and Michel Foucault and has been developed most forcefully by PW Kahn, Reign, above n 12; idem, The Cultural Study of Law (1999); idem, Law and Love (2000); idem, Putting Liberalism in Its Place (2005); idem, Out of Eden (2007); idem, Sacred Violence (2008).
European discourse is no longer attracted to the question of what we should do (for instance, with a view to the democratic deficit); it is now fascinated by the question of who we are. Europe’s discursive nodal points are defined by contested notions of identity. Therefore, we will have to inquire into what meaning we read into Union law, and how this act of reading and understanding interacts with our beliefs about ourselves and our ends (see section V). No functional analysis can grasp this dimension of the law.

II. Post-politics and Law: The State of the Union

1. A Cultural Study of Law

The starting point for a cultural-legal investigation of European constitutionalism is a conception of law other than that offered by our dominant legal discourses. As Paul Kahn points out, the rule of law is a shorthand expression for the imaginative construction of a complete social-political order. It is a way of perceiving events and actors, and a framework of understanding that makes it possible to perceive legal meaning in every event. It provides a temporal and geographical shape to events, a normative ground for claims of authority, and an understanding of the self and others as subjects with rights and responsibilities. It has its own imaginative universe, and it is the imagination that constructs the past and the future of the polity, just as it constructs, at the same time, the political identity of the citizen. In the political imagination of citizens of Germany, for instance, the rule of law echoes with the memory of World War II and Auschwitz; American citizens’ political imagination of the rule of law echoes with the memory of revolution and civil war, with a continuity between the citizens and the Founders, etc. In other words, the rule of law is a structure of beliefs about the meaning of the polity. Its value lies not in objective facts but in the deployment of power to sustain these beliefs. What we must investigate, then, is the structure of meaning within our experience of public order as the rule of law occurs.

National law usually has a richly textured cushion of cultural resources that it can rely on. It is a symbolic form that establishes a world of pre-existing rules to which individuals appeal in order to make sense of their lives. It serves as a community’s memory in that it preserves existing meanings. Many of those meanings derive from a different symbolic form—political action—competing with law. Political action’s world creates, rather than preserves, meaning, and locates meaning in individuals performing unique acts. Political action takes revolution, not constitutional preservation, as its paradigmatic political act. The conflict between law and political action is a conflict between past and future, tradition and possibility, loyalty and responsibility. Most obviously, the tension arises at law’s origin. Political action and law co-opt each other at the point of law’s myth of origin, revolution. Revolutions create meaning; law preserves that meaning. The need for permanence requires the establishment of a historical memory, a text—not just any text, but a text that bears the meaning of law’s source. The first text of the revolution is the bodies of the revolutionaries: revolutionary ideas become the foundation of a new political order only when individuals are willing to engage in acts of sacrifice and invest their bodies in that new set of ideas. Sacrifice is the inscription on the body of ideal meaning. The body lends the authenticity of its sacrifice to the legal text that is the product of revolution—the product of the spent body, in other words, is the legal text. The sacrificed body establishes the legal text as ‘ours’. This is the deep structure underneath law’s

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15 See Kahn, Love, above n 13, 171.
16 See Kahn, Reign, above n 12; idem, Cultural Study, above n 13. Sacrifice becomes the crucial paradigm in this context. Sacrifice is the process by which ideas are embodied in historical artefacts. Law, then, begins with
smooth, liberal surface design. It is myth and memory (not rationality), sacrifice (not contract), will (not reason and interest). A legitimate nation-state's legal system exerts a tremendous normative pull not because of the threat of punishment or some basic consensus; rather, the legal regime expresses, in traditional terms, the 'sovereign will' of the community. To disconnect law from the idea of sovereignty fails to see the crucial connection of the rule of law to self-rule. In a democratic regime, sovereignty and law are tightly linked. The sovereign people govern through the rule of law; and by following the law, citizens participate in popular sovereignty and achieve self-government.\(^\text{17}\)

The maintenance project of the law is a project of instantiation: the individual becomes a citizen and, ultimately, the sovereign. Law, then, is not simply about the promise of order; it is about identity. As such, it is incredibly erotic, political and dangerous.

The meaning of law in the European Union is very different from the meaning I have just laid out. Union law lacks the erotic component so distinctive of nation-state politics. It epitomises the project of a rational rule of law. I will give a few examples, and will attempt to show that the differences in the conception of the rule of law have decisive consequences for the Union’s finality and future gestalt.

2. The Union’s Birth from Reason

The Union was not born from belief, visionary revolution, shared sacrifices, emotions, or love, but rather from the spirit of reason and enlightenment. How could it be otherwise?\(^\text{18}\) Europe was a macabre unity, coming together in infinite destruction, with prisoner-of-war camps and millions dead, as an expanse of rubble. Auschwitz was the absolute zero, and the hatred was great enough to spawn serious suggestions to 'strew Germany with salt'. To build Europe upon emotional appeals to feelings of sharedness and community would necessarily have had to fail. Still, there were two imminent problems to solve: first, what to do with Germany; and second, how to rebuild Europe.\(^\text{19}\) The Schuman plan was the well-planned and deliberate response to these questions. One cannot be deceived by its pathos: note that it speaks of 'de facto solidarity' only. The lack of grand vision and the tangible pragmatism of the Declaration have been noted too often to be repeated here. What is important, though, is the fact that European integration was conceived as a contract and as a project guided by enlightened rationality. We see this in many details. Take the original gestalt—the Union. There is no doubt that the Union, irrespective of its subsequent constitutionalisation, was constructed through classic international law treaties. International law, with few exceptions, is basically law through consent between states. Governments represent states, and international law is the product of governmental actors striving for coordination of their mutual interests. International law, in other words, is the

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\(^{17}\) See Kahn, *Liberalism*, above n 13.

\(^{18}\) To be sure, there is the Schuman Declaration’s pathos; there is also Churchill’s Zurich speech on 19 September 1946, calling for a ‘United States of Europe’: W Churchill, *His Complete Speeches, 1897–1963, 1943–1949* (ed RR James, 1974), reprinted in BF Nelsen and AC-G Stubb (eds), *The European Union* (1998) 7. However, Churchill was out of office at the time. What is more, it seems the Zurich speech was just another example of that typically British aphorism, ‘Don’t do what I do, do what I tell you to do’: JHH Weiler and SC Fries, ‘A Human Rights Policy for the European Community and Union’ in P Alston (ed), *The EU and Human Rights* (1999) 147. It was Churchill himself who, a few years earlier, had maintained that ‘We are with Europe, but not of it’: quoted in: D Heater, *The Idea of European Unity* (1992) 148.

apotheosis of the social contract: it is predicated on the analogy between the sovereign state and the unified self. Purvis points out that liberalism in international law, as elsewhere, can be understood as a philosophy that combines an atomistic psychological assumption with a radical epistemology about morality. The liberal psychological understanding is sovereign-centred, with world order representing nothing more than a social contract between sovereigns. The epistemological assumption is the principle of subjective value, leading to the claim that decisions about morality can only be made by the international order’s atomic components, its sovereigns. There is no need to explain at length the lack of sacrifice and of the erotic in international law. We can, again and again, study the unerotic consequences of liberalism and universality by looking to nation-states’ unwillingness to invest bodies, money or meaning into NATO or UN projects.

3. Europe as Style, Expertise and Project

Europe’s cultural artefacts and symbols have also received their share of this ethos. The world of Brussels’ office towers was designed to embody the technical coolness and modernisation of the old continent. It was a world of Xeroxed working documents and greyish-greenish office furniture, of simultaneous translators in soundproof cabins featuring multi-channel cables, of licence plates in blue, white and red, and of new European schools teaching transnational history and more than three foreign languages. This sat well with the Zeitgeist of skyscrapers, autobahns and nuclear power plants: where such controlled technique was to rule, national idiosyncrasies and peculiarities became mere folklore and thus superfluous. Europe was in the hands of technocrats.

The international element of the Union (eg the European Council and the Council of Ministers) is closely associated with contractarianism and liberalism. Both are political theories which are speechless in the face of sacrifice. A similar charge may be levelled at the Commission, whose mode of governance is hostile to the idea of sacrifice, too. The Commission pools expert knowledge and seems like governance through management and technocracy epitomised. There is a diffusion of accountability through the rise of comitology. Expert management, however, may produce an efficient and perhaps even satisfactory distribution of society’s resources, but it cannot produce the historical and communal understanding of self-identity that characterises the rule of law as an experience of political order. To the expert, it does not matter how the present state of affairs came about. Loyalty may appear irrational. Management, as a form of science, knows no borders. Law is silenced by claims of expert knowledge that purport to provide their own grounds of authority. Scientific expertise always speaks for itself. Like every scientific voice, management exists in the present. It tests the past and future against present interests, whereas law tests the present against the past. Management is in history but is not itself historical. Without history, however, there can be no identity.

Another facet of Europe as a project of modernity becomes visible in the oft-used metaphor of Europe as a project. This is one of the central motifs of modernity.

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22 See Kahn, Reijn, above n 12, 182.
23 Incidentally, the notions of ‘project’ and ‘project-maker’ are in themselves highly modern notions and deserve more attention. For a cultural genealogy, see M Krajewski (ed), Projektemacher (2004).
In modernity, Man’s finitude becomes reconciled with the infinite and eternal, in terms of progression . . . [as] an interim apotheosis, one which rejects the preceding being but which also contains that being and prefigures all the object is yet to become.  

European academic literature will not tire of emphasising the nature of integration as a ‘project’ and the procedural nature of Union law. The Treaty of Rome, we read, did not lay down a static legal order that was complete from the outset. Rather, European integration is said to be a legislative process characterising the Union as a legal system evolving over time. The Court, too, cashes in on the myth of progression by privileging the teleological method of interpretation. Progression, it seems, becomes an essential element in the mythical structure of the Community legal order. The Union cannot compete with the law of nation-states as a source of order or transcendent being in terms of what it is; it can only attempt to do so in terms of what it is not, and in terms of what it will be.

The Union legal order, as a purely rational legal order, is unable to use the same imaginative and cultural resources as the nation-state. Unlike national legal orders, the Union legal order is precisely what it professes to be: a legal order originating from contract and exhausting itself in reason and interest. The Union has no subtext of will, and hence battles with the fatal difficulty to explain to us, its citizens, why its legal order is uniquely ‘ours’.

4. Europe as Imagined Community

The Union, of course, has not turned a blind eye to this dilemma. The Commission, above all, has commissioned countless studies, initiated working groups and written up White Papers in order to test social acceptance of the Union, define problem areas and work out solutions. In addition, long before 1993, the Commission embarked upon various initiatives in the fields of media and information policy to promote integration in the sphere of culture by enhancing what it saw as ‘the European identity’. These initiatives have not been very successful—I will return to this in a moment—which is why scholars tend to underestimate the Commission’s prowess. The Union’s demiurges know their political theory. They have read Hobsbawm and have learned that history is central to the imagining of community, for how people experience the past is intrinsic to their perception of the present. History, they know, is also fundamental to their conception of themselves as subjects and members of a collectivity. Following Hobsbawm and Ranger, they have focused on the ‘invention of European traditions’ and on practices which seek to inculcate certain values and norms of behaviour by implying continuity with the past. The past, like social memory, is a construction, actively invented and reinvented. The Commission might also have learned from Benedict Anderson’s highly influential ‘Imagined Communities’. Anderson defines nations as ‘imagined political communities’ because its members will never know, meet or even hear of most of their fellow members, yet in the minds of each lives the image of their communion. Indeed, his theoretical point of departure is mass sacrifice for the nation and, ultimately, death. Death brings the threat of oblivion. In a secular age we increasingly look to posterity to keep our memory alive, and the collective memory and solidarity of the nation help us to overcome the threat of oblivion. Nations are characterised by symbols of commemoration, notably the Tombs of Unknown Soldiers, which suggests that

25 See M de S-O Lasser, Judicial Deliberations (2004); J Bengoetxea et al, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in G de Búrca and JHH Weiler (eds), The European Court of Justice (2001) 43.
nationalism, like religion, takes death and suffering seriously (in a way that Marxism and liberalism do not). It does so by ‘transforming fatality into continuity’, by linking the dead to the yet unborn. The nation, according to Anderson, is particularly suited to this ‘secular transformation of fatality into continuity, contingency into meaning’, since nations ‘always loom out of an immemorial past, and, still more important, glide into a limitless future. It is the magic of nationalism to turn chance into destiny’.\(^{28}\) This is just what the Commission had in mind: transforming contingency into meaning. However—unfortunately, if you want—the Commission had no fatalities at its disposal to turn into continuity. Perhaps here is the reason why its initiatives to enhance European consciousness and Europeanise the cultural sector all too often appear unconvincing.\(^{29}\)

5. Europe’s Iconography

The Union has recognised the overwhelming importance of symbols. Being not a ‘natural’ but an ‘imagined’ community, it needs to be constructed through complicated ideological, political and cultural mechanisms and procedures. Such construction and reconstruction takes place discursively. The reconstruction of community as European Union touches upon the self-understanding and practices of its members, their bodies and their construction of the ‘Other’. Discursive constructions build on communication in order to develop, and generalise, an image of the self.


\(^{29}\) One early example of the Commission’s attempt to define a cultural foundation for European unification is the signing of the ‘Declaration on the European Identity’ in 1973: Commission of the European Communities, ‘Declaration on the European Identity’, Bulletin EC 12-1973, 118; see the wonderfully evocative account by C Shore, *Building Europe* (2000). This approach to Europe is still very much in fashion, as the Decision of 14 February 2000 establishing the Culture 2000 programme demonstrates: Decision 508/2000/EC of the European Parliament and of the Council, [2000] OJ L63, 1. Consider, for instance, the following passages: ‘If citizens give their full support to, and participate fully in, European integration, greater emphasis should be placed on their common cultural values and roots as a key element of their identity and their membership of a society founded on freedom, democracy, tolerance and solidarity’ (5th recital); ‘To bring to life the cultural area common to the European people, it is essential to encourage creative activities, promote cultural heritage with a European dimension, encourage mutual awareness of the culture and history of the peoples of Europe and support cultural exchanges with a view to improving the dissemination of knowledge and stimulating cooperation and creative activities’ (9th recital). Activities and implementing measures include, among many others, ‘the European Capital of Culture and the European Cultural Month’, ‘organising innovative cultural events which have a strong appeal and are accessible to citizens in general, particularly in the field of cultural heritage’, and ‘European prizes in the various cultural spheres: literature, translation, architecture, etc’ (Annex 1, Activities and Implementing Measures for the Culture 2000 Programme). Another prominent example is the White Paper on ‘European Governance’ and the attendant working group reports (European Commission, ‘European Governance: A White Paper’, COM(2001) 428). Working Group 1a dealt with ‘Broadening and Enriching the Public Debate on European Matters’. It found its purpose ‘in the sobering and well-documented reality that, despite all of the efforts made by Europe’s institutions over the last decade, very few convincing answers have yet been found to the cry: “how can we take Europe closer to its citizens?”: ‘Report of Working Group on Broadening and Enriching the Public Debate (Group 1a), White Paper on European Governance, Work Area No 1, Broadening and Enriching the Public Debate on European Matters (2001) 8 available at http://ec.europa.eu/governance/areas/group1/report_en.pdf (accessed on 9 February 2009). While the Union’s competences and responsibilities closely resemble those of most nation-states, its institutions do not have a relation ship with the general public ‘that remotely compares with that of national institutions’ (ibid, 9). Public support, therefore, is far from overwhelming. Knowledge of European affairs is low; prevailing attitudes to the Union are characterised by either indifference or a lack of knowledge, or a combination of both (ibid, 11). The working group maps the way forward by pointing out that decision-makers need the support of an informed European public and the creation of a ‘collective intelligence’ on European issues. Hence the heading ‘Enlightenment could lead to more popular support’ (ibid, 14). In practical terms, the Group suggests partnership networks of journalists, teachers, professors, associations, etc, to foster dialogue ‘close to the ground’ and ‘establish links between EU institutions and civil society’. One of the most important proposals is that ‘The EU must be taught’ (ibid, 16).
They make use not only of narratives, but also of images, media and cultural artefacts of all kinds. ‘Imagined communities’ have to do with ‘imago’, too. Objects become images of meaning.\(^{30}\)

It is here that EU iconography comes to the fore. The Adonnino Committee recommended various ‘symbolic measures’ for enhancing the Community’s profile. Foremost among these was the creation of a new EC emblem and flag. That flag was taken from the logo of the Council of Europe. It boasts twelve golden stars, which form a circle against a blue background, and is professed to be a symbol of everything that is said to make Europeans European: from the occidental via the religious to the esoteric. The number of stars is fixed, twelve being (as the Council of Europe has it) a symbol of perfection and plenitude, associated equally with the apostles, the sons of Jacob, the tables of the Roman legislator, the labours of Hercules, the hours of the day, the months of the year and the signs of the zodiac. Twelve is also a representation of the Virgin Mary’s halo of stars in the Revelation (from which, according to some interpretations, the new Messiah will be born). Thus, it seemed the symbol par excellence of European identity and European unification, a rallying point for all citizens of the EU.

There are countless other symbolic vehicles for communicating the ‘European idea’. Take, above all, the European anthem, which is the overplayed ‘Ode to Joy’ from Beethoven’s Ninth Symphony.\(^{31}\) Take the Jean Monnet Awards, the European Woman of the Year Awards, the variety of the European Year of the Cinema, Culture or the Environment, or the officially designated Europe Day. Take the European Literature Prizes, the standardised European passport, the European license plates, the stamps bearing portraits of EC pioneers or the European City of Culture initiatives. The political aim behind these initiatives was ambitious, trying nothing less than to reconfigure the symbolic ordering of time, space, information, education and the media to reflect the ‘European dimension’. In the end, all this pathos has failed.\(^{32}\) What, after all, is pathos? Formulas of pathos are designed to formally inject new tension into a frozen, rigid world and make it move again.\(^{33}\) The distinctly European problem of pathos is not life’s eventful turbulence, but rather the paralysis of all expression in a hieratic world of gestures. Pathos is thus a final escape from problems of meaning—and that is the context to discuss the European pathos not just of anthems and flags, but of the failed Constitutional Treaty and the Charter of Fundamental Rights as well.

To speak of pathos is to speak of the aesthetic. It is impossible, through purely functional description and analysis, to capture the gestalt of the Union. Description and analysis today will have to move on to, or at least include, the level of the aesthetic. The much despised and oft-scolded world of consumerism has taken this to heart long ago. Legal analysis has not. Recent studies of consumerism show what I mean. They attempt to recover the suppressed aesthetic data of our lives and to make the vast archive of subliminal images accessible to conscious analysis. They describe consumerism on the level on which the consumer actually experiences it: on the visceral level of the senses, the bodies, from the point of view of the hand reaching for the soup can on the store shelf, the ears listening to the boom box broadcasting the sounds of a cool, refreshing soft drink splashing into a frosted glass, and the eyes fixed on the screen of the multiplex as the \textit{Titanic} sinks.\(^{34}\)

\(^{30}\) See the excellent collection of essays in U Bielefeld and G Engel (eds), \textit{Bilder der Nation} (1998).

\(^{31}\) Available as either a high-quality recording or, perhaps for the busy, a compressed recording at http://europa.eu/abc/symbols/anthem/index.en.htm (accessed on 9 February 2009).


The Union, too, should be the subject of aesthetic discourse. It is a bit surprising that it is not because, for decades now, the Commission has been talking about ‘A Citizens’ Europe’. The citizen perspective should be important, then, and it would be helpful to examine the Union on the visceral level on which the Union citizen actually experiences it. Much less surprising than the lack of aesthetic discourse would be the analytical result, which is, mostly, nothing less than disastrous. The Commission continually bemoans the fact that Europeans feel alienated from the Union, that they have disappointed expectations, that there is a widening gulf between the Union and the people it serves—and wonders why.35 The answer is right there, on its own website. Whoever looks up the flag, the anthem and the prizes will have an intuitive understanding of the citizens’ indifference towards ‘their’ Union.

6. A Cultural-legal Study of the Union’s Problem

The European Union’s problem of meaning is precisely this: that its citizens are more or less indifferent towards it. The Union produces texts which nobody reads and nobody knows. Nobody is interested. That has fatal consequences. Texts, legal texts above all, are a polity’s memory, if you want the hard disk storing authentic witness. In nation-states, some legal texts—constitutions—embody ideal historical meaning that links the present to the past, to some point of origin, like a revolution and the consecutive writing of the constitution. They construct an imaginative fabric that allows a state to inscribe its own identity into the identity of its citizens. They form a metaphysical and political deep structure that is largely ignored by theory but still has an important place in political practice.36 Such texts constitute states as ‘imagined communities’ and continue them over time. They can claim loyalty as their source of moral support because they are ‘ours’. Union texts are not ‘ours’; they are just texts, empty shells with no roots. Rather than an embodied set of meanings, they are seen as a set of ideas without the power to make a claim upon the citizen. They do not bear the deep social meaning. There is no myth of origin; there are no bodies willing to be invested into ideas, no traces, no sacrifices. There is nothing that could convey authenticity on EU texts. Ultimate meaning disappears behind the semantics of rationality. Because of the lack of sacrificial meaning, Europe, in contrast to all its rhetoric, is not a new beginning really, since what is missing is the founding, creative power. The political future will look like the political past: belief in novelty, which is behind sacrifice, is non-existent. In the Union, then, there is nothing to remember and hence nothing to maintain. Union texts do not constitute a collective self; rather, they constitute a Common Market. Markets cannot tell us who we are. They operate through desires, which are mere placeholders. As market placeholders, ‘we have no character, only desires. The desiring body is not read, it is satisfied. It leaves no trace; its very existence is a matter of indifference to others’.37 Money, the universal means of exchange on the market, is the perfect example. There is nothing with less memory than money. An old saying says you should not conduct money business with friends or foes. The perfect business partner is thus someone completely indifferent, gaged neither in favour nor against us.38 The category of price, it seems, makes history and individuality disappear. Remarkably, it is precisely at the point of this total indifference

35 For a recent example of the Commission’s stunned disbelief and disappointment see European Commission, above n 29, 5.
36 See C Geertz, Local Knowledge (1983) 146: ‘The “political theology” (to revert to Kantorowicz’s term) of the twentieth century has not been written . . . But it exists . . . and until it is understood at least as well as that of the Tudors, the Majapahits, or the Alawites, a great deal of the public life of our times is going to remain obscure. The extraordinary has not gone out of modern politics, however much the banal may have entered.’
37 See Kahn, Reign, above n 12, 86.
where the European rationality of the market and the European social contract—concluded by
unencumbered selves behind the veil of ignorance—converge.

With no history, no identity and no individuality you cannot produce and maintain social
and political meaning. We do not reach ourselves through markets and reason alone. We
cannot reason about, or trade in, the symbolic dimension of meaning. Whereas money and
reason create borderless fluidity, political and social meaning needs to be rooted. The Union’s
legal texts are lacking in the way they look to the past, and they are unable to stabilise anything
deeper than the ever-changing fluid surface of trade, travel and consumption. That is the reason
why the EU appears so breathless in the eye of the beholder. As there is no memory to store
meaning, meaning needs to be generated through political action, again and again. Meaning, in
the Union, exists only within transitory and forgetful moments. It is ahistorical and respects
neither borders nor authenticity. Without reservoirs of meaning, there can be no room or time
to have a breather, read the legal texts and realise their ideal content. There can be no stable
meaning; there can be only frantic, restless and ceaseless production of ever-new meaning.
Europe, in this sense, is truly revolutionary, because political action may never come to an end.
In the conflict between loyalty and responsibility, the latter prevails. Responsibility, however, is
the mode not of law, but of political action.39 Citizens therefore see Europe as politicians
negotiating and renegotiating. Politicians speak the discourse of responsibility; the future is a
horizon of possibilities. Europe is the never-ending project. History is being rewritten and
re-written. It is in the nature of revolutions to break with the past—and here is the reason
why all references to occidental culture, Christendom and Latin (or French) as the once lingua
franca seem so unpersuasive. Revelation, which shares a temporal structure with revolution,
constructs meaning not from history, but from truth, which manifests itself in and through
action. That is why we were hardly able to read through the Treaty of Nice before, with its ink
not yet dried, we heard talk of the post-Nice process and plans for the next intergovernmental
conference.

III. The Middle Ground: Politics Gone Awry

The Union, in its attempt to be close to its citizens, has initiated counter-measures. Most of them
can best be understood, I believe, from the perspective of consumer aesthetics. There is no
substance to them; they are just an effort in aesthetics. What lies behind them is a principle of
consumerism. They denote the middle ground between post-politics and politics; they are
politics gone awry.

1. Europe and Consumer Aesthetics

One of the most important functions of the aesthetics of consumerism, writes Harris, is to
provide us with an emotional cushion, a form of camouflage, a credible disguise for a culture
that refuses to admit the truth about itself. We do not like to see ourselves as consumers, or our
culture as that of consumerism. We continue to pretend that our values are those of an intimate
world full of mom-and-pop businesses, rather than an overpopulated megalopolis dominated by
multinational cartels. The aesthetics of consumerism helps us keep that faith by hiding consum-
erism from consumers. They combat our estrangement from a world packaged in plastic by
restoring the ‘aura’ of the handmade to our commodities. They also shore up our sense of
selfhood and individuality, which have been deeply compromised by the conditions of urban

39 See Kahn, Reign, above n 12, 76–84.
society. The aesthetics of consumerism have incorporated our distrust into their marketing techniques. They have built into consumerism symbolic forms of resistance to it: ineffectual strategies of rebellion that make consumers believe they are loners or oddballs, immune to advertising strategies rather than at the mercy of Madison Avenue. The perfect disguise for conformity has become rebelliousness. You buy shoes, for example, which remind you of running shoes, and feel like a rebel battling the conformist obligation to wear conservative shoes with dark laces to work. You are being in control, capable of action and rebellion, rather than being controlled: you ‘dare to be different’. In fact, all you actually do is wear fashionable shoes, just like everybody else. It is possible to identify a number of broad principles that govern the appearance of popular culture, among them cuteness, zaniness, coolness and idyllic quaintness. Quaintness responds to the discontent of a culture trapped in an eternal present. It disfigures things to eradicate the stigma of their newness, their disturbingly characterless perfection that smacks of the alienating anonymity of assembly lines. Quaintness also compensates for the absence of real personal history. We hide our sense of uprootedness by creating a sepia-tinted simulacrum of history and ‘instant’ traditions. Even, and especially, those who are cut off from history, like we often are, feel the need to establish something like continuity with the past. The result is quaintness riding roughshod over authenticity. It often mourns the loss of cohesion in family life and of the intimate circle brought together around the fireplace by darkness and cold weather. Quaintness is the industry’s tool to help reduce our deep-seated distrust of advertising and our fear of shoddy goods. It rectifies problems that consumerism itself creates, and allows us to express our discontent with consumer culture and society. Quaintness is also what the Union is after. As vehicles, the Union has chosen a number of romantic idyllic items; one of them was the Constitutional Treaty; another is the Charter of Fundamental Rights.

2. The EU Charter of Fundamental Rights as Consumer Aesthetics

The Charter serves the same purposes as quaintness in consumer aesthetics. Both the appearance of popular culture in the form of quaintness and the Charter are meant to offer us symbolic ways of expressing discontent, and to neutralise our feelings of inferiority, caused by our status as objects, not subjects, of globalisation and international trade.

The Charter has little other use than that associated with consumer aesthetics. The ECJ has developed, for almost four decades, a rich and differentiated human rights case law. Since 1969, at least, the Court has been ready to invalidate Community legislation that violates EC fundamental rights. Does the newly proclaimed Charter offer better protection of fundamental rights? The Charter itself says no. In its Chapter VII, it admits that neither the scope of the rights it guarantees is broader, nor the level of protection is higher, than the case law status quo.

Clarity is another common justification for the Charter. However, like all human rights documents, the Charter is drafted in magisterial, sometimes cloudy, language. While there is much to say in favour of such constitutional traditions, clarity is not one of its features.

Finally, it is not a symbol of shared European identity. While it was solemnly proclaimed, it has no binding legal force. Some regard this as a symbol not of shared identity, but of European impotence and of refusal to take rights seriously. Even if it is bound to become law as part of the Treaty of Lisbon, doubts remain about its integrative force. Europe already has a pronounced culture of rights, with a tightly knit web of fundamental rights protecting its

40 See Harris, above n 34, xxi–xxiii.
42 Ibid.
citizens: bills of rights in Länder and federal constitutions, the EJC rights jurisprudence, the European Convention on Human Rights (ECHR) and its human rights court in Strasbourg, and the two 1969 UN Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. The Union would also accede to the ECHR (Article 6(2) TEU-Lis). Waving yet another catalogue of rights in a culture of rights saturation will not take the citizen any closer to the Union.43

Why is it, then, that so much money, and so many resources, are lavished on the Charter if there is so little to say for it, either legally or symbolically? Part of the answer is: it is aesthetic. The Union wants the Charter to destigmatise itself and to neutralise our distrust. The vehicle is quaintness. The Charter compensates for the lack of real European history. Notwithstanding all rhetoric the Union is a young entity with no model or predecessor. Europe has not one story, but a multitude of stories, which are contradictory, competing and violent, and which need to be reconciled with each other. Europeans think of ‘their’ Union as faceless Brussels bureaucrats, smooth, modern, insipid and characterless. The Union suffers from its unrooted newness. Its insatiable surge forward cuts it off from the past. That provokes its citizens’ distrust, and they refuse it their loyalty. The Union is seen as the epitome of bureaucratisation and centralisation. It rationalises life (through international division of labour) and depersonalises the market (through internationalisation). It emphasises competition and cross-border trade of goods through the Common Market, thus appearing as commodification of values personified. In addition, there is the peculiarly modern angst because truths and certainties crumble, identities become fragmented and transitory, feelings of displacement and uprootedness grow, and all that is solid melts into air. The Union ideally attends to such anxieties.44

The Charter of Fundamental Rights is the Union’s designers’ programme to steer in the opposite direction. The Charter’s solemn declaration evokes the spirit of the Virginia Bill of Rights of 1776 and of the Déclaration des droits de l’homme et du citoyen of 1789. In part, this is deliberately done in order to create the impression that the Union’s roots reach back to the origins of modern democracies. Perhaps, what is hoped for is not merely a solution to the problem of lacking history and character, but to that of democratic legitimacy as well. By proclaiming a catalogue of rights, the Union adorns itself with the embellishments of the fountains of democracy—among them, the principle of popular sovereignty.45

At the same time, in reaching back to 1776 and 1789, the Union creates a patina for itself. A patina is a physical property of material culture that consists in the small signs of age that accumulate on the surface of objects. The surface of objects, originally in pristine condition, takes on a surface of its own, being dented, chipped, oxidised and worn away. This physical property is treated as symbolic property: it encodes a status message and is exploited to social purpose. That purpose is the legitimation, authentication and verification of status claims.46 Just as newly acquired wealth, in a world of traditional hierarchy, was under pressure to provide visual evidence of the authenticity of its status claim, the Union is trying to secure and verify its status in a world of nation-states. The Union is the nouveau riche in Europe and needs to prove that its wealth is not fraudulent. The gatekeeper that controls status mobility is patina. The Charter, of course, is meant to be the chipping and oxidisation on the EU’s pristine surface.

43 I am by no means alone in this judgment. See, eg Weiler, above n 1, 334–5.
44 See ibid, 260–1.
45 This connection has also been detected by P Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) 7 ELJ 125.
46 On the function of patina in material culture, see G McCracken, Culture and Consumption (1988) 31–43; Architektenkammer Hessen and R Toyka (eds), Patina (1996).
The Charter also conjures up an atmosphere of solidarity, brotherly love and trans-generational community (the political theory equivalent of the intimate circle gathering around a fireplace). Here is a world resurrected before our eyes that has never known the critique of rights developed by legal realism, Critical Legal Studies, communitarianism, feminism and postmodernism. The Charter appears as a means to develop a moral and ethical foundation for the Union. It draws on the twin sources of the Ideal and the Other. On the one hand, it refers us to the informing ideal of an ethos of collective societal responsibility for the welfare of the individual and of the community as a whole. On the other hand, the Charter refers to the Other, that which is excluded but nevertheless there, such as stories of injustice and fear, or the barbaric orient. However, both references are (aesthetically, at least) unconvincing. They remain wooden and simplistic in a saturated liberal society. One accepts them the same way one accepts a shoe manufacturer’s claim that its shoes are not shoes but the result of a dream.

The creation of the Charter also speaks for my thesis that it is designed to create an atmosphere of quaintness. The European Council, meeting in Tampere in October 1999, decided to establish an ad hoc body. On its first meeting, that body called itself ‘Convention’—a name that smacks of Philadelphia and Paris. Atmospherically, this is not insignificant. It fits well with the name of the website that documented the drafting process of the Charter: http://db.consilium.eu.int. ‘Consilium’ is Latin, the former European lingua franca, and conjures up the image of a Roman council of wise old men, white-bearded and clad in togas. That image is linked to progress and modernity surging forward. ‘Consilium’ is amended by ‘eu.int’—a cipher of globalisation (‘int’) à la Europe (‘eu’) —and it appears on the internet, the most progressive medium of communication with virtually unlimited possibilities. Such connection of old and new, of tradition and modernity, of local roots and global aspirations, also shows in the Convention’s email address: fundamental.rights@consilium.eu.int. The old lingua franca appears in the same breath, the same address even, as the new lingua franca, the world language English.

Finally, the choice of the Convention’s President fits into the picture well, too. Roman Herzog is a former professor of constitutional law and Justice and President of Germany’s Federal Constitutional Court—thus standing for cool rationality, academic smartness and legal expertise beyond doubt. He is also the former President of the Federal Republic of Germany—standing for political vision and statesman-like stature. Most importantly, though, he was born in a small town in Bavaria (Landshut), was married and has two sons. Despite his steep career, Herzog conveys the impression of somehow being native and rooted in the soil, sometimes even of that specifically Bavarian snugness.

All these phenomena serve an aesthetic purpose. That purpose is to soothe our deep-seated distrust of the smooth European machinery and its faceless bureaucracy. A ‘Convention’ is neither a machine nor a bureaucracy. Its members have a distinctive personal image. They listen to ‘us’ (represented by pressure groups) and take into account our reservations and suggestions.

47 The Preamble, for instance, provides that ‘[e]njoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations’. The Charter’s individual chapters have the following headings: I—Dignity; II— Freedoms; III— Equality; IV— Solidarity; V— Citizens’ Rights; VI— Justice.

48 That is what the print on a shoebox by Camper, a Spanish-based company that is all the rage in Germany, says; see U Haltern, ‘Europe Goes Camper’, Constitutionalism Web-Papers No 3 (2001) available at www.qub.ac.uk/pais/Research/PaperSeries/ConWEBPapers, and its German version in [2002] Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 261.

49 The German version is even more telling than the English one. The body is called ‘Konvent’—according to Duden Fremdwörterbuch (6th edn 1997) a Konvent being 1. a) a community, esp of nuns, bound by vows to a religious life under a superior; b) a gathering of protestant priests for further education; 2. a) a weekly gathering of the [active] members of a fraternity; b) collectivity of lecturers at a university; 3. (no pl, hist) the convention during the French Revolution.
Herr Herzog even talks like someone from Landshut: how can he not be one of us? The stroke of genius that shows in the idea of a Convention is that, in spite of all the idyllic cosiness, the Union’s twin attributes—rationality and expertise—are not weakened. On the contrary, they grow stronger because the drafting of the Charter rests with a body of experts that bears the name of a gathering of university lecturers, of a community of monks or nuns, or of a political body during the French Revolution—in Latin still. It must seem to the Union’s architects that such a body will be able to scatter peoples’ doubts without giving up the tried and true Union standard of administrative expertise. Under such conditions, anything becomes possible—to have transnational governance and a Heimat, even to talk Latin and Bavarian at the same time. Things that seemed incompatible become compatible. There is nothing that cannot be achieved. Is it any wonder that the Convention method was used to draft the Constitutional Treaty? It must have seemed like the golden bullet that can blast a hole in the Gordian knot which blocks communication between the Union and the citizens that it wants to be close to.

3. The Problem with Consumer Aesthetics

There is much logical consistency in the Union’s deliberate use of the aesthetics of consumerism. Today’s citizens have turned, to a large degree, into consumers. Our personal salvation experiences are often founded upon consumption. ‘It is the consumer attitude which makes my life into my individual affair; and it is the consumer activity which makes me into the individual,’ writes Bauman, and Urry maintains that ‘citizenship is more a matter of consumption than of political rights and duties.’ Saatchi & Saatchi Europe is a reality, and not a bad one at that. There is no reason, then, why Europe should not print the Charter’s text on the wrapping of its product ‘European Union’ in order to sell it.

The problem is that the Union actually believes that the Charter really is a step towards shared European identity. That is as if a shoe manufacturer, convinced by its own adverts, actually believed its shoes were not shoes but the result of a dream. It simply is wrong to suppose that under the Charter’s influence the people living in Europe will turn into European subjects, coming together in solidarity as a European Community. We have already seen where such belief leads: to the comical attempt to make use of nation-state artefacts. Indeed, those artefacts, in the nation-state, are able to transport political and social meaning. However, the Union’s texts, like the Charter, are not. It is true that subjectivity, in the times of globalisation, has come under increasing pressure. When locality gets devalued and geographical space is cancelled out, people begin to feel like objects of transnational interests. Fundamental rights, however—the nth catalogue, at that—are no cure. The cure, as Bauman says, is playing the mobility game. Scope and speed of movement make all the difference between being in control and being controlled, between shaping the conditions of interaction and being shaped by them. It seems that to participate in the competition that races along before our eyes is to reconstitute subjectivity. Perhaps the perils of the market are met effectively only by the weapons of the market. Next to that, fundamental rights pale into near-insignificance and seem like anachronistic window-dressing, at least if injected into the rationality of money and the market.

But let us be honest. In times when society itself seems like a fancy-dress party, with identities designed, tried on, worn for the evening and then traded in for the next, we actually

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like anachronistic window-dressing. That is why we are delighted about the Charter. ‘If there is kitsch in our daily lives,’ writes Daniel Harris, the theorist of consumerism, ‘it is because there is kitsch in our minds.’

IV. Post Post-politics: The Court Steps In

What looks unconvincing coming from political actors such as the Commission, the Council or Member State governments may look different when uttered by the ECJ. The Court has recently taken a leaf out of the Commission’s book by entering into what we might term ‘political rhetoric’. Its vehicle was, to little surprise, its citizenship and rights jurisprudence. After all, human rights mark the boundary between ‘us’ and ‘them’. Rights are distributed as a token of membership; little wonder, then, that it is here where law and identity connect. The language of rights introduces a range of values into the Community’s legal and policy-making processes. These values differ sharply and ostentatiously from the Community’s legacy of economic focus. Rights talk, in this reading, denotes a certain moral content to Community law and policies, and thus offers a means of developing a moral and ethical foundation for the Community.

Rights are commonly conceived of as an integrating force and relied on as a logic for creating group identity that transcends national barriers. It is here that the rhetoric of rights and the rhetoric of citizenship interlock.

Initially, the Court promoted identity forging through human rights and citizenship with extreme caution only. The Konstantinidis case of 1993 is a good example (1). Later, however, the Court switched gears and used Union citizenship to table its revamped notion of what Union law and European identity are about (2). I believe this road to be problematic (V).

1. Cautious Beginnings: Konstantinidis

The case begins simply, but ultimately implicates no less than the warring visions of the identity of Europe. It starts with a Greek national living in Germany, Χρήστος Κωνσταντινίδης, transliterated in his passport as Christos Konstantinidis, who became engaged in a Kafkaesque dispute with the German authorities over nothing less than his right to his name. In 1990 Mr Konstantinidis applied to the German Registry Office to correct a misspelling of his name in the marriage register. Upon examining his application, however, the German authorities determined that his name had, from the first, been improperly transliterated under German law. The spelling, they found, did not comply with the system of transliteration established by the International Organization for Standardization (ISO), the use of which is mandated by a 1973 treaty to which both Germany and Greece are parties. They ordered that pursuant to the ISO he must henceforth be known as Hrästos Kónstantinides.

The poor man was horrified. The new spelling disguised his ethnic origin (Hrästos, as the Advocate General observed to the ECJ, does not look or sound like a Greek name and has a vaguely Slavonic flavour) and offended his religious sentiments by destroying the Christian

54 See Harris, above n 34, xx.
character of the name. Mr Konstantinidis was also a self-employed masseur and hydrotherapist, and envisioned the inconvenience and loss of business from having to change the name by which he was known to his clientele.

The newly christened Hristos sought protection from the German courts, which referred the matter to the ECJ for a preliminary ruling under the Article 234 EC procedure.

In his Opinion of 9 December 1992, Advocate General Jacobs gave voice to the common-sense intuition that Mr Konstantinidis must be protected by human rights. He suggested that Mr Konstantinidis should be able to invoke European Community human rights against Germany. Wherever a Community national goes to earn his living in the European Community, he argued, ‘he will be treated in accordance with a common code of fundamental values’. Then Advocate General (AG) Jacobs said: ‘In other words, he is entitled to say “civis europaeus sum”’ (I am a European citizen) ‘and to invoke that status in order to oppose any violation of his fundamental rights’. The ECJ was not so sure. It chose to stay out of the human rights/citizenship business. While the Luxembourg judges saw fit to afford some protection to Mr Konstantinidis, they did not buy into, or even refer to, AG Jacobs’s sweeping concept. Rather, they decided the case exclusively on the basis of Article 52 EEC Treaty (embodying the economic freedom of establishment, now Article 43 EC) and the principle of non-discrimination on the basis of nationality. The German authorities, concluded the Court, were not entitled to insist on spelling the applicant’s name in such a way as to misrepresent its pronunciation since such ‘distortion exposes him to the risk that potential clients confuse him with other persons’.

a) Advocate General Jacobs

While the doctrinal implications of the case are simple, on a deeper level, as the Advocate General acknowledges himself (paragraph 46), the case is about the depth and foundations of European integration. It is the concept of citizenship that, in its understanding as a membership right, connects the polity and the rights-bearer. ‘Civis europaeus sum’, Jacobs has the European consumer say, and attempts to trade in the traditional, and much-despised, market citizen (or homo economicus, or Marktbiuerg) for citizenship cast in terms of human rights, and in modernist, almost cosmopolitan terms at that. His mindset is best illustrated by an example he gives. Right before he suggests that any individual should be able to claim ‘civis europaeus sum’ and rely on the ‘common code of fundamental values’, he hypothesises about the ECJ’s right to intervene if a Member State instituted a draconian penal code under which theft was punishable by amputation of the right hand. The reader’s immediate reaction will be, ‘We’re Europeans,
this can’t be legal, there must be human rights protecting us’. Identifying a form of oppression which horrifies us and which we have reason to expect would horrify anyone from our cultural or social background is a great strategy to argue for a universal claim.\textsuperscript{61} AG Jacobs makes a strong appeal to what he, and surely we, his Western readers, associate with the humanity of the individual. Viewed in this way, AG Jacobs is a cosmopolitan. He identifies a core of what makes us human—in his penal code, hypothetical bodily integrity; in his argument in the case itself, identity conferred through a name—and entrusts a national court with upholding it across all boundaries.\textsuperscript{62}

Ironically, in a cultural reading, these arguments are put to work for a very situated, bounded, geographically and historically sharply defined communal self. Consider, first, that the draconian penal code hypothetical conjures up the stereotyped epitome of Europe’s Other: backward countries under Sharia, in far-away corners of the world, rejecting not only the enlightened wall between the Church and the State but also the essentialist notion that common human rights standards can be arrived at and ought to be upheld everywhere in the world. Invoking the Other, and provoking the foreseeable response, reifies a distinctly Western liberal democratic identity. Inventing Europe in the mirror of the Orient by inventing the Orient has a long tradition in Europe.\textsuperscript{63} Hence, surprisingly, at the heart of the human rights argument lies the almost racist image of the bedevilled Orient.\textsuperscript{64}

Remember, secondly, that AG Jacobs uses Latin (‘civis europeus sum’) to voice his citizenship concept. Latin was the European lingua franca, the language of diplomacy and polite society, far into the sixteenth century, until French replaced it. Latin, as a bygone common language, still conjures up a common Europeanness, much more so than French does. It is considered the root of European civilisation.

Consider, thirdly, that it was the Apostle Paul who repeatedly said to the Romans, ‘Civis Romanus sum’, to keep the Roman soldiers from physically abusing him and his followers.\textsuperscript{65} AG Jacobs, in using the parallel phrase, appeals to the deep strata of Latin Christendom, which, as a cultural framework, has become interchangeable with the idea of Europe. Christianity, moreover, is not only the undercurrent of contemporary European culture; it also carries with it a siege mentality. Islamic invasions along with the barbarian and Persian gave a European identity to Christendom as the bulwark against the non-Christian world.\textsuperscript{66} Note that it also provided Western monarchies with a powerful myth of legitimisation. The Advocate General, in surprisingly few words, summons up the rich texture that is part of the idea of Europe.

\textsuperscript{61} Even though we are aware that it may be a common practice as part of a cultural tradition in other societies, it is nevertheless abhorred—and rightly so. One may accept the relativist’s anthropological point that sensibilities, moral ideas and ideas of respect for persons and minimally decent treatment vary from society to society. This particular practice, however, so excites our sympathies for those who suffer from it, and so offends our sensibilities, that the example invites us to condemn the practice notwithstanding its establishment in a culture: J Waldron, ‘How to Argue for a Universal Claim’ (1999) 30 Columbia Human Rights Law Review 305.

\textsuperscript{62} If law is to embody this universalist claim, its apparent origin must be in (one universal, not context-specific) reason, not will. With law being the expression of (universal) reason, the inevitable momentum will be towards empire, away from multiple states: see Kahn, Cultural Study, above n 13, 58. And the empire, logically, must be ruled by one emperor, who holds all the strings, who will perhaps delegate but never divide his authority, and who can, jealously yet legitimately, claim exclusive loyalty. It is here that the unified European constitutionalism has its deeper roots.

\textsuperscript{63} For details see Delanty, above n 8, 84–99. The classic text is, of course, EW Said, Orientalism (1978).

\textsuperscript{64} The irony is highlighted by the fact that, if at all, the argument is made precisely the other way round. Hervey, for instance, suggests that the market construction of rights within the EU raises what she terms the ‘racist implications of Community law’: TK Hervey, ‘Migrant Workers and Their Families in the European Union’ in Shaw and More (eds), above n 55, 91, 95–6.

\textsuperscript{65} Of the narrative, inter alia, in Acts 16, 37; 22, 25–9.

\textsuperscript{66} See Delanty, above n 8, 26.
Thus, there are two layers in the Advocate General’s argument. On the one hand, he claims that names are cultural universals, and that to tamper with them is to deprive individuals of their identity. In a way, he protests against Germany’s distorting Christos’s first name, which signifies his uniqueness and individuality as a human being. This is a violation sufficiently egregious to evoke our universalist, abhorred response, which is why Christos Konstantinidis needs the Court’s protection under the blanket of human rights. On the other hand, he argues that Germany has violated the rights of ‘one of us’, a European citizen who can claim membership in the same polity as the rest of us. Here, AG Jacobs protests against Germany’s distorting of Mr Konstantinidis’s last name, which provides the bearer with family and extended kinship ties. It identifies Konstantinidis as a Greek national, and hence as part of the Community family. The violation should be made good not because it is so egregious, but because this is no way to treat a member of your extended family.

These two layers do not necessarily contradict each other. In fact, they work well together in that they provide the notion of citizenship, as used by the Advocate General, with a core of organic essentialism. This core—in the first version of the argument, Aristotelian; in the second, European-centred—undermines competing claims to identity and loyalty. If the organic-cultural core of what defines membership in a community is as AG Jacobs claims it is, how can there be a different one when it comes to a different polity? Is it possible that there even is a different polity that can lay a claim to loyalty?

The problem with this vision is its displacement of nationality, and thus the finality of just another superstate. The distribution of human rights in the European Union becomes the thick wall separating Us from Them, those who belong from those who do not, and Europe from the Other. This flies in the face of Article 17(1) EC, which reads: ‘Citizenship of the Union shall complement and not replace national citizenship.’ Moreover, it is out of touch with reality. Citizens do not identify with the Union; rather, they feel alienated, and do not trust Brussels. The reason may be that the nation, through its myths, provides a social home, a shared history and a common destination. It is the emotional, romantic side of belonging. Weiler calls it the Eros, while the national is Civilisation. If this is true, the Advocate General’s effort to wave yet another catalogue of rights before the public will be meaningless in the attempt to create an effective attachment of the European citizens to their new polity, and bring them to accept the redrawn political boundaries. It would also fail to reflect the complicated multilayered structure of European integration, citizenship or individual identity. It is impossible to funnel polycentricity, legal and cultural pluralism, and plurality into the old vessels of unity and exclusivity.

b) The Court

Far from taking up AG Jacobs’s proposals, the Court in its brief decision does not even mention human rights. Still, the Court has a theory on citizenship and identity. That theory emerges from the Court’s elaborate silence and its use of economic law to protect Mr Konstantinidis.

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68 See OPTEM, above n 32.
69 See Weiler, above n 1, 324–57. See Anderson, above n 28: while the nation is the place of culture, and culture is the domain of feeling, there is no culture in nationalism, only an elegant, decorous absence of feeling.
71 While it may seem strange, at first glance, to distil a theory from silence, it is not so far fetched for those who are familiar with the Court’s jurisprudential culture. The Court and the Advocate General often seem to engage in a peculiar instance of division of labour. The Advocate General eloquently summarises arguments
The context of the Court’s theory is that of economic existence. Markets require a fluidity of capital, human and fixed. Market actors, both on the production and the consumption end, must be open to the reshaping of their own conception of the self over time. Identities, in other words, can be adopted and discarded like a change of costume. Bauman has likened modern life to a pilgrimage into the desert where one is in constant danger of losing one’s identity. That exactly is what happens to Konstantinidis: he loses his name, unquestionably the main bearer of identity. He learns, through painful experience, that mobility means to subject oneself to forces that will change identity in unknown ways, and that he is not the sole master of his identity.

The Court, then, essentially negates what the Advocate General believes. AG Jacobs is a modernist: identity is in the hands of the individual, and the goal is not to impinge upon it. He believes in a manageable world and rationality. History, to the Advocate General, is progress. The task is an impossible one: humanity as such, order, harmony, and certainty. While the horizon can never be reached, it is precisely the *foci imaginarii* that make the path feasible and even inescapable. If humanity is essentialist, human rights protect at least an essentialist core. The more human rights the better, and the more encompassing their scope the better, too. It is a matter of logic, therefore, to apply human rights judicial review against the Member States. It protects Konstantinidis in his being human (or at least, in his being one of us). His humanity is, inter alia, his autonomy, and as an autonomous sovereign agent he has the capacity to choose to travel beyond the boundaries of his known world. Protecting that autonomy means absorbing the risk involved in this endeavour. Choice and morality are private; risk is public. Konstantinidis’s freedom must be unharmed—and it is the job of the government to protect it. The tools of protection are, of course, human rights, as the ultimate weapon at the disposal of the enlightened agent.

The Court is sceptical. It appears comfortable with the notion of citizenship as consumer identity. Commentators are uniformly and customarily critical of such suggestions. Weiler, for example, speaks of ‘bread-and-circus democracy’ and a ‘Saatchi & Saatchi Europe’.72 However, there is strong evidence that today ‘we can learn more about the operations and values of social communication from Saatchi & Saatchi than from [Justices on the US Supreme Court] Holmes and Brandeis’.73 Rather than mourning a world we have lost, and condemning consumer culture as a social pathology that is both hedonistic and parasitic, we should accept that individuals use consumption—understood as rituals and codes which form a flow of information—to say something about themselves, their families and their loyalties. The kinds of statements they make reflect only the kind of universe surrounding them. The meanings and rituals of consumption mark out the categories and classifications which constitute social order. We might want to imagine the postmodern consumer as ironic and knowing, reflexive and aware of the games being played. The consumer has considerable cultural capital.74

The Court, it seems, understands this. It has refused to pretend that Europe is composed of individuals carrying their immutable identities around with them, and has recognised instead and precedents, and does not shy away from openly pointing to considerations that go well beyond narrow legal reasoning. The Court, by contrast, more often than not hides the ball. While it is far from being positivist—in fact, the ECJ is acutely aware of the political environment it adjudicates in, and is very often driven by considerations relating to it—it is not exactly outspoken with regard to the ‘true’ rationales that drive it. The reason might be the necessity to ‘speak strict legalese’ in its dialogue with its national counterparts. Whatever the merit of that speculation, the result is that in order to obtain a complete picture one has to look not only to the decision, but to the Advocate General’s opinion as well. Only in superimposing one on the other, like two transparencies layered together against the light, can one see the meaning shining through the silence.

74 Some strands of sociological literature even emphasise the communal nature of consumption. According to this view, consumption takes on more and more social functions as a form of sociality, even solidarity: R Shields, Lifestyle Shopping (1992) 110.
the risk that identities will be changed, perhaps erased, by forces beyond individual control. Identities are not pre-social, monolithic or unchanging; they are multilayered, complex and impacted in unpredictable ways by disordered cultural spaces. The Court recognises that Konstantinidis, like all of us, is not just a self-defined independent agent. Power is exercised not primarily by him, but by the changing social environment around him. The Court displays a postmodern sensibility by limiting that power as is appropriate to Konstantinidis’s endeavour as an economic pilgrim.

c) Conclusion and Critique

In a way, the Court takes up AG Jacobs’s suggestion of linking the Konstantinidis case to the notion of citizenship. European citizenship, however, will not be defined through essentialist human rights, or exclusive demands on loyalty. According to the Court, a theory of European citizenship has to take into account the practice of citizenship in Europe. That practice does not support liberal, communitarian or republican theories of citizenship. Beyond its glossy surface of liberal human rights, or communitarian Europeanness, the European experience of citizenship is exactly as Article 17 EC has it: it is framed by the ‘limitations and conditions laid down in this Treaty and by the measures adopted to give it effect’, that is, by economic ratio. There is a gap, then, between the projected nature of the European polity on the one hand, which has appropriated cherished symbols of statehood and which lays claim to its citizens’ political loyalty, and the nature of the European citizens’ experience of citizenship on the other hand, which is dominated by rituals of trade, travel and consumption. The Advocate General models his vision of citizenship according to the nature of the polity, and embraces the notion that citizenship in Europe is still a project. Applying human rights against Member State actions would accomplish the project of rights-based citizenship, and at the same time the project of an ever-more federal Europe. The Court, in contrast, models its vision of citizenship after the practice, and experience, of citizenship. It refuses to bridge the gap between Europe’s reach and citizenship’s practice by projecting onto the individual attributes that have long dissolved, and hopes that have proved illusory.

European identity, as understood by the Court in 1993, proves to be fleeting, unstable and insecure, and hinges on participation in the market. It is just as complex and multilayered as the law that supports it. The upside is that the Union, in sustaining nothing more than weak and thin post-political identity, is able to perform its role as Civilisation. The downside is that postmodern superficiality squashes hopes for a vibrant political life and European Eros.

2. The Way Forward?—Evolving Union Citizenship

Obviously, this state of affairs sits squarely with the increasingly shrill discourse of shared values and a European identity rooted in commonness, feelings of belonging and a shared fate. The mounting pressure is nowhere more evident than in the Court’s own documents, namely its Advocate Generals’ opinions. In Konstantinidis, AG Jacobs seems to have started something of a tradition. A little later, AG Léger in Boukhalfa75, AG La Pergola in Martinez Sala76 and AG

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75 See AG Léger in Case C-214/94 Boukhalfa [1996] ECR I-2253, no 63: ‘Admittedly the concept embraces aspects which have already largely been established in the development of Community law and in this respect it represents a consolidation of existing Community law. However, it is for the Court to ensure that its full scope is attained. If all the conclusions inherent in that concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations. Taken to its ultimate conclusion, the concept should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality. Such equal treatment should be manifested in the same way as among nationals of one and the same State.’
Jacobs again in *Bickel & Franz* made sweeping statements. The most extensive and fervent treatment of Union citizenship comes from AG Cosmas in *Wijsenbeek*. He first turned against the notion that Article 18 EC might not in itself have regulatory scope:

First, it underestimates the constitutive task of the Community’s constitutional legislature, presenting it as being devoid of substance. Secondly, it disregards the Community’s evolutive dynamics at a time when those dynamics are obvious at all stages in the evolution of the written rules and case-law on the free movement of persons. Lastly, my objection is based primarily on the very wording and spirit of the article in question . . .

Up to the Maastricht Treaty,

the text of the Treaties establishing the Communities gave the impression that persons were not considered to possess rights, in other words as autonomous holders of rights and obligations, except indirectly; it is only by repercussion that they benefit from the favourable consequences of the direct application of a rule of Community law and, more generally, of the implementation of the economic objectives of the Community legal order. The central objective of the Community rule lay in principle in the development of the Community itself and in the promotion of its fundamental aspirations . . .

This, however, has changed, according to AG Cosmas, with the insertion of Article 18 EC:

The article in question is inspired by the same anthropocentric philosophy as the other provisions of the body of rules of which it forms part. One class of persons, the citizens of the Union, become holders of a specific right—in the present case the right to move and reside freely within the territory of the Member States—irrespective of whether the enjoyment of this right is accompanied by the promotion of other Community aspirations or objectives.

This is where one of the most essential differences between Article 8a [now 18] and Article 48 [now 39]ff is to be found. The latter articles have established a functional possibility for nationals of the Member States, which they are granted so that they exercise it with a view to the creation of a common market, the objective of which can only be to permit persons to pursue their economic activities in optimum conditions. Article 8a [now 18], by contrast, establishes for nationals of the Member States (now designated citizens of the Union) a possibility of a substantive nature, namely a right, in the true meaning of the word, which exists with a view to the autonomous pursuit of a goal, to the benefit of the holder of that right and not to the benefit of the Community and the attainment of its objectives.

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77 See AG Jacobs in Case C-274/96, *Bickel & Franz* [1998] ECR I-7637, no 23–24: ‘The notion of citizenship of the Union implies a commonality of rights and obligations uniting Union citizens by a common bond transcending Member State nationality. The introduction of that notion was largely inspired by the concern to bring the Union closer to its citizens and to give expression to its character as more than a purely economic union. That concern is reflected in the removal of the word “economic” from the Community’s name (also effected by the Treaty on European Union) and by the progressive introduction into the EC Treaty of a wide range of activities and policies transcending the field of the economy . . . Freedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship.’


79 Ibid, para 82.

80 Ibid, paras 83 and 84.
What follows must be a fundamental change:

In other words, Article 8a does not simply enshrine in constitutional terms the acquis communautaire as it existed when it was inserted into the Treaty and complement it by broadening the category of persons entitled to freedom of movement to include other classes of person not pursuing economic activities. Article 8a [now 18] also enshrines a right of a different kind, a true right of movement, stemming from the status as a citizen of the Union, which is not subsidiary in relation to European unification, whether economic or not.81

Citizenship, therefore, is not structured through the parameters of the common market (paragraph 86). As can be seen from ‘the body of European constitutional literature’, citizenship is linked not so much to Articles 39ff EC, but to ‘the fundamental right to personal freedom, which is at the apex of individual rights’ (paragraph 89).

The Court did not follow its emphatic Advocate Generals. Rather, it developed Union citizenship in small, incremental, but ultimately very powerful steps. While it remained hesitant in Bickel & Franz and Wijsenbeek, it regrouped in a series of cases that led to a consistent and potent citizenship jurisprudence.82 The first of this series was Martínez Sala.83 Article 17(2) EC ‘attaches’ to the citizen the rights and duties existing under the EC Treaty, especially the non-discrimination principle in Article 12. Ms Martínez Sala could claim equality of treatment, in this case access to a German child-raising benefit for her newborn child, even if she was solely dependent on welfare and could bring herself within the personal scope of Community law by no other means than that she was a Union citizen lawfully residing in another Member State. The only material condition was that the benefit she claimed must fall within the scope of EU law.84 Some have concluded that this is something close to a universal right of access to all kinds of welfare benefits to all those who are Union citizens and are lawfully resident in a Member State.85

The next step was Grzelczyk.86 The Court’s reasoning resembled that of Martínez Sala but was more far-reaching. The ECJ used citizenship to determine the sphere of ratione personae for the application of Article 12 EC; it is because Mr Grzelczyk is a Union citizen lawfully residing in Belgium that he can avail himself of Article 12 EC, in all situations that come within the scope ratione materiae of Community law. The very scope ratione materiae is defined in part by the right to move and reside freely in another Member State.87 Also, the Court held that

Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.88

This line of reasoning was finally confirmed in d’Hoop.89 If Konstantinidis came to the Court today rather than in 1993, the ECJ’s decision would look very different from what it did eleven years ago. In fact, a similar case involving the changing of names did come to the Court, and it did decide on the basis of the citizenship provisions. The case Garcia Avello90 concerns the surname borne by children born in Belgium to a married couple resident there. The father is a

81 Ibid, para 85 (emphasis in the original).
83 See Case C-85/96, above n 76.
84 Ibid, para 63.
87 Ibid, paras 32 and 34.
88 Ibid, para 31.
Spanish national, the mother is Belgian and the children have dual nationality. On registration of their births in Belgium, the children were given the double surname borne by their father—Garcia Avello—composed, in accordance with Spanish law and custom, of the first element of his own father’s surname and the first element of his mother’s surname. The parents subsequently applied to the Belgian authorities to have the children’s surname changed to Garcia Weber so that it reflected the Spanish pattern and comprised the first element of their father’s surname, followed by their mother’s (maiden) surname. That application was refused as contrary to Belgian practice. To little surprise, the Court decided in favour of the parents. Importantly, it continued its citizenship jurisprudence and heavily relied on Martinez Sala, Grzelczyk and d’Hoop.

This jurisprudence, in conclusion, is interesting in more than one respect. First, the Court decided to use, for the first time in the field of Union citizenship, rather emphatic language. Union citizenship rises to be the ‘fundamental status’ of Member State nationals. If it is ‘fundamental’, nationality consequently loses its hitherto fundamental character. Secondly, the Court does not follow its Advocate Generals’ doctrinal submissions. It does not sketch Union citizenship as a ‘fundamental right to personal freedom’, which, according to AG Cosmas in Wijsenbeek, is at the ’apex of individual rights’. Citizenship, according to the Court, is not foremost about freedom, but about equality. The ECJ links the citizenship clause with Article 12 EC and its principle of non-discrimination on the grounds of nationality. Belongingness mediated through nationality thus becomes less relevant; citizenship of the Union becomes fundamental. Behind this doctrinal construction stands the notion of transnational equality of European citizens. Citizenship is defined through the idea that Europeans across borders are equal—or, at least, are not unequal because of their respective nationalities. What is implied is that European citizens are part of a whole. While AG Cosmas’s right to personal freedom is about solitary individuals, their individual will and their individual ends, the principle of non-discrimination hinges on some form of commonality that makes them part of a larger organism. The gestalt of citizenship is not simply one of liberal individualism and rights so prominent in the Advocate Generals’ opinions, but is enriched through a collective dimension. Of course, this dimension is ‘imagined’, to borrow Anderson’s wonderful phrase. The Court, in other words, starts to construct an imagined community. This is the truly revolutionary moment in the Court’s citizenship jurisprudence. The difference between the Advocate Generals’ conception of citizenship and that of the Court is not merely academic; rather, it marks the difference between rights-based individualism and collective imagination of Gemeinschaft. From the first speaks a logic of enlightenment and its aspiration to place the individual, freedom and autonomy at the centre of communities—this is what AG Cosmas means when he speaks of ‘anthropocentric philosophy’. The Court, on the other hand, displays a good deal of sensitivity towards collective identity as part of individuals’ lives.

It may be that the Court has embarked on a journey towards political rhetoric. Political rhetoric invokes physical participation in a transtemporal community that is the physical corpus of the polity. Our century-long experience identifies that community as the state. Political rhetoric is about the realisation of the idea of the state in the individual citizen’s body.91 While political rhetoric is usually wary of law, just as law more often than not excludes political rhetoric, there are instances when these two come together. Prominent examples are the topos of sovereignty and the mythical point of origin of a community. In such instances, constitutional discourse becomes an important source of political rhetoric. Constitutional courts show us the high political rhetoric of the nation. Courts speak in the name of the sovereign people and tell us who we are, and who we are not. The ECJ’s recent jurisprudence

91 See Kahn, Liberalism, above n 13, 244.
on citizenship may mean it is ready to take on its role to elaborate the character of the political subject who is the citizen, and to identify the relevant community as the Union.  

V. Politics and Post-politics

1. The Murmuring Nation

The turn towards identity in European law is fraught with ambiguity. This comes as no surprise, taking into account the historical conditions of the discursive interlocking of citizenship and human rights: the disintegration of European natural law, the rise of social contract theories and the development of states in the modern sense. The success of the nation-state within the last two centuries is conditioned by ambivalent semantics. On the one hand, state and nation mark the rise of modern, post-traditionally organised polities that have rid themselves of all organic bonds. All pre-modern commitments, such as family and religion, have weakened and discharged the citizen into a mobile environment. The modern nation-state is constituted through citizens as abstract individuals, not through members of preformed groups. On the other hand, modernity has produced its own antithesis. In an environment of an abstract public domain and a gestaltless levelling of social bonds, individuals look for traces of true commonality in secluded spaces. The language of common roots, shared history or cultural unity is the by-product of the modern aseptic language of the nation-state. Today, more than ever, it is intertwined with the rhetoric of the initiated, the unspeakable and the secret, which makes the political appear ambivalent and ambiguous. At the same time, it is the very condition of modernity, comparable to vampires, which are portrayed as remains from the past, while their existence is in reality constituted by modernity itself. The state speaks the language of citizenship, rights and universality, but it means some unspeakable remnants, from which it is possible to sniff out the unique, the authentic and the unmistakable commonality. It is this interlocking of efficient bureaucracy and cloudy identity that makes the nation demonic.

The arcane underside of the political drifts to the surface as soon as a polity turns to identity discourse. This is true whether or not it is a transnational polity. Little wonder, then, that

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92 It is no coincidence that the Court assumes a new role and turns to political rhetoric and identity. The discursive environment accompanying the citizenship jurisprudence since 1998 has exerted much pressure on Community law to reflect identity in its structures, programmes and meanings. There has been increasing politicisation and a distinct turn away from the primacy of legal and economic integration. The question of the political, the search for Europe’s political imagination and the debate about its identity, foundations and ends have entered the stream of European discourse with such vigour that debates about democratic structures, transparency, effective administration etc have been, if not replaced, at least contextualised. What does Europe mean to its citizens if the turnout at elections for the European Parliament is extremely low? What is the Community about if the logic of economic growth seems exhausted after Seattle? Is there a democratic identity in sight if, in the centre of Europe, a party is represented in the Austrian government that in the eyes of many is intolerant and xenophobic and that sends ministers to the Council? What does our common money mean to us after the dispiriting Duisenberg/Trichet compromise and the drop of the euro below the par of exchange with the dollar in January 2000? Who are we as Europeans if the CFSP is disgraced by the violent conflict in Kosovo? All these questions pressed for an immediate answer; all involved European identity. We have seen part of that answer in the debates on the future of Europe and the quest for a Constitution for Europe. Mostly, however, this has been symbolic politics. The more important, if less showy, part of the answer is the Court’s new role and, above all, law’s changing meaning.


Europe today struggles with old demons. Jurists should be aware, too, that law is not immune from such ghosts from the past. Just as the nation murmurs beneath the surface of transnational integration, the mythical and the mystical whisper beneath the aseptic surface of the law. As Europe turns to identity, research must turn to Europe’s law’s deep structure.

2. Europe’s Legal Imagination of the Political

The debate on EU constitutional legitimacy has moved from formal validity (the legitimacy of the Court’s constitutionalising legal discourse) via deontological concerns (the democratic deficit) to foundational myths (issues of European identity and demos). Europe is redefining its political imagination. Most legal research, as instructive as it is, has little, or the wrong things, to contribute to this search. Trawling the bowels of the regulatory state will not yield a European imagination of the political. Perhaps, we are witnessing the move away from Civilisation towards Eros.

The political, of course, is a contested domain. Its imagination is contingent upon the reality that surrounds it. Living in a world of economic transactions, consumption and markets—a world, that is, in which (in the words of the Schuman Declaration) ‘war becomes unthinkable’—the political is largely replaced by the market. Identity is as fluid as money flows, citizenship becomes more a matter of consumption than of political rights and duties, and Shore writes, ‘The citizen-hero of the new Europe thus appears to be the Euro-consumer’.

That, however, may quickly change. Political meanings are as contingent as any others: they can slip away with a slight change of perspective and can just as easily slip back into place. As soon as the political enters the domain of ultimate values and meanings, it becomes incommensurable with the values of the market. We need no reminder of this after 9/11. At the centre of such imagination stands the nation-state. It is the sole source, and the only end, of its own existence; it loves only itself. It exists as a meaning borne by citizens willing to invest their bodies in its continued existence as an order of law. Its power rests on the willingness of individuals to take up, as their own self-identity, the identity of the state. Maintenance of the state, then, becomes a meaning worth fighting and dying for. That is the nature of sacrifice: to take on, in one’s own body, the meaning that informs and sustains a larger community. The modern nation-state has been extremely successful in mobilising its population to make sacrifices in order to help sustain the state’s continued historical existence.

We stand dismayed and helpless before the tenacity of the nation-state’s political imagination. Living in Europe, we like to think we have outgrown the autonomy of the political and have entered the age of post-politics. We describe politics as a site of competition between interest groups. Ultimate

95 See, eg, C Joerges and NS Ghaleigh (eds), Darker Legacies of Law in Europe (2003); J Laughland, The Tainted Source (1997).
97 This may be the reason much of the debate on European good governance (see, eg the helpful writing in EO Eriksen et al (eds), European Governance, Deliberation and the Quest for Democratisation (2003) and vol 8, issue 1 of the European Law Journal (2002)) seems strangely out of touch with the questions that vex Europe today.
99 See Shore, above n 29, 84.
100 See Kahn, Liberalism, above n 13.
101 For an impressive example, see M Ignatieff, Blood and Belonging (1994) 248: ‘I began the journey as a liberal and I end as one, but I cannot help thinking that liberal civilisation—the rule of laws, not men, of argument in place of force, of compromise in place of violence—runs deeply against the human grain and is achieved and sustained only by the most unremitting struggle against human nature.’
political meanings have given way to a multiplicity of particular interests. Many of those interests are just the same as those advanced through the market. Politics, therefore, appears as an alternative means of accomplishing market-ends. We have long lost sight of the notion of sacrificial politics at home. ‘Who,’ asked Benedict Anderson in 1983, ‘will willingly die for Comecon or the EEC?’

In part, this is a matter of perspective. It was none other than Carl Schmitt, in 1932, who realised that nowhere in liberal accounts of the state does anyone die; there is only protection from the state, no dying or killing for the state. Liberalism—a theory of contractual origins of law, whether or not behind a veil of ignorance—fails to see law’s move from contract to sacrifice and the collective nature of sovereignty. Yet this is not just another version of the story of the blind men and the elephant. There are signs that the political and the market are in fact increasingly being conflated, with ‘citizens’ and ‘consumers’ becoming essentially one and the same thing. Can we really deny a blurring and flattening of modernist (not to mention pre-modernist) distinctions? Is it not true that, to a large extent, values have first materialised, then dematerialised and now exist purely as signs circulating within a political economy of signs? The plane of signs and culture can no longer be anchored in ‘finalities’ in the external world (eg consumption is no longer anchored in the finality of need, nor knowledge in truth, technocracy in progress or history in a meta-narrative of causation and teleology). It often seems there is little credible beneath or beyond the flat landscape of endless signification. Perhaps, in Europe, the outlines of a liberal order—a post-political order stripped of its attachment to a popular sovereign—are emerging, something that Kahn calls the ‘European model’.

I fear that while Europe is increasingly postmodern in relation to its Member States, it becomes just as increasingly modern with respect to its own identity. A slight change of perspective may yank us back onto a terrain where we distinguish between friends and enemies, believe in ultimate values, crave for meaning that we derive from standing for some larger community which will outlive ourselves, and are ready to invest our bodies into the continued existence of the polity we live in. Do we want such a political imagination for Europe? If so, how do we get there? If not, can we prevent it? These are questions that concern the meaning of the political just as they concern the meaning of law. Law is memory, and we are witnessing the Court feeding it with its new notion of collective identity. Jurists cannot leave this field to political science or politics.

3. Finality: Eros? Civilisation?

It will get more and more difficult to say what we actually mean when we speak of ‘European law’. What was thought of as a single body of rules has developed into a rich and inter-related patchwork of legal regimes, orders and spaces. The emergence of cross-referenced legal fields makes it pretty much impossible to maintain a single, coherent way of thinking about Community law. Research will doubtless break up into diverse disciplines: material and institutional, grand theory and micro theory, and subject areas. Much of EU legal studies have

103 See Anderson, above n 28, 53.
104 See C Schmitt, The Concept of the Political (G Schwab trans, 1996; originally published 1932) 71.
105 See Kahn, Rege, above n 12; idem, Liberalism, above n 13; U Haltern, Was bedeutet Souveränität? (2007).
106 See Haltern, above n 14, 507–40; but see Weiler, above n 1, 332–5.
108 See Kahn, Liberalism, above n 13.
110 See J Shaw, ‘Introduction’ in idem and More (eds), above n 55, 1, 8.
already moved into this direction. Integrating political and legal analysis will not hold all those diverse strands together under one roof. That, however, is a sign not of law’s demise, but of its maturity. It is law that in the future may help forge a European identity and remodel a post-political finality into genuinely political ends. With Union law’s changing meaning, Europe may change its direction.

To be sure, rethinking the meaning of law in European integration in no way means a diminishing role of the ECJ. We should not expect lessening influence, or even a decreasing docket, in Luxembourg; quite the contrary. Once the Union and its Court enter the stage of the political, we may expect the constitutional discourse of the ECJ to become our most important source of political rhetoric. In a political community with symbolic narratives of self-creation, the Court’s legitimacy will be located not merely in the ‘science of law’ but in politics. Political identity will focus on a legal text, which may or may not be the Treaty of Lisbon. The political, which will define our self-understanding, will merge into our understanding of ourselves as a community under the rule of law. The myth will be that through the law, uttered by the Court, we participate in a sovereign act of self-government.

There is a profound temptation in awakening Europe’s political imagination, yet a polity imagines itself as a transtemporal community only from the perspective of the will. There is no will in the abstract and no universal will, only the narrative of self-creation of a particular community. Thus, Europe is at a decisive crossroads. Aspiring to a world of deep politics, it may easily overcome the social legitimacy deficit; at the same time, it enters the field of belonging, imagined authenticity, possibly of friends and enemies and blood and soil. The law would indeed be not about what we should do, but about who we are. On the other hand, Europe aspires just as much to a world of post-politics, where we imagine ourselves as fluid, multiple and fragmented. Here, the political looks like the economical, the state does not love only itself but looks like the market. This is the world of networks, a world stripped of flesh and bodies.

The failure of the Constitutional Treaty and the turn from constitutional hubris toward a Union of interests, travel, trade and consumption may signify a step towards the second model. To be sure, the European model, if it is to be the second model, is not the model of the rest of the world, nor even the American model. It is my suspicion that the political will not simply go away, not even in Europe. Yugoslavia has taught us about the fragility of post-politics; political rhetoric from Luxembourg will do little to rekindle our belief in the dawning of the age of post-politics. Law in the Union may soon take on a meaning different from what it is today, and while this would lead to a vibrant political life, it is not difficult to spot the problems. In this light, maybe there is something to say for striving for Civilisation rather than Eros.

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112 See D Wincott, ‘Political Theory, Law, and European Union’ in Shaw and More (eds), above n 55, 293.