

What Is Political Union?

By Alexander Somek*

A. Introduction

Recent proposals to fix Europe's ailing monetary union have led some to endorse a stronger fiscal union. Such a fiscal union, which would supposedly comprise stronger budgetary supervision as well as a modicum of revenue collection by the Union itself, is taken to mark the step towards "political" union. The article explores the question of what, if anything, is understood by "political" in this context. After distinguishing three possible meanings of political union, the article argues that a true union of this kind would rest its focus on the form of life that can be sustained among Europeans. Surprisingly perhaps, the article concludes that less centralization and unwinding monetary union in its current form may well be more congenial to a political union than hectic bids for fiscal centralization.

B. These Glorious Days

The legal study of the European Community and Union had its heyday when the elusiveness of its subject was a widely shared experience. The novelty of the phenomenon confounded commentators to such an extent that the best to be hoped for was to designate the unprecedented through the adjectival use of *sui generis*. Unsurprisingly, there was also widespread agreement concerning the aptness of characterizing the Union by stating what it was not.¹ According to a belabored, albeit unsatisfactory, formula, the Union was seen to occupy some indeterminate intellectual space between an international organization and a state. The Union was said to be more than the former and less than the latter—after all, there were, on the one hand, awe-inspiring normative features, such as supremacy and direct effect, but also, on the other, the conspicuous absence of a Weberian monopoly of force.

On the eve of the creation of the Union, this indeterminacy became ennobled with an exalted apology. It took the form of the pleasing reassurance that it would be "ironic" if the

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¹ See William Wallace, *Less than a Federation, More than a Regime: the Community as a Political System*, in *POLICY-MAKING IN THE EUROPEAN COMMUNITY* 403 (Helen Wallace, William Wallace & Carole Webb eds., 2nd ed. 1983).

Community were to be turned into a state, let alone a superstate, given that it sought only to tame the nation state within a system of supranational discipline. These were J.H.H. Weiler's edifying ideas.² Supposedly, the Union aimed at an ever closer embrace among nations that must not result in a merger; it was about rescuing the nation, as a cultural phenomenon, from being appropriated by the state; and about preventing the abuse of the national boundary as a means of excluding—and condescending towards—the other. Positively put, at its heart, the Community was designed to respect the *other*. These messages were adorned with a footnote referring to Hermann Cohen's forlorn work *Die Religion der Vernunft aus den Quellen des Judentums*.³ Not only did this sound uplifting, it even appeared to be profound.⁴

In the face of real suffering, such edifying messages suddenly appear vapid. Within a few years, the euphemisms that added conceptual glamour to indeterminacy appear to be strangely inappropriate. The explanation is straightforward. They provided a far too narrow perspective on European integration and concealed the highly determinate core of Community and Union.

C. False Indeterminacy

In order to understand this, one merely needs to attend to symptoms. Here is one: Our culture does not have much of a problem with identifying superstars, selecting supermodels, celebrating superman, and the ambition of being a superpower. Even the supernatural incites gripping anxiety. By contrast, the superstate gives European Union scholars the creeps. When it comes to the state, *super* is not better. This bespeaks a characteristically liberal anxiety. The state is a necessary evil. That much is conceded. But a superstate would only bring evil. The Union promised to tame the old Leviathans without thereby itself turning into Behemoth. No superstate. Amen.

In spite of this rejection of the "strong state," established European Union discourse has nonetheless revolved around the core maxim that matters ought to be pushed "beyond" the nation state. But what would await one in the beyond if not state power? Apparently, one gets what one expects. While statisticians see states enter the celestial sphere of intergovernmental bargaining, neo-functionalists perceive administrators engaged in the mundane practice of smart problem-solving. Both were believed to push the scope of what nation states can influence beyond their narrow bounds. Nobody would need a state for

² See J.H.H. WEILER, *Fin-de-siècle Europe: Do the New Clothes Have an Emperor?*, in *THE CONSTITUTION OF EUROPE: DO THE NEW CLOTHES HAVE AN EMPEROR? AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 238, 250-2, 262 (1999).

³ See *Id.* at 252, 343; see also Hermann Cohen, *DIE RELIGION DER VERNUNFT AUS DEN QUELLEN DES JUDENTUMS* (1919).

⁴ In contrast to Weiler, Cohen explains that monotheism is the reason for respecting the stranger or foreigner. See Cohen, *supra* note 3, at 144-5 (arguing that "[a]ll people are equally creatures of the same God."). It must appear doubtful whether this idea is compatible with the public reason of a liberal society.

that. Beyond the nation state lay some stateless zone of shared authority; for Americans: *pooled* authority.

Even the left haplessly bought into this social imaginary. It may have been an outgrowth of deep-seated distrust of anything smacking of power. In any event, the left was misguided enough to ignore that, in a transnational setting, the Union effectively embodies the type of state that caters to the protective needs of civil society. It is, in other words, a specimen of Hegel's *Not- und Verstandesstaat* (a state subservient to necessity).⁵

Legally speaking, the Union has come to this world as an administration of justice, on the one hand, and as an agency regulating the internal market, on the other. With respect to the former, it infused national legal systems with the spirit of free markets; with respect to the latter, it replicated and concentrated the administrative power that Member States could no longer effectively exercise themselves. The protection of the rights of individuals and the managements of risk are subservient to the pursuit of individual interests. This is the core of the state by virtue of necessity, i.e., Hegel's *Not- und Verstandesstaat*. In order to realize this, the left, Habermas most prominently, instead of fancying "the beyond," had better studied Hayek, who, in the late 1930s, already understood that an international federal system would reduce the nation state to exactly the format the market liberals find desirable.⁶ It would, indeed, mark the consummation of the liberal program.

The explanation is rather simple. According to Hayek, an "ideal" international federal system inhibits redistribution at the federal and the local level.⁷ It is likely to preempt social programs, not owing to the gradual augmentation and expansion of benevolence, but by making the social question *structurally* obsolete. A federal system that is *international* in its design, Hayek conjectures, puts an end to government bailouts for ailing industries for the simple reason that there is not enough popular support for aiding one region over another.⁸ The absence within such a system of what Mill called "common sympathies"⁹ among compatriots incapacitates intervention by the federal government on

⁵ G.W.F. Hegel, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 221 (Allen W. Wood, ed., H.B. Nisbet trans., 1991).

⁶ For a relevant rediscovery of Hayek, see Fritz W. Scharpf, *The Double Asymmetry of European Integration, Or: Why the EU Cannot Be a Social Market Economy* (Max Planck Institute for the Study of Societies, Working Paper 09/12, 2009), available at <http://www.mpifg.de/pu/workpap/wp09-12.pdf>. See also Martin Höpner & Armin Schäfer, *Eine neue Phase der europäischen Integration: Legitimitätsdefizite europäischer Liberalisierungspolitik*, in *DIE POLITISCHE ÖKONOMIE DER EUROPÄISCHEN INTEGRATION* 129, 130 (Martin Höpner & Armin Schäfer eds., 2008).

⁷ FRIEDRICH AUGUST VON HAYEK, *The Economic Conditions of Interstate Federalism*, in *INDIVIDUALISM AND ECONOMIC ORDER* 255, 271 (1948).

⁸ *Id.* at 257-8.

⁹ JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 308 (1991).

A portion of mankind may be said to constitute a nationality if they are united among themselves by common sympathies which do not

mere political grounds. By the same token, the pursuit of social programs at the state level is hampered, owing to widespread regulatory competition. For example, under conditions of unequal economic development majority support for limiting working time or universal compulsory unemployment insurance is extremely unlikely to arise.¹⁰

If a state is that which stabilizes the operation of civil society *qua* market economy, then the Union is a state that has emerged from within national systems “jointly and severally.”¹¹ Its allegedly indeterminate nature, which scholars have competed to conceptualize, is an ideological disguise that renders the brute in more pleasing fashion than would the use of sober, and somber, Hayekian terms. Likewise, the rhetorical denouncement of the superstate deflects attention from the fact that the *liberal* state had already left its national bounds in order to busy itself with protecting transnational markets.

D. Facile Causality

Ironically, the liberal quest for the beyond did not have much of an orientation. While the state of civil society is working to integrate markets, the final objective that would have lent *moral* significance to the beyond remained profoundly unclear. The attempts to fill this void gave rise to a practice that Majone very aptly described as “crypto-federalism.”¹² More Europe was always considered to be good. No matter whether common polices created public bads, “more Europe” was always considered to take care of it. Even today we can hear the refrain: “What would solve the crisis for us?” “More Europe!”

Indeed, the beyond that Europe was supposed to arrive at did not amount to more than supplanting the sovereign state with something that was roughly as clear as our conception of heaven.¹³ It was simply going to be good there. More importantly, the beyond held out the promise to rescue Europeans from the nation.

This reflects a second dogma. The first dogma, mentioned above, said that Europe was not to become a superstate—possibly a supermodel for the organization of the world, but

exist between them and others—which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively.

¹⁰ See HAYEK, *supra* note 7, at 263.

¹¹ See PETER LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE* (2010).

¹² GIANDOMENICO MAJONE, *EUROPE AS THE WOULD-BE WORLD POWER: THE EU AT FIFTY* 102 (2009).

¹³ However, for an intriguing historical exploration, see COLLEEN McDANNELL & BERNHARD LANG, *HEAVEN: A HISTORY* (2001).

definitely not a superstate. The second dogma posits that the nation *state* is the root of all evil.¹⁴ The underlying reasoning is easy to comprehend and has been replayed several times. Nations, if unchecked, lead to nationalism. Nationalism, in turn, leads to antagonism. Antagonism leads to bloodshed. Bloodshed leads to suffering.

Of course, Europe was supposed to sustain nations in the form of a cultural space where humans can flourish. But the nation, in order to sustain itself, was supposed to make a sacrifice. Only as an ox was the bull allowed to enter the ark.

Treating the nation as a dangerous inheritance is consistent with that liberal view of the world which is accurately characterized by adding the prefix *neo*. In contrast to classical liberalism, for which nationality was the natural vehicle for the unification of a people, the world according to neo-liberalism is not composed of peoples but of merchants moving containers around. Nations create heterogeneous obstacles in the sea of voluntary exchanges. Moreover, they are prone to engage in protectionism since it is their mission to accord priority to the welfare of their own folks over the welfare of other individuals.

But the established approach to nationalism involves a number of surprising beliefs. First, combating protectionism is believed to be a tool for curbing the propensity of countries to lapse into nationalism.¹⁵ This insinuates that any protectionist act represents a dangerous step towards national self-aggrandizement. Within this intellectual universe, a discriminatory tax imposed on imported goods is on the same plane as a government that tries to rescue *Hungarianess* by curbing freedom of speech and tolerating violent acts perpetrated by marauding para-military troops. In fact, that the Union has the powers to deal with the former while it remains speechless in the face of the latter reveals something about its nature.

Second, it is within this same intellectual universe that limiting the nation is deemed to be essential to combating nationalism.¹⁶ Strip the national government of the power to influence its country's destiny and nationalism will disappear. This involves a very simplistic view of causality. It is so simple, indeed, that one must suspect that the reverse is true, namely that the systematic weakening of nations is likely to occasion upheaval and unrest on their behalf.

Third, the master narrative that Europe sustains about its beneficial existence, for which it was recently awarded the Nobel Peace Prize, also involves a deleterious causal

¹⁴ See WEILER, *supra* note 2, at 342.

¹⁵ For a historical reconstruction of this belief, see Christian Joerges, Europe's Economic Constitution in Crisis (Nov. 22, 2012) (unpublished manuscript) (on file with the author).

¹⁶ See WEILER, *supra* note 2, at 342.

oversimplification. The cause of the First World War? Nationalism. The cause of the Second World War? Nationalism. Amazingly, within this frame of mind, nationalism has a God-like quality. It is *causa sui*. It comes to this world as an *ens a se*. The cause of all evils is not caused by anything outside itself. Nationalism is not caused, for example, by industrialization, class stratification, social and territorial mobility, increasing insecurity, or lingering religious prejudice, that is, by a number of factors that are part and parcel of the rise of the capitalism, which the Union embraces so warmly. If being committed to European integration means believing in the evil-generating features of nations alone it requires buying into a series of gross sociological and historical simplifications.

Worse still, Europe appears to have been built upon the belief that, in order to tame the nation state, the mysterious beyond would have to be based upon something entirely different from nationality. This involves a dangerous reduction of options. It precludes basing the Union on an idea that may have been expressed, hitherto, only in narrow national form. This reduction discourages any exploration of the option that the nation was only an application of the more general idea that any defensible form of community has to be a *political* community. It is precisely this idea that I would like to explore below.

E. Three Concepts of the Political

There is consensus today between the two European Presidents, Herman von Rompuy and José Manuel Barroso, that in its current form the Union can no longer be sustained.¹⁷ Something new has to be found.

But what would this be? The answer to this question today is what it was before: Europe should be a political union.¹⁸ The problem is that we are roughly as sure about what a political union might be as mainstream scholars have been, to this day, about the nature of the European Union. We seem to understand what *political integration* is: It is integration as negotiated by governments.¹⁹ But we are less sure about political union. We sense that a political union would overcome the received mode of political integration, for it would take a sizeable chunk of power out of the hands of national governments and transfer it to a more centralized Union.

¹⁷ See generally Herman Van Rompuy, *Towards Genuine Economic and Monetary Union: Report by the President of the European Council* (June 26, 2012), available at http://ec.europa.eu/economy_finance/focuson/crisis/documents/131201_en.pdf; José Manuel Durão Barroso, *State of the Union 2012 Address by European Commission President* (Sept. 12, 2012), available at http://europa.eu/rapid/press-release_SPEECH-12-596_en.pdf.

¹⁸ See Barroso, *supra* note 17, at 4, 9 (stating this position explicitly); but cf. Van Rompuy, *supra* note 17, at I-3 (stating a more muted position).

¹⁹ For a reminder, see FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 43-84 (1999).

It is, nonetheless, relatively easy to make out three different philosophies that compete to provide the authoritative understanding of political union. Intriguingly, each presupposes its own understanding of *the political*.

First, it is possible—and indeed quite common—to conceive of political integration from a *functionalist* perspective. This scintillating predicate can be used here, appropriately, both in the sociological sense²⁰ and in the more specific sense that it has attained in so-called *neo-functionalist* integration theory.²¹ Simply put, the political union is what now seems necessary in order to sustain the European economy. The chief concern is system reproduction. We must move forward to preserve the status quo. Creating a political union means, therefore, overcoming the chiefly intergovernmental mode of political integration in favor of another one that links the stabilization of financial markets and public finances more directly with the peoples of Europe.²² Political union is a necessity: If the Union were to remain fundamentally dependent on the consent of national governments it would be “destined to fail.”²³

This is the core idea. It is clearly reflected in the statements of van Rompuy and Barroso.²⁴ Of course, everyone avoids the “S” and the “F” words—statehood and federalism, respectively—even though Barroso is rhetorically daring when speaking of a “federation of nation states.”²⁵ This goes hand in hand with the renunciation of the superstate.²⁶ The strengthening of “European democracy” always comes last, that is, after it has been made clear what needs to be done in order to rescue economic and monetary union.²⁷ But democracy is part of the package. It is deemed to be inevitable so that the system to be stabilized will be nourished by sufficient input legitimacy in order to underpin the authority necessary for effective supervision. Nowhere is this more clearly spelled out than in a paper that implicitly claims to avoid such an instrumentalist perspective:

²⁰ For an introduction, see HANS JOAS & WOLFGANG KNÖBL, *SOCIAL THEORY: TWENTY INTRODUCTORY LECTURES* 43-67, 249-280 (A. Skinner trans., 2010).

²¹ For a recent discussion of the latter, see Martin Höpner & Armin Schäfer, *Integration Among Unequals: How the Heterogeneity of European Varieties of Capitalism Shapes the Social and Democratic Potential of the EU* 4-5 (Max Planck Institute for the Study of Societies, Discussion Paper 12/5, 2012).

²² See Barroso, *supra* note 17, at 9; see also Miguel Poiaras Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice* 20-1 (Robert Schuman Centre for Advanced Studies, Policy Paper 2012/11, 2012), available at <http://network.globalgovernanceprogramme.eu/wp-content/uploads/2012/10/report.pdf>.

²³ Maduro, *supra* note 22, at 18.

²⁴ See Barroso, *supra* note 17.

²⁵ Barroso, *supra* note 17, at 11.

²⁶ Barroso, *supra* note 17, at 11.

²⁷ See Barroso, *supra* note 17, at 9; see also Van Rompuy, *supra* note 17, at I-2.

A fiscal Union does require a political Union. This problem is particularly acute with respect to the commission's position. On the one hand, the Commission has lost part of its powers of political leadership to the Council. But, on the other hand, it has acquired significantly more powers with respect to the member states and the Fiscal compact and other fiscal crisis related legislation such as the six-pack. To be effective and legitimate, the Commission must be able to rely on the kind of legitimacy that comes with [a] direct link to the outcome of European elections.²⁸

Second, political union can be imagined more along the lines of state sovereignty as integration reaches out to the traditional areas of *high politics*, such as foreign policy, common defense and organizing the military.²⁹ Obviously, in this context, the term political has a more Schmittian ring. After all, it appears to affect, at its core, the intensity of association.³⁰ Were it a political unity, Europe would have identified common friends and adversaries. It would send European men and women to the battlefields. They would give their lives for Europe in order to prevent genocide or to protect human rights. Not surprisingly, this vision is reflected in the document prepared by foreign ministers.³¹ In the eyes of some Britons, at any rate, the relevant report is an outright attack on national sovereignty and the inherited North Atlantic alliance.³²

Even though this understanding of political union may, at first glance, not appear to be related to the current crisis, its relevance is revealed, ironically, in the persistent drift of power towards the intergovernmental domain.³³ Not only is the European Council firmly in

²⁸ Maduro, *supra* note 22, at 27.

²⁹ On the distinction between the *high politics* concerning defense and foreign relations and the *low politics* of market regulation, see Stanley Hoffmann, *Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe*, 95 DAEDALUS 862, 876 (1966).

³⁰ See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26, 38 (G. Schwab trans., 2007).

³¹ See *Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, Poland, Portugal and Spain* (Sept. 17, 2010), available at http://www.cer.org.uk/sites/default/files/westerwelle_report_sept12.pdf.

³² See Nile Gardiner, *EU Proposals for a European Army Would Destroy NATO and Threaten the Transatlantic Alliance*, DAILY TELEGRAPH, Sept. 19, 2012, <http://blogs.telegraph.co.uk/news/nilegardiner/100180784/eu-proposals-for-a-european-army-would-destroy-nato-and-threaten-the-transatlantic-alliance/>.

³³ For a highly perceptive study, see Mark Dawson & Floris de Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 76 MOD. L. REV. (2013) (publication forthcoming 2013).

charge of designing policy, the adoption of the Fiscal Compact proves that a regular international agreement is used in order to circumvent Treaty constraints and to create a *fait accompli* for weaker states. Crisis management gives rise to executive problem solving. It uses the channels of foreign policy. The avowed foes are fiscal irresponsibility and profligacy. Both are the remains of a political world that preceded the emergence of our contemporary authoritarian liberalism.³⁴ Evidently, this is not an understanding of political union that one would gladly befriend on Facebook; it is more of a depressing reality than of an ideal to be aspired to.

Third, political union can mean what *the political* means for traditionalists.³⁵ From their perspective, the concept of the political signifies a certain *individual* self-understanding. As a political being, one shares a space with others. The contingent coexistence of these others is normatively taken for granted as if it were a necessity. One's own life is seen as going on in their midst. Whenever one reflects upon one's own life one views it as part of a situation that is tied to a particular place. Being active, as a political being, means to be acting in concert with others in order to preserve and to organize the form of life in which one participates. Genocide or other ways of eliminating opponents are non-political acts. Within a political space one is politically self-determining if—and only if—one yields to those others to whom one belongs. Identity is mediated by sustainable difference. Obviously, the social perspective of political beings is conducive to the experience of solidarity with others and mutual trust.

It may seem as though traditionalists can join the camp of functionalists, but only with a less instrumentalist emphasis. Creating a political union may hence simply mean to establish the republican space necessary to enable collective action for the joint pursuit of the common good.³⁶ But this would be a merely formal conception of such union, which would not do justice to the political, which is substantive. It is about shaping, developing, and preserving a form of life that some share in a certain place of the earth. Traditionally, this place has been called a polis or a state, but names are not determinative.

³⁴ See the contribution by Michael Wilkinson in this issue. Michael Wilkinson, *The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union* (in this issue).

³⁵ Commentators of an earlier draft of this article have wondered whether it would not be more accurate to characterize the position that follows above as *republicanism*. I abstain from using the term for a systematic and for a historical reason. Systematically, the place of *republican* thought has been occupied by positions emphasizing either civic virtue or non-domination. Neither is relevant to the more general point about political self-determination to be made here. Second, *traditionalism* highlights the temporal dimension of the matter that concerns the demise of our traditional political world.

³⁶ For such a republican perspective on political union, see DAVID MARQUAND, *THE END OF THE WEST: THE ONCE AND FUTURE EUROPE* 135-136 (2011).

F. Reconstructing the Transnational Effects Arguments

The multi-layer crisis is the hour of functionalists. Their ruminations owe their thrust to the normativity that is concomitant with distress. Something needs to be done. It has to be done now. Most importantly, it has to originate from the beyond. Such functionalist problem-solving remains largely oblivious to the form of life that is at stake in the place called "Europe." This is why a traditionalist has to harbor doubts.

Of all functionalist calls for political union, the proposals by Maduro, who cleverly avoids using the term, appear to be the most sophisticated, at any rate, from the perspective of democratic theory. Most laudably, he is aware that the bailout mechanisms that are currently used, notably the European Stability Mechanism, are utterly divisive.³⁷ Some European countries are publicly cast in the role of generous *givers*, while others, the *receivers*, are expected to pay for munificence. They are expected to bear the political brunt of retrenchment and austerity. In the face of an enduring crisis such a perception invites the question whether "solidarity" on the part of the givers is met with sufficient efforts to limit wasteful public spending; it also motivates people on the receiving end to regard themselves as the victims of a European capitalism that benefits only a few. Evidently, such a morally toxic environment is likely to divide, rather than to integrate, Europe.³⁸

Maduro proposes a different approach. In his opinion, the economic, monetary and fiscal crises have to be understood as a crisis of democracy.³⁹ National democracies are either unwilling or incapable of internalizing the externalities they create for others. His conclusion is that the sphere of democracy must be expanded to an extent at which it appears large enough to digest, *internalize*, all externalities.⁴⁰

In order to prove his point, Maduro draws on the transnational effects argument.⁴¹ He presents the banking, fiscal, and sovereign debts crises as the result of adverse effects, *externalities*, that national democracies create for one another in a transnational setting.

³⁷ See Maduro, *supra* note 22, at 7, 13.

³⁸ For a rough sketch, see Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Preemption of Democracy*, 25-6 (Max Planck Institute for the Study of Societies, Discussion Paper 11/11, 2011), available at http://www.mpifg.de/pu/mpifg_dp/dp11-11.pdf.

³⁹ See Maduro, *supra* note 22, at 5.

⁴⁰ Maduro, *supra* note 22, at 5.

⁴¹ For an introduction and critique, see Alexander Somek, *The Argument from Transnational Effects I: Representing Outsiders Through Freedom of Movement*, 16 EUR. L.J. 315 (2010); Alexander Somek, *The Argument from Transnational Effects II: Establishing Transnational Democracy*, 16 EUR. L.J. 375 (2010).

He concludes that these democracies cannot internalize these externalities as long as they do not merge and unify the political power necessary to address them. While Maduro does not, regrettably, distinguish explicitly between and among various types of externalities, it is nonetheless possible to extract them from his argument.

Above all, externalities are either *unidirectional* or *mutual*. In contrast to the former, the latter arise from relations of interdependence. For example, profligate spending by Member State governments has created a unidirectional externality for their fiscally more responsible peers. The fiscally responsible end up having to guarantee funds in order to make debt restructuring of potentially defaulting states possible.⁴² By contrast, free movement of capital has given rise to mutual externalities. The availability of cheap credit from Banks of Northern Member States in the European South caused a real estate bubble. Once the bubble burst, Banks in the European North were incapable of recovering their capital from Southern European borrowers—or banks—for these were in no position to pay back their loans. Free movement of capital has created an interdependence that no national democracy is in a position to address satisfactorily.⁴³

The internalization of *both* types of externality supposedly requires more centralization.⁴⁴ In principle, it may be possible to contain the first type through stricter fiscal supervision by a transnational body, such as the Commission. The second type is impossible to contain for nation states acting in isolation—unless one were to give up free movement of capital, which would not be desirable according to Maduro.⁴⁵ Hence, the internalization of the mutual externalities to which economic and monetary Union gives rise necessarily has a centralizing drift.

It should be noted that there is a subtle change of the subject of internalization when moving from unidirectional to mutual externalities. Stricter supervision of budgetary planning and spending in the course of the *European semester* or the excessive macroeconomic imbalance procedure shifts responsibility back to the Member States.⁴⁶ They are forced to stay within their bounds so that the unidirectional externality does not

⁴² See Maduro, *supra* note 22, at 9–10.

⁴³ Maduro, *supra* note 22, at 10.

⁴⁴ In principle, the first type of externality could also be addressed through unilateral sanctions. This, however, would be inconsistent with the mechanisms of European Union law.

⁴⁵ See Maduro, *supra* note 22, at 10.

⁴⁶ See Regulation 1176/2011 of the European Parliament and of the Council on the Prevention and Correction of Microeconomic Imbalances, 2011 O.J. (L 306) 25, 27; Regulation 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the Euro Area, 2011 O.J. (L306) 1, 1.

arise in the first place. By contrast, the mutual externalities that Maduro addresses are internalized into a unit that is larger than the Member States. More precisely, the interdependence is left in place, but the adverse effect of the externality is removed by designing an instrument of intervention that could not be designed if the Member States acted in isolation or merely coordinated their policies. For example, the creation of a European Budget that is capacious enough to address balance of payment and sovereign debt problems of Member States shifts the internalization of externalities—the adverse effect of cheap credit and asymmetrical shocks—to a larger, more encompassing unit. This is important to note, since the category of mutual externalities forces Maduro implicitly to recognize a third type of externality, which can be called the *identity* externality.

The unidirectional externality consists of one state creating costs for another. Its mutual counterpart results from a situation in which states create costs for each other by virtue of the interdependence of their economies. By contrast, an identity externality arises from the fact that states are what they are for one another, namely, bounded units of economic governance with special responsibility towards their peoples. This externality can be overcome only by changing the nature of the subject for whom it arises in the first place. The European sovereign debt crisis is divisive for the simple reason that populations in the relevant Member States are loyal to their nation. In contrast to the mutual externality, the source of the externality is not mutual interdependence but the fact that the identity of the subjects of the externality poses an obstacle to its resolution. Why should the Slovaks have to pay for the perceived profligacy of the Greeks? Why should the Germans agree to create a transfer union if the expected benefits for Germans are diffuse and perhaps skewed in favor of the wealthy?

According to Maduro, the identity externality can be internalized only if the citizens of respective states bracket their national allegiance. They have to perceive the benefits that European integration generates and to realize that enjoying the benefits comes with certain obligations.⁴⁷ Internalizing this externality requires moving, as a citizen, beyond the nation state.

Maduro's proposals for dealing with these externalities are remarkable. They do not address the option of limiting mutual externalities directly by restricting interdependence. They also do not restrict themselves to exploring how mutual externalities might be contained by moving problem-solving upwards within an already *existing* multi-level system; rather, the focus rests almost exclusively on sustaining interdependence on the basis of internalizing the identity externality. In essence, Maduro suggests that the economic and monetary crisis can be addressed effectively by creating a European system of taxation. He dismisses widespread concern that the Euro may kill the Union out of a firm

⁴⁷ Maduro, *supra* note 22, at 11-12.

belief in the benefits of the common currency.⁴⁸ He observes, correctly, that the Euro did not trigger capital mobility. He concludes, therefore, that switching back to a system of national currencies would not solve the core problem. In Maduro's view, this would introduce another externality because devaluing a currency is in its effect equivalent to a tax on imports.⁴⁹ He believes that externalities of this kind can only be averted if the side effects of the common currency, which concerns asymmetric shocks, are addressed from above. A European system would have to replace the current European Stability Mechanism, which is too deeply steeped in a nationalist imaginary. This alternative system would have to be based on taxes, such as a financial transaction tax and a corporate tax. The selection of taxes not only would generate powers to tax what states have become incapable of taxing themselves because of their interdependence,⁵⁰ it should also send out a signal of distributive justice. The taxes would have to be selected so that their collection would communicate to all European citizens that the major beneficiaries of European integration also have to pay, at least partly, for their gains. Creating a link between taxes and the benefits of integration would underpin the legitimacy of the system. Hence, Maduro expects a double effect. Taxes would not only be the means for neutralizing externalities; they would also signal to Europeans that the identity of the subject of internalization has to change:

How revenues are collected in a polity, and taxation allocated, also informs citizens of the reasons for that polity and what it means to be a member of it. EU revenues should not be simply determined on the pragmatic basis of how much is required to fund the Union budget and what's the easiest way to obtain it. Instead, the sources of EU revenues should be determined by what makes the Union more legitimate before its citizens by making visible the reasons for the Union's existence and linking its revenues to the benefits and costs that different social groups obtain from European integration.⁵¹

In a functionalist vein, Maduro concludes that more centralization is acceptable only if it is based on stronger democratic input. This is true, in his view, even for the measures that are necessary to contain the first externality through intrusive budgetary supervision by

⁴⁸ Maduro, *supra* note 22, at 10-11.

⁴⁹ Maduro, *supra* note 22, at 10.

⁵⁰ This competition has not reduced the tax base yet. It has benefitted smaller states. In any event, the externality that states are to themselves means that they can no longer tax what they would like to tax.

⁵¹ Maduro, *supra* note 22, at 12.

the European Commission. The comprehensive authority that the macroeconomic imbalance procedure invests the Commission with vis-à-vis national governments can be effectively exercised only if it is based on sufficiently strong input. In other words, the Commission has to be in a position to appeal to a mandate from the people.⁵²

G. This Is Not Justice

It remains unclear whether Maduro, at the end of the road, really believes what he claims to believe at the outset, namely that retaining the Euro on the basis of deeper economic and monetary integration is a matter of blind economic necessity: More integration should be a matter of choice, not an inescapable process outside of political control.⁵³

Like other functionalists Maduro is convinced that reasonable citizens would be persuaded by the functionalist logic underpinning his argument. There is no room for citizens whom Maduro deems unreasonable. With this we get to the heart of the problem, which is the naturalism of Maduro's economic philosophy. Not only does he seem to believe that once the interdependence among members of society reaches a certain intensity it would in and of itself trigger central political integration, he does not even reflect on the normative presuppositions underlying his identification of *relevant* externalities. Undoubtedly, if states devalue their currency they make it harder for foreign goods to be sold. But there are good reasons to assume that states have a right to devalue their currency just as well as they have a right to impose tariffs on goods for which they have not made a concession. Similarly, many national economies are exposed to wage competition. This is a relevant externality only if wage competition is deemed to be undesirable. Most importantly, the identity of a national democracy creates an externality only if it is already taken for granted that everyone would be better off if these democracies were to be absorbed into some larger unit. This is the normative premise underlying Maduro's arguments. It is not the case that the observation of externalities leads to the conclusion that there ought to be more centralization; rather, the bid for greater centralization facilitates the identification of relevant externalities. The arguments are based, hence, on a *petitio principii*; which means, in English, that they beg the question.

Indeed, any operation with the transnational effects argument, which claims to perceive externalities as though they were natural facts, presupposes what it wishes to prove, namely that states or populations have a right not to be exposed to certain effects.⁵⁴ Such

⁵² Maduro, *supra* note 22, at 19-20.

⁵³ Maduro, *supra* note 22, at 11.

⁵⁴ Generally, Maduro's texts appear to accept as their default position some basic dogmas of mainstream law and economics. From this perspective, "externalities" are effects that reduce aggregate welfare. But Maduro does not explicitly apply this perspective in his analysis. The argument does not address aggregate welfare but the future of democracy.

a theory of rights is what Maduro fails to provide. What he offers, instead, is a vision of European integration that appeals very diffusely and vaguely to greater overall welfare and some distributive justice. The “more Europe” that Maduro presents us with is highly unspecific. One may even concede that the tax yield expected to flow from a financial transaction tax and some corporate tax may be sufficient to replace the European Stability Mechanism. But would it suffice to support strained national programs? In countries that have to negotiate conditionality requirements with the troika in order to arrive at a deal with the ESM welfare programs will likely be under the contradictory demands of retrenchment and having to pay out more and more to an increasing number of unemployed Europeans.⁵⁵ Will the European Union only help to fill national coffers that are empty because governments had to intervene in order to rescue banks? How just will this appear to ordinary Europeans? Maduro does not take this larger picture into account in his attempt to redesign the Union from the perspective of justice. The less well-off and young unemployed Europeans will go under while the common currency will survive, which is, accidentally, what the business community can accept. This is not justice. This is the Hayekian way.

What is more, Maduro takes it for granted that the tightening of budgetary discipline pursuant to the Six Pack will stay in place regardless of European taxation. Never mind that there appears to be scarcely anyone left in the Union who seems to debate the questionable legality of both the excessive imbalance procedure and the Fiscal Compact.⁵⁶ Europe appears to have already returned to a situation where the legality of the legislative state is overridden in favor of the legitimacy that accrues from taking decisive action in the face of an emergency.⁵⁷ It should not surprise us, therefore, that his call for a *de facto* direct election of the President of the Commission is somewhat reminiscent of Schmitt’s quite ingenious recommendation to back up executive emergency action with plebiscitary legitimacy. Schmitt observed quite accurately that when a society is under the impression of a severe crisis any election of a “strong leader” is turned into the equivalent of plebiscites over proposed emergency measures.⁵⁸ In the case of plebiscites, the people are restricted to saying “yes” or “no.” They do not deliberate. They matter only insofar as they are capable of dispensing acclaim. It is to be feared that this is exactly what European “leaders” competing for election would like to see the people deliver.

⁵⁵ I owe this point to Fritz W. Scharpf, *Rettet Europa vor dem Euro!*, BERLINER REPUBLIK (Feb. 2012), <http://www.b-republik.de/aktuelle-ausgabe/rettet-europa-vor-dem-euro>.

⁵⁶ For one critical voice among several others, see Martin Höpner & Florian Rödl, *Illegitim und rechtswidrig: Das neue makroökonomische Regime im Euroraum*, 92 WIRTSCHAFTSDIENST 219 (2012).

⁵⁷ For a less drastically stated account, see DAWSON & DE WITTE, *supra* note 33.

⁵⁸ See CARL SCHMITT, LEGALITY AND LEGITIMACY 63 (J. Seitzer trans. & ed., 2004).

H. The Alternative

The problem of functionalism is that it does not lay its normative premises on the table. If it did it would have to confront the question whether “more Europe,” as envisaged from the functionalist outlook, is indeed desirable.

It needs to be conceded, of course, that functionalists are very adept at imagining the type of regime that may be necessary in order to sustain the common currency. Hence, Maduro’s proposals appear reasonable as long as one shares his liberal economic philosophy. But this condition points to the heart of the problem. Europe would be ill-advised, in this case, to make another consequential choice in favor of economic liberalism without bringing the matter before the people. Too much is at stake. Going down the functionalist path would be defensible only if in the long run a European society were to organize its social security and assistance at the federal level. Not only is this not likely to happen in the future,⁵⁹ the vastness and social heterogeneity of the continent would make any such centralized system likely to incline towards the minimalism that is the mark of a liberal social model. Why should Europeans take such a trajectory for granted? Is it because the Euro needs to be retained as a “symbol” of integration?⁶⁰

European integration needs to be based on something more reasonable than mere idolatry. It would be clearly odd, using an analogy, to baptize Jones as a Catholic and to ask him afterwards whether he would also like to be one. Once a Catholic, always a Catholic: *baptisma habet characterem indelebilem*. Hence, we should be extremely circumspect when creating a more federal system that entrenches the Euro *a priori*. We should not ignore an alternative.

Maduro is entirely correct in analyzing the current malaise in democratic terms. If the point is to rescue democracy, however, the functionalist thrust needs to be reversed. It will not do to repair the self-subversive tendency of economic and monetary Union first and to let the peoples choose later the leader that might navigate the ship of European competitiveness through the rough waters of international finance. Rather, the peoples need to decide, plainly and simply, whether they would like to continue with economic and monetary union in its current form. Such a choice should be made by the peoples whose countries currently participate in the Euro group. They have already experience of its

⁵⁹ For a particularly skeptical perspective, see John Gray, *Why Europe Is Floundering*, THE GUARDIAN, Oct. 17, 2012, at 38.

⁶⁰ See *Merkel will weitere Anstrengungen*, DIE SCHWEIZER SUCHMASCHINE, Oct. 18, 2012, <http://news.search.ch/ausland/2012-10-18/merkel-will-weitere-anstrengungen> (noting that German Chancellor Merkel called the Euro “a symbol for the economic, social and political integration of Europe.”).

adverse effects alongside the advantage of having faceless banknotes as a “symbol” of integration.

A referendum on the Euro could precipitate the constitutional moment that the Union has tirelessly tried to induce for years. There are always alternatives.⁶¹ A reasonable alternative to the Europe suggested by functionalists, without returning to national currencies in one fell swoop, would be to explore a certain way of transforming monetary union into a system that may resemble its predecessor.⁶² National currencies would exist side-by-side within a range of deviation from an imaginary center. Such an alternative would also have to address the unconstrained power of rating agencies, however difficult this may be.

Replacing the Euro with a more flexible system would, of course, not be tantamount to dissolution of economic union. But it should not be forgotten either that the major reasons for seriously exploring the option of rescinding monetary union are, first, the enormous hardship that it engenders for the populations of Member States with high sovereign debt problems and, second, the strain that it puts on European “*de facto* solidarity.”⁶³ Given that the affected Member States are not in a position to devalue their currencies, the chief means available for revitalizing their economies is a drastic reduction of salaries and wages, in addition to cutting social benefits. Such social retrenchment is possible only on the basis of ruthless trade union busting. Whether such a development is desirable for a future European society is more than open to debate. It is also a question whether it is a sound path towards economic recovery.⁶⁴ What is more, even if, as functionalists seem to imagine, a revitalized political process were to arise at the federal level it may well be the case that national democracies crumble under the weight of widespread unrest. The question that functionalists would have to confront, then, is whether a politically invigorated European Union might use part of its tax revenue to fund European troops that will enable Member States to suppress opposition at home.

I. In Defense of Traditionalism

If such a referendum were to resemble the long hoped for constitutional moment it would likely merge into a debate on what Europe might actually stand for now that the neoliberal project seems to have run its course. This would be the type of debate, to be sure, that Europe should have had already thirty years ago; admittedly, it was not ripe for it then, for it had not yet created a common sphere of experience in order to reflect on itself.

⁶¹ See Maduro, *supra* note 22, at 11.

⁶² See Scharpf, *supra* note 55.

⁶³ See Robert Schuman, *Schuman Declaration*, May 9, 1950, available at http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm.

⁶⁴ On the little success in the United Kingdom, see Scharpf, *supra* note 55.

If a debate on an alternative to the functionalist program were to emerge the focus would finally come to rest on the questions that have to be addressed in order to create political union: How do Europeans want to live? Do they want to live together? What common effort would make their form of life possible?

When it comes to these questions it is necessary to retrieve another story of Europe, which was eclipsed during the decades when the idea of Europe was usurped by the neoliberal dream of bigger markets and heightened competitiveness. It is possible to confront the functionalist tale concerning the relentless march toward “more Europe” with an alternative account of what European societies aimed at during the second half of the twentieth century. This story is not about taming the nation state. It is about taming the market and involves the various fortunes of human emancipation from self-made necessity. The relevant narrative recognizes that while at a certain point the “real socialist” alternative fell by the wayside, what has survived, within the European Union, are a number of successful, democratic, social welfare states. They carve out negative liberty from the oppressive omnipresence of markets, in particular in those spheres where market dependence offends human dignity. People cannot hold their head up high if they work for their sheer subsistence or depend for their health care and retirement income on the vagaries of markets. As members of a political community they should be able to elevate human life above the sphere of necessity. What is more, work should not be at the center of human existence. It is too humdrum for that. Even though a small elite seems to have succeeded at talking work up to a medium of self-realization, for the large majority of people life begins when the workday is over. This is not only understandable, it is a shared *European* experience. It is decidedly different from the values embedded in other, more work-focused cultures, such as those of the United States and perhaps of Japan.

From the perspective of this alternative story, political union is not about coping with interdependence by kicking taxes and transfers upstairs; rather, it offers a hope of emancipation from the oppressive effect that interdependence exercises on people who are forced to collect one qualification after the other in order to have a fair shot at obtaining an unpaid internship or on those whose skills are considered to be obsolete after they have spent decades on their perfection. The promise that society will not leave people alone when they find themselves in situations such as these is the legacy of our European form of life.

Of course, Europeans are committed not to be belligerent. They have pledged to respect human rights. They are for the rule of law. But all decent societies should be. There is nothing particularly European about the values that the neo-liberal Union has exhibited in the various showcases of integration, such as the monstrous draft constitution.

Sadly, the Union has never really been part of Europe, more ambitiously understood. Even more sadly, the Court of Justice of the European Union, aided and abetted by the

Commission, has moved internal market law into a direction in which Member States with a “social market economy”⁶⁵ encounter grave difficulties in sustaining the institutions underpinning their political economy.⁶⁶ The Member States of the European Union are socially heterogeneous. This heterogeneity has increased with every round of enlargement. Nevertheless, it is not necessarily the case that under conditions of political integration a liberal model of political economy would prevail. But it would be highly likely to predominate if the Court were to continue—through negative integration—to put social market economies under pressure to alter their institutional arrangements and systems of industrial relations. The current Union, in a word, has an asymmetrical adverse impact on those Member States that are more European according to the alternative story. Paradoxically, the Union threatens to push Europe out of the European Union.

From this perspective, the Europeanization of the Union would call for far greater respect for various traditions of organizing capitalism with the aim of emancipating people from the oppressive omnipresence of markets. The point of the whole enterprise would shift dramatically from leveling the playing field to assisting states in accomplishing their tasks in the face of globalization. Not surprisingly, the prime directive of removing obstacles and distortions would have to be replaced with an enlightened protectionism⁶⁷ that makes room for the management of macroeconomic imbalances and democratic participation. The new prime directive would commission the Union with the task of helping Member States sustain their cultures of embedded capitalism. A Union of this type would rest on the recognition that the institutions conducive to human emancipation are not only historically path-dependent but also extremely vulnerable to erosion under conditions of heightened regime competition. Hence, shifting the Union’s focus from internal market-building to sustaining the ways of life associated with Europe’s social legacy would require some fundamental reorientations. Most definitely, the provisions on state aid and the *ordo-liberal* submission of the state to the strictures of competition would have to be rescinded. The effect of the fundamental freedoms would have to be rescaled to their original design.

Admittedly, this is not the only story that can be told about Europe. But it would pay to juxtapose this alternative account with the functionalist tale of “more Europe” where each step of integration is presented as logically occasioning the other. Once the currently predominant perspective is set against this alternative it would all of a sudden appear in the political light appreciated by traditionalists. The meaning of functionalism could then

⁶⁵ I am using quotation marks because this way of speaking involves a crude simplification of a highly complex reality. See Scharpf, *supra* note 6, at 7.

⁶⁶ For a summary of the work that has been done over the last few years in exploring this question, see generally Höpner & Schäfer, *supra* note 21.

⁶⁷ See Martin Höpner, *Nationale Spielräume sollen verteidigt werden*, 3 MITBESTIMMUNG 47 (2012), available at http://www.boeckler.de/39145_39165.htm.

be translated into the idiom of the life world. It would be seen, then, that sustaining monetary union on the basis of some fiscal union would carry with it, almost by implication, less emancipation from markets and more of the old Lisbon strategy values of competitiveness, flexibility and adjustment. It would become clear that functionalist demands are associated with a more anxious form of life, with a strong preference on being productive at the expense of what might be possible beyond and outside of work.

Thus, should the choice become clear, the European integration process could finally be given into the hands of the European peoples.

J. Conclusion

With the ascendancy of neo-liberalism at the “end of history,” moving back in history has become Europe’s new mode of making progress. Europeans can take a lesson from this. Returning to what may seem like the by-gone days of the *Trente Glorieuses* is not precluded by the course of human events. When Hayek undertook in the 1940s to write his apology of economic liberalism there was hardly anyone left in Europe who still believed in this idea. Roughly forty years later, it had become the ruling ideology.

In a like manner, Europeans have very good reasons to appropriate their social legacy now. Lest we forget, it is much more intimately connected with the events preceding European integration than market building or creating the most competitive knowledge-based economy of the world. Possibly, these more recent projects will soon disappear from our horizon like a face drawn into sand on the beach.