# On Supranationality

## Alexander Somek

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### Keywords

constitution building, democracy, integration theory, Nation-state, non-majoritarian institutions, social policy, supranationalism, law

### Abstract

European integration faces a quandary. Even though the European Union is on the eve of an unprecedented expansion, politicians and scholars claim that it lacks a coherent direction, and they speculate about what the *finalité politique* of European integration might look like. In this article it is argued that a debate devoted to ends needs to take heed of what has been introduced in the course of the integration process, namely, supranationality as a new mode of political organisation. After a brief discussion of two prominent conceptions of supranationality, the author contends that the most promising reading of supranationality lies in conceiving of it from the perspective of anti-discrimination.

### Kurzfassung

Die europäische Integration steht vor einem Dilemma. Obwohl die Europäische Union sich am Vorabend ihrer wohl historisch bedeutsamsten Erweiterung befindet, wird von manchen Politikern und Wissenschaftern behauptet, dass ihr die Richtung fehle. Sie spekulieren darüber, worin die finalité politique der Europäischen Integration bestehen könnte. Dieser Beitrag mahnt zu Umsicht. Bevor eine Debatte über die Ziele der Integration sinnvoll geführt werden kann, sollte bestimmt werden, was durch den Integrationsprozess bislang hervorgebracht worden ist, nämlich der Supranationalismus als ein neues Modell der politischen Organisation. Nach einer kurzen Diskussion zweier prominenter Konzeptionen des Supranationalismus tritt der Autor dafür ein, diesen aus der Sicht der Anti-Diskriminierung zu begreifen.

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# 1 The Bicycle Mentality

A mentality, widely shared among those concerned about the future of European integration, represents, despite overtones bespeaking unremitting anxiety, an accurate self-reflection of the integration process at the end of the twentieth century. It says that as European integration unfolds, it also and at the same time falters. Accordingly, European integration is taking place, if at all, on the brink of collapse. What gives life to the integration process—and what indirectly lends coherence to that which has already been achieved—is that it is constantly challenged by ambitious goals. This is where we stand today, and this is where we have always been—at any rate—in the last fifteen years.

In the context of international trading law this mentality is referred to as the "bicycle theory of integration".(1) Falling down can only be avoided by constantly moving forward. In the context of European integration it appears as if such a bicycle process were confirmed by historical fact. At the end of the century, Europe has made major progress.(2) After a period of stagnation in the 1960s and 1970s integration gained new momentum after an effort had been made to boost the European Economy through the adoption of the Internal Market Agenda set out in the Single European act (1986).(3) Immediately following the official "completion" of this Internal Market in 1992,(4) the signing of the Maastricht Treaty ushered in a new age of integration. The Treaty set out the principles and institutions for a common currency and brought co-operation in foreign affairs and matters of internal security policy under the umbrella of the newly created European Union. The Union, a meagre substitute for what some had once envisaged as a "United States of Europe", was created as the lofty but substantially empty "roof" crowning its three constituent "pillars":(5) the *European Communities* (EC, ECCS, Euratom), the *Common Foreign and Security Policy*, and the *Co-operation in Police and Criminal Justice Matters* (originally "Justice and Home Affairs"). Finally, the Amsterdam Treaty, even though slowing the pace of integration considerably, provided for some institutional adjustments, in particular, by strengthening the European parliament vis-à-vis the Council of ministers,(6) and by paving further ground for a future common European defence policy.

For a number of years, marked by ambitious reforms, it seemed as though Europe had now been made fit for assuming the role of a major player on the globe.

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In the meantime—and with the conclusion of the summit of Nice in December 2000 we face the next Treaty revision—another major issue of integration is on the agenda, namely, enlargement. In the future the Community might well encompass countries whose culture is not unmistakably European, such as Turkey, or whose economic system is still in the process of accommodating the standards of a Western market economy.(7) Taken to its extreme, enlargement would imply a quantum leap from presently 15 to up to 30 Member States in the future. Clearly, the realisation of such a prospect—cloudy as it is in many respects—would require major institutional adjustments that may well have to go beyond the tinkering with the weighing of votes in the Council or the allocation of seats in the Commission that have been both of major concern to the European Council of Nice.(8) It appears, then, as if the Community's stubborn commitment to growth, its relentless endeavour to expand the "ever closer union among the peoples of Europe",(9) could finally give birth to what, at the moment of its founding,(10) was clearly perceived to be a utopian vision, namely, a "United States of Europe". Without major institutional adjustments preserving effective Community action, integration would grind to a halt owing to the unmanageable number of Member States represented in Community institutions.(11) The negotiations of the Nice summit, so it seems, have achieved little or next to nothing in respect of those structural problems. Even though the number of seats in the European Parliament has now been limited to 732, the size of the Commission may even implode to the number of 27.(12) Against this background, the suggestion made earlier by German Foreign Minister Joschka Fischer that a "European constitutional treaty" ought to be adopted, thereby transforming the Union into a "European federation",(13) may not have yet lost its intuitive appeal. In his opinion, such a federation should include, among other things, a European government, over which a directly elected chief executive, invested with ample executive powers, might preside.

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Widening is not, however, the only vision that captivates the imagination of European politicians. There is, as it were, an oligarchic downside to the matter, that is, the countervailing tendency of "deepening". The idea—most candidly expressed by the French president Jacques Chirac in a speech delivered before the German *Bundestag*—is that the integration process among the economically more advanced Member States should not be stalled owing to the accession of "reform states" or the disturbance caused by some reluctant laggards. Rather, a European vanguard should be allowed to move ahead in certain areas of public policy, whereas the rear guard may for the time being wrestle to comply with Community law as it stands. In the same way, notions such as "hard-core Europe", "multi-speed", "variable geometry" lend expression to the idea that European integration should give room to the emergence of different, not even concentric, overlapping circles of Member States, which may decide to co-operate with one another in some policy areas but not in others.(14) As awareness that integration could proceed along these lines increases, there is also growing concern that Europe may be cast asunder.

## 2 A Model Case Without a Model? ↑

Despite an unyielding commitment to "progress", however, there is presently a good bit of embarrassment, too, namely, on the question of what the guiding co ncern of the process *ought* to be. Europe is moving on. It is growing. But where is it going? And where should it *stop*? Even though

European scholars and politicians alike have repeatedly pointed to the urgency of a broad and public debate on Europe's final objectives,(15) it appears as if no one at present had a workable answer.

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This perceived lack of orientation is all the more paradoxical when one considers that some scholars—and not only those reflecting a European background(16) —surmise that the European Union could well provide the model case for successful co-operation in the age of globalisation.(17) Indeed, it is assumed that regional co-operation, following the European pattern, might provide an antidote to the social ills of transnational markets without sacrificing the benefits of free trade. But what can students of the model case be expected to discover if all they encounter is a complex organisation that is growing and is nevertheless, as some claim, ignorant of its "ultimate objectives"?

To be sure, there *is* more to the European Union and, in particular, its major component, the European Community, than a commitment to aimless growth. It was Neil MacCormick who has recently reminded us of the fact that peace and prosperity are goals whose attainment the European Community has served extremely well.(18) But Europeans want more. They want to understand whether or not the European Union is an example—maybe even a model case —of *the good polity*. When it comes to developing answers to *this* question, I surmise that to limit our inquiry to "ultimate objectives"—even though doing so is fashionable in present-day Europe—will lead us astray. Taking up an idea that was first articulated by Weiler,(19) I assume that what is unique and perhaps promising, too, about the European Union is its having introduced *supranationality* as a new mode of political association.

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# 3 Turning Inward: The Notion of Supranationality ⬆

Still, it is not easy to determine what supranationality is. It is not, at any rate, if one refuses to rest content with the truism that it deals with an irregular set of i nstitutions that are based on international agreements and found in a sphere "beyond the nation-state".(20) In other words, the challenge—and it has to be taken up by Europeans as well as by those interested in the European model case of regional integration—lies in enhancing our understanding what supranationality is and whether or not we have reason to endorse it. What is required, thus, is a public philosophy(21) explaining and evaluating an institutional order that has emerged in post-war Europe.(22) It is only from within the perspective of such a public philosophy that one can proceed to a sober discussion and assessment of Europe's "final goals".

In what follows, I would like to discuss briefly two different conceptions of supranationality.(23) What they have in common is their establishment of a link between explanation and evaluation. They seek to clarify, first, what lends coherence to supranationality and, second, they hint at the reasons for endorsing it. I should like to refer to these conceptions as "supranationality as rational bypassing of democracy" and "supranationality as boundary patrol", respectively. Finally, I shall introduce a third conception of supranationality, a conception holding out the promise of avoiding the shortcomings of both. It goes without saying that I will be providing nothing more than a very rough sketch of these conceptions.

# 4 Supranationality as Rational Bypassing of Democracy ⬆

According to the first conception, supranationality is, above all, a perfect system of negotiation among national governments.(24) It rests on the institutionalisation of a mode of problem-solving that is unavailable to the nation-states acting alone, unavailable for the simple reason that the problems concerned are of a transnational scope. Each co-operating nation-state would be worse off if it had to cope, by itself, with the policy externalities caused by other nation-states.(25)

Proponents of this conception also claim that the institutionalisation of supranational co-operation is unobjectionable from the vantage point of democratic legitimacy. Nation-states gain control, even if only jointly, in a sphere over which, considered in isolation, they would have no control at all. The reach of national politics is thus extended. Such an extension would amount to a democracy deficit only if national parliaments preferred the abstention of joint decision-making, which they clearly do not.(26) Accordingly, the bypassing of national democracy coheres entirely with, and is a normal reflection of, the limits of national democratic governance.

This, I take it, is the modest version of the by-passing claim. There is, however, a more radical and, as it were, immodest perspective on supranationality, understood as rational bypassing of national democracy. It is most clearly and, I might add, also most lucidly expressed in the writings of Giandomenico Majone. In his opinion the key to understanding supranationality lies in conceiving of supranational governance, which is substantially anchored in the work of the Commission and its co-ordinate and subordinate bodies, as an instance of non-majoritarian politics.(27)

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Non-majoritarian institutions, in Majone's words, are "by design [...] not directly accountable to the voters or to elected representatives".(28) Delegation of authority to such institutions is *rational* if governments want to make long-term policy commitments, such as the creation of an Internal Market. What is more, opting for the non-majoritarian alternative is also politically *prudent* if governments wish to exempt certain spheres of policy-making from the vicissitudes of parliamentary legislation, electoral control or public discussion.(29) National politicians understand that devolution to the European level makes possible the avoidance of responsibility where shouldering it would be particularly burdensome. This is always the case where the costs of a policy of retrenchment are relatively concentrated while the benefits are widely diffused.(30) Resort to non-majoritarian institutions provides an escape in cases in which political leaders and parties are notoriously likely to suffer retribution by the electorate and in cases in which, in order to avoid that consequence, they are compelled to yield to interest group pressure. According to Majone, the Commission bureaucracy—as the de facto "engine" of legislation—is a non-majoritarian institution.

In addition, Majone claims that where the substance of public policy is concerned, the work done by supranational institutions is to be preferred to democratic decision-making even from the perspective of European citizens. Owing to the impact exercised by interest groups in the national political process, legislative proposals whose implementation would impose concentrated costs—that is, costs borne by certain groups—and advance non-concentrated but fairly diffuse interests are scarcely able to prevail.(31) They are smothered by powerful groups. Contrariwise, the interests of the silent majority, whose interests are too diffuse to incite collective political action, are more adequately represented at the European than at the national level.(32) According to Majone, then, supranationalism is also desirable from the perspective of the people. It is a normative ideal. It is best understood, indeed, as a result of the national democratic process cunningly denying itself.

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Leaving Majone's claim aside that only a limited range of policy areas is amenable to supranational problem-solving and that the core of social policy, namely redistribution, cannot be counted among them,(33) I might just like to say a word or two on the idea of democracy cunningly denying itself in the supranational context. I suspect that what Majone depicts as the rule of European bureaucrats marks the recrudescence of the ideal of government by "the better sort", with the latter, in this case, composed of a distinguished group of legal, economic, and technological experts.(34) For it is the fair representation of interests by a "caring" elite that matters, not the voice of those affected by social policy. At its root, this conception of representation is "aggregative" and not deliberative, that is, interests are conceived of as neutral data feeding the input-side of the political process. It is assumed, ordinarily, that such an aggregation of interests is brought about through voting. In marked contrast, representation by emphatic and benign European bureaucrats, paradoxically, is aggregative without aggregation. In this respect, it amounts to a doubly truncated version of "democracy". First, it is about aggregation without votes and, secondly, it endorses virtual representation without deliberation.(35) However, both tacit assumptions of European elitism effectively undermine the claim that the bypassing of democracy is rational from the point of view of democratic citizens. How could we ever believe, let alone, scrutinise Majone's claim that diffuse interests are adequately represented on the supranational level? The answer is that all we *can* do is to turn to the people and ask them what they think is the case. This confirms our conviction that the sublimation of democratic communication into the mere virtual aggregation of interests is a bogus idea.(36)

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# 5 Supranationality as Boundary Patrol

A steadfast commitment to old European values such as political liberty brings me to the second conception of supranationality that I would like to consider here. It is decidedly different from the first. I might mention, at the outset, that it shares a distinctive characteristic with models of a mixed constitution,(37) namely the concern to preserve something that is taken to be good by simultaneously containing its built-in tendency to corruption.

This second conception of supranationality is most vigorously articulated and defended in the writings of Joseph Weiler. Against federalist ambitions, Weiler maintains that supranationality does not strive for unity.(38) As Weiler sees it, the EC, with which he is more or less exclusively concerned, aims not at the abandonment of the nation-state but at its taming through the submission of national politics to a "new discipline of solidarity".(39) The integration project is essentially devoted to guiding nation-states in the process of discovering that *self-limitation* for the sake of the values embodied in a community of states is part of the common good *of their citizens*.

Maintaining the nation-state by containing its abuses, this appears to be the magic formula animating what Weiler calls the "community vision". Its realisation, according to Weiler, requires the we remain vigilant to three types of "boundary abuse".(40) First, there is the external boundary of the state. The paradigmatic case of abuse is the initiation of violent conflict. Second, there is the boundary between the nation and the state. It is abused whenever the state is seen not merely as an instrument for the realisation of the good of individuals but is perverted into "a substitute to a meaningful sense of belonging and originality", becoming the projection of individual fate and destiny. European fascism is evidently the most salient example of that type of boundary abuse.

Third, there exists a social boundary between "us", the members of a national polity, and "them", the others who are strangers. The behaviour of nationals denigrating and discriminating against strangers represents the third type of boundary abuse.

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One may want to conclude that as long as boundary abuse is monitored by supranational institutions, the European nation-state will remain unaffected. After all, this appears to be the distinguishing characteristic of the "community" vision in contradistinction to the "unity" vision. Strangely enough, however, Weiler also maintains that on another level, "the supranational community project is far more ambitious than the unity one and far more radical."(41) In his opinion, the supranational project seeks not only to police, but also "to *redefine* the very notion of boundaries of the State". Regarding the first boundary, the former clear-cut boundary between states is transformed into a zone of continuous "uneasy existence, although with an ever increasing embrace".(42) As for the second boundary, supranationalism fosters the spontaneous expression of group identities. The turbulence caused by free movement within the Community invites foreign cultures to flourish in different national polities. With respect to the third boundary, supranationality "strips" a sense of belonging from the "false consciousness" created by nationalism.(43) By dissociating personal identity from the *bounded* solidarity with others who are like me, it helps to overcome the excruciating and dissociating use of the distinction between "us" and "them".(44)

At the point, however, at which Weiler vindicates a universalist spirit for supranationality, an unresolved tension comes to the fore.(45) On the one hand, there is the strong appeal to contain rugged individualism, both with regard to the conduct of international relations and with regard to sustaining the virtues of nationality, such as having a sense of belonging to a certain society or group. On the other hand, however, there is also the far less sentimental promise that owing to the progress of integration, the conditions for treating others with full respect will be increasingly severed from national ties.(46) I surmise that the means of resolving this tension envisaged by Weiler would indeed require that what he perceives to be the core values of nationality—"belonging" and "originality"(47) —be dissociated from the entanglement with the state. A reduction of national solidarity to its folkloric uses, however, is something that Weiler cannot endorse. He is perfectly aware that it would scarcely be desirable and that, as a matter of historical fact, it cannot be expected to happen in Europe.(48) For this reason the tension remains unresolved. It remains unclear what the fate of the nation state is going to be—or ought to be in the context of European integration. Coming to grips with this matter requires, in my opinion, casting the matter in different light, that is, seeing it not from the vantage point of a communitarian constitutionalism, which—in the spirit of ancient republicanism—is concerned with keeping abuses at bay, but rather from the perspective of different types of constitutions that interlock in a supranational regime.

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# 6 Three Interlocking Constitutions

The alternative conception, which I would like to sketch here—granting the point that it still represents "work in progress"—is based on the premise that the supr anational move beyond the nation state has resulted in the unfolding of three different types of constitution.(49) In consolidated form they have lain dormant at the constitutional structure of the nation-state. In fact, I assume that the emergence of supranationality, at any rate the European version of it, presupposes the *disintegration* of the nation-state. As these constitutions unfold,(50) they also alter their meaning.

This bespeaks the old dialectical insight that differentiation is also determination. My point is that the supranational level proper can be characterised with reference to but one type of constitution, that is, the constitution of anti-discrimination.(51) There are two other types of constitution, however, that have to be taken into account here as well—the constitution of liberty and the constitution of inclusion.

The *constitution of liberty* sees what may be called an "administration of justice", that is, a judiciary and a legislature watching over the systematic coherence of laws, in charge of upholding the rule of law and protecting basic liberties, notably private property and freedom of contract, against infringements by the state. Private law is taken to be the normal basis for governing the legal relationships between citizens. The problem solved by this constitution is that of protecting the structure of pre-politically given rights and the autonomy of commercial ('civil') society against encroachments by the democratic majority.(52)

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With the rise of the modern welfare state, a different type of constitution emerges. Its development can be understood *as a response to the problems posed by the constitution of liberty*. The basic normative idea is that people cannot reasonably be expected to participate in a market economy unless there are safeguards against the risks created by the attendant mode of social inclusion.(53) To be a participating member of a society integrated on the basis of market relationships is to be at peril of being excluded from society(54) owing to contingencies such as accidents, illnesses, a falling demand in the labour market, etc. Even though it is uncertain whether the risks associated with participation in society will ever materialise, it is nevertheless certain that if they should materialise, one is likely to be affected adversely or, indeed, to lose the position of a fully co-operating member. The mode of inclusion into society, thus, involves a *constant risk of exclusion*. To the mode of collectively managing this risk of exclusion there is the response of a second constitution, this is, the *constitution of inclusion*. The bulk of social legislation enacted by the European welfare states is the legal manifestation of this type of constitution, which, even though this is scarcely noticed, is distinct from the constitution of liberty. The institutions of the constitution of inclusion are different from the constitution of liberty. For example, the "social partners" may even lack the formal recognition of the liberal constitution.

## 7 Protection from Systematic Discrimination ⬆

Awareness of the differences between and among the types of constitution helps us to arrive at a new—and clearer— notion of supranationality. In respect of e xisting liberal constitutions and constitutions of inclusion, supranationality protects individual agents against disadvantages arising *systematically* from the co-existence of nation-states.(55) For example, the European Community's Internal Market Agenda can be understood as unleashing the liberties enshrined in a liberal constitution from the artificial constraints of the nation-state. The liberal constitution with its built-in focus on rights(56) and their priority is not intrinsically related to the nation-state. In fact, nationality is the only ground of discrimination to which a liberal society, confined to national bounds, cannot respond without denying itself. As a consequence, it is *rational* to elevate this aspect of anti-discrimination to a level beyond the nation state.

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I would like to highlight, briefly, four of the aspects in which supranationality, as it stands today, can

be understood as anti-discrimination vis-à-vis those who are right-holders in a liberal polity.

First, the most fundamental *legal* means of releasing the liberal constitution from its national bounds is the invocation, by market citizens in national courts, of the basic liberties, which are laid down in the EC Treaty.(57) At bottom, these liberties granting the free movement or goods, enterprises, capital, services and workers are explicit equality-rights.(58) They protect against discrimination on the ground of nationality.

Second, the creation of a trans-national liberal constitution requires that certain basic rights be protected by the Member States themselves. It is therefore no trivial matter when the EU Treaty demands that the Member States honour human rights and the rule of law (Art. 6 EU Treaty). The supranational constitution of anti-discrimination presupposes the existence of liberal constitutions. Supranationality cannot stand on its own. Like any other realisation of equality it presupposes an *equalisandum*.

Third, in the practice of the European Court of Justice the supranational commitment to anti-discrimination has acquired remarkable depth, which I take to be one of the defining marks of the supranational project. Moving beyond protection against discriminatory behaviour by the Member States, Community law promises to eliminate the *systematically* discriminatory effects on economic mobility inherent in a system of nation-states.(59) This move to systematic anti-discrimination is closely tied to a program *of negative integration,* which is devoted to the elimination of barriers to free trade.(60)

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Fourth, as is well known from debates about "affirmative action",(61) removing or dismantling systematically discriminatory social institutions may also require active state intervention.(62) Thus, Community legislation can be understood as intervention of this nature for the purpose of eliminating structures that give rise to discriminatory effects on intra-Community commerce.(63) Overstating my point just a bit, I might say that community legislation is affirmative action for trans-national businesses.(64)

But what about anti-discrimination in respect of the constitution of inclusion? It should not go unnoticed that, at least in principle, the constitution of anti-discrimination by its very nature reflects a deeper relation to inclusion than to liberty. In the latter case, anti-discrimination commends itself by virtue of the fact that the nation-state is not the necessary institutional locale for realising a liberal system of rights. In respect of inclusion, the relation goes deeper, since the constitution of inclusion already has in and of itself a basic anti-discriminatory thrust vis-à-vis the effects of the constitution of liberty. Markets systematically discriminate against those who are old, suffer from chronic diseases, remain untrained or unskilled, or those who wish to lead a life that renders them unfit in some respect for permanent inclusion in the economic system (for example, the rearing of children).(65) The social rights and benefits created in the context of a constitution of inclusion respond to the systematically discriminatory effects of a liberal polity. Where it is understood that a system of nation-states is not just a means to but also an obstacle in the path of inclusion, this anti-discriminatory thrust can be reinforced on the supra-national level.

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There is one area in which existing supranationality has been very successful indeed, namely in

enhancing the mobility of workers.(66) Similarly, serious efforts have been made to combat discrimination of women in the job market.(67) When it comes to the most pressing problems of inclusion, however—redundancy payments, financing of pension funds, employment policy, and the like—it is evident that European supranationality is still clearly headed toward the liberal constitution. Owing to its patent lack of even-handedness, *the European constitution of anti-discrimination is at war with itself*. A remarkable imbalance thus arises in the relation of liberty and inclusion, and it is reasonable to assume that this is one major reason for growing popular estrangement from the EU.

What would it take to realise anti-discrimination with respect to inclusion? In principle, it would require greater levels of intervention on behalf of those who are likely to suffer disadvantages owing to the *national confines* of existing social policy. As is well known, in the age of globalisation nation-states are forced to compete with one another to attract the allocation of capital. In fact, if Streeck is correct, the integration process has caused a major reorientation of national welfare policy, which is presently shifting its focus from redistribution to the support of regions in international competition.(68) As a result, national politics is likely to sacrifice (or "dump") those located at the very bottom of the socio-economic hierarchy in order to succeed in the competitive struggle to attract international investment. The situation is exacerbated by the fact that the European Union shifts the social costs of market integration to the nation-states by simultaneously disarming them of the political instruments necessary for protecting the well-being of their citizens—and this is true, in particular, of Monetary Union.(69) While national social policy is losing ground, nothing indicates that the emerging gap will be adequately filled on the European level.(70) The resulting situation is awkward, and the question is whether the situation can be sustained in the face of growing popular estrangement. It is indeed the ambivalence of European Community vis-à-vis social policy, I surmise, that gives rise to the mood that Europe lacks a clear orientation. The present system of nation-states is *systematically* incapable of counteracting discriminatory treatment of those who are then likely to become the victims of the convergence of trans-national liberalism and social nationalism in present day Europe.(71)

# 8 Conclusion ✝

Overcoming the weakness of a system of nation-states with respect to inclusion is the greatest challenge lying ahead of European integration. Perhaps this is also its final goal? In any event, if European politics were to come up with a solution to this enigma, it could then rightfully claim to have designed a "model case", or at least something that is indeed u nprecedented on this globe.

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# Endnotes ✝

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(1) See John H. Jackson, *The World Trade Organisation. Constitution and Jurisprudence* (1998) at 24.

(2) This is accurate if the publication of the "White Paper" in 1985 is seen as the starting point of a powerful re-launching of the Integration process. See Paul Graig and Gráinne de Búrca, *EU Law. Text, Cases, and Materials*, ( 2nd edn, 1998), at 1112-1115.

(3) The idea that the effort to strengthen the ability of European firms to compete on the World Market is what motivated the Single European act is not the only explanation for its adoption. I for one find this explanation most convincingly expressed in Streeck, 'Vom Binnenmarkt zum Bundesstaat? Überlegungen zur politischen Ökonomie der europäischen Sozialpolitik' in S. Leibfried and P. Pierson (eds.), *Standort Europa. Europäische Sozialpolitik* (1998), 369 at 370-373. For a different account, highlighting the pressure exerted by France and Germany on Britain, see Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45 *International Organisation* 19; *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht* (1999) ch. 5.

(4) Of course the Single Market project did not come to an end in 1992. For gaps existing, in particular, in the areas of public procurement, company law, and taxation, see Craig and de Búrca, above n 2 at 1131.

(5) For a critique of the "pillar" metaphor see von Bogdandy and Nettesheim, 'Ex Pluribus Unum: Fusion of the European Communities into the European Union' (1996) 2 *European Law Journal* 267.

(6) For an assessment of the relevant changes, see Dehousse, 'European Institutional Architecture after Amsterdam: Parliamentary System of Regulatory Structure?' (1998) 35 *Common Market Law Review* 595 at 603-606.

(7) With the end of the Cold War, Europe has lost its orientation on the question of whether this or that country is to be recognised as "European". Until 1989, it was clear that countries "on the other side of the great divide" were not candidates for future accession. This has changed. See Roermund, 'Jurisprudential Dilemmas of European Law' (1997) 16 *Law and Philosophy* 357 at 358.

(8) See Art 3 of the *Protocol on the Enlargement of the European Union,* which is part of the Treaty of Nice (2001/C 80/01), dealing with the reweighing of votes in the Council and alterations of the voting rules, and Art 4 of the same Protocol introducing an amendment to Art 213(1) EC Treaty—to be effective on 1 January 2005—saying that when the Union consists of 27 Member States the number of Members of the Commission shall be less than the number of Member States.

(9) This is the vision expressed in the preamble of the Treaty of Rome.

(10) See Craig and de Búrca, above n 2 at 10.

(11) This concern has been voiced in the so-called Dehaene-Report on the Institutional Implications of Enlargement. On 1 September 1999, the President designate of the European Commission, Romano Prodi, invited Jean-Luc Dehaene, former Prime Minister of Belgium, Richard von Weizsäcker, former President of the Federal Republic of Germany and Lord Simon of Highbury, former chairman of British Petroleum and former Minister, to give their views, in complete independence, on the institutional implications of enlargement in view of the forthcoming Intergovernmental Conference. See http://www.law.harvard.edu/programs/JeanMonnet/dehaene.html. For a discussion, see Somek, 'Braucht Europa den imperialen Parlamentarismus?' (2000) 1 *Juridikum*, 9.

(12) See the revision of Art 189 EC Treaty in the draft Treaty of Nice, above n 8, and Art 4 of the *Protocol* cited above n 8.

(13) See Fischer, 'Vom Staatenverbund zur Föderation – Gedanken über die Finalität der Europäischen Integration' http://www.auswaertiges-amt.de/6_archiv/2/r/r000512a.htm.

(14) For an overview of the existing ideas and an attempt at differentiation, see Ehlermann, 'Differentiation, Flexibility, Closer Co-Operation: The New Provisions of the Amsterdam Treaty' (1998) 4 *European Law Journal* 246 at 247-249; Filip Tuytschaever, *Differentiation in European Union Law* (1999) at 136-217. Presently, there are general principles for closer co-operation (Art. 43-45 EU Treaty) and special provisions for the first and the third pillar (Art. 11 EC Treaty, and Art. 40 EU Treaty, respectively). These principles formulate such a restrictive set of conditions that taking them on their face would render initiatives to closer co-operation either next to impossible or at least barely attractive to the Member States involved. For a lucid analysis, see Stephen Weatherill, ''If I'd Wanted You to Understand I Would have Explained it Better': What is the Purpose of the Provisions on Closer-Co-operation Introduced by the Treaty of Amsterdam?' in: D. O'Keeffe and P. Twomey (eds), *Legal Issues of the Amsterdam Treaty* (1999) 21. In the draft of the Treaty of Nice, these conditions have now been relaxed. Just see the new Art 40-40a EU Treaty and Art 11 EC Treaty introduced by the Treaty of Nice, above n 8. For a perspective on the "metaconstitutional" implications of flexibility, see Walker, 'Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe' in: de Búrca & Scott (eds) Constitutional Change in the EU. From Uniformity to Flexibility? (2000) 9.

(15) See, in particular, Dehousse, above n 6 at 627. See also Dehousse, 'Rediscovering Functionalism' 7 *Jean Monnet Working Paper* 2000, http://www.jeanmonnetprogram.org/papers/00/00f0101.rtf at 6. In section 2 of the *Declaration on the Future of the Union*, which is to be included into the final acts of the intergovernmental conference preparing the Treaty of Nice, it is cheerfully admitted that the revisions made by the Treaty of Nice have not achieved too much: "Having opened the way to enlargement, the Conference calls for a deeper and wider debate about the future development of the European Union. In 2001, the Swedish and Belgian Presidencies, in cooperation with the Commission and involving the European Parliament, will encourage wide-ranging discussions with all interested parties; representatives of national Parliaments and all those reflecting public opinion; political, economic and university circles, representatives of civil society, etc. The candidate States will be associated with this process in ways to be defined."

(16) See, for example, Anthony Giddens, *The Third Way and Its Critics* (1999) at 159-162.

(17) See, for that matter, J.H.H. Weiler, *The Constitution of Europe. 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (1999) at 96; Moravcsik, 'Europe's Integration at Century's End' in: Moravcik (ed), *Centralisation or Fragmentation? Europe Facing the Challenges of Deepening, Diversity, and Democracy* (1998), 1 at 58.

(18) See Neil MacCormick, *Questioning Sovereignty. Law. State, and Nation in the European Commonwealth* (1999) at 142.

(19) See Weiler, above n 17 at 246.

(20) This is not to deny that supranationality is a legal concept and that to have legal import, in particular, in respect of supremacy and direct effect, is indeed an important component of supranationality. The question posed here, however, is whether or not supranationality, legally and institutionally defined, is also desirable.

(21) I borrow the term "public philosophy" from Michael Sandel, who introduced it to designate "the political philosophy implicit in our practice, the assumptions about citizenship and freedom in our public life." See Michael Sandel, *Democracy's Discontent. America in Search of a Public Philosophy* (1996) at 4. I might add that this is by far not the only conceivable conception of public philosophy. For "public philosophy" as a normative guide to public policy making, see Robert E.

Goodin, *Utilitarianism as a Public Philosophy* (1995) at 26.

(22) For an attempt amounting to a very trivial overview of the history of political ideas and a dreary plea for deliberative democracy, see Deidre Curtin, *Postnational Democracy. The European Union in Search of a Political Philosophy* (1997).

(23) There is more, of course, that would merit attention, federalism in particular, or MacCormick's intricate juxtaposition of conceptions of democracy with conceptions of subsidiarity. See MacCormick, above n 18 at 149-153 and on federalism recently Michael Burgess, Federalism and European Union: The Building of Europe, 1950-2000 (2000). For want of space, however, the discussion restricts itself to presenting merely two highly divergent conceptions. However, there is a reason why I have selected these rather than other positions. Both try to isolate supranationalism as a distinct political ideal and do not assimilate it to already existing ideas.

(24) The characterisation as a "perfect" system of negotiation is Scharpf's. See Scharpf, 'Demokratie in der transationalen Politik' in U. Beck (ed), *Politik der Globalisierung* (1998), 228, at 238. For a more extensive demarcation of the policy fields susceptible to co-operation, see Fritz Scharpf, *Governing in Europe. Effective and Democratic?* (1999) at 104-110.

(25) See Scharpf, 'Demokratie', above n 24 at 236.

(26) See Scharpf, 'Demokratie', above n 24 at 237. For a similar argument, see Michael Zürn, *Regieren jenseits des Nationalstaates. Globalisierung und Denationalisierung als Chance* (1998) at 234.

(27) For an introduction and critical discussion, see Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' 99 (1999) *Columbia Law Review* 628 at 684-698.

(28) Majone, 'Europe's 'Democracy Deficit': A Question of Standards' (1998) 4 *European Law Journal* 5 at 15.

(29) See ibid at 17.

(30) See Pierson, 'Social Policy and European Integration' in: A. Moravcsik (ed), *Centralisation or Fragmentation? Europe Facing the Challenges of Deepening, Diversity, and Democracy* (1998) 124 at 151.

(31) See Majone, 'Redistributive und sozialregulative Politik' in: ed. B. Köhler-Koch and M. Jachtenfuchs (eds), *Europäische Integration* (1996) 225 at 243-244.

(32) See ibid at 244; Scharpf, 'Demokratie', above n 24 at 238.

(33) See Majone, above n 28 at 21.

(34) See MacCormick, above n 18 at 146.

(35) There are claims to the contrary, however, even then democracy is confined to the inner circles of regulatory power. See on 'deliberative supranationalism'

Joerges and Neyer, 'From Intergouvernmental Bargaining to Deliberative Processes: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273 at 275, 282.

(36) For a convincing criticism of the reduction of democratic communication to voting, see John S. Drysek, *Deliberative Democracy and Beyond. Liberals, Critics, and Contestations* (2000), at 56.

(37) See Mac Cormick, above n 18 at 144-145.

(38) For a recent re-statement of his claim that European supranationalism is distinct from traditional federalism, see Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg' *10 Jean Monnet Working Paper 2000*, http://www.jeanmonnetprogram.org/papers/00/001001.html.

(39) See Weiler, above n 17 at 93. This new solidarity is brought about by mitigating the tension among state actors on the one hand and between each state actor and the Community on the other.

(40) See Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 3 *European Law Journal* 219-258 at 248.

(41) Weiler, above n 17 at 341.

(42) See ibid at 93.

(43) See Weiler, above n 40 at 250.

(44) In a most recent paper Weiler reintroduces the latter idea in the name of a "Principle of Constitutional Tolerance". See Weiler, above n 38 at 13-15.

(45) Weiler, above n 17 at 343, attributes this tension to the paradox of European integration that increasing modernisation brought about by enhanced mobility and the breakdown of local markets are "part of the roots of European angst and alienation."

(46) See Weiler, above n 38 at 15.

(47) See Weiler, above n 40 at 245.

(48) See Streeck, 'Competitive Solidarity: Rethinking the 'European Social Model' ' (1999) 8 *Max-Planck-Institut für Gesellschaftsforschung Working Paper*, http://www.mpi-fg-koeln.mpg.de/publikation/working_papers/wp99-8/index.html.

(49) For the purpose of the argument made here I assume that constitutions are problem-solving devices of a second-order. They are designed to solve the problem of how collective problem-solving is to be organised in a rational and mutually acceptable way. Constitutions serve the formal purpose of facilitating and stabilising successful and legitimate collective action. They seek to protect, for example, against tendencies to collective self-subversion. Stephen Holmes has made the latter clear with regard to "gag rules". See Stephen Holmes, *Passion and Constraint. On the Theory of Liberal Democracy* (1995) at 202-236

(50) *Ausdifferenzierung* is the German concept for this. See Zürn, above n 26 at 329.

(51) For a first instalment, see Somek, 'A Constitution for Anti-discrimination: Exploring the Vanguard Moment of Community Law' (1999) 5 *European Law Journal* 243 at 264-269.

(52) For an account of the constitution of liberty, thus understood, see Grimm, 'Die Grundrechte im Entstehungszusammenhang der bürgerlichen Gesellschaft' in his *Die Zukunft der Verfassung* (1991) 67 at 92-96.

(53) It goes without saying that the account of the welfare state offered here is indebted to François Ewald, *L' Etat Providence* (1988).

(54) See Niklas Luhmann, 'Inklusion und Exklusion,' in his *Soziologische Aufklärung,* vol. 6 (1995) 237 at 249-250.

(55). It presupposes, therefore, that "discrimination" is not just a matter of individual conduct. It is also reasonable to speak of "discrimination" where the *systematic consequences of a set of institutions* are concerned if that set could have been selected differently or could be altered in the future by ourselves as a *collective body*. What lends continuity or coherence to our commitment to anti-discrimination, however, is the vision of the social division of responsibility on the basis of which we determine whether or not either *behaviour* or the *choice of a system of institutions* conceivably stems from the ascription of lesser value to the lives and interest of some. Indeed, the idea that my conduct, even though it need not be based on discounting the lives and interests of some, may be a component of an institutional system that, as a whole, engenders such an effect, bridges the gulf between the two different understandings of discrimination.

(56) For such a rights-based, liberal account of European Community law, see Mestmäcker, 'On the Legitimacy of European Law' (1994) 58 *Rabelszeitschrift für ausländisches und internationales Privatrecht* 615 at 629-631.

(57) See Miguel Poiares Maduro, *We The Court. The European Court of Justice and the European Economic Constitution* (1998) at 25-30.

(58) See Jarass, 'Elemente einer Dogmatik der Grundfreiheiten' (1995) 30 *Europarecht* 202 at 216; Simons, 'Equality as a Comparative Right' (1985) 65 *Boston University Law Review* 387 at 391, 424.

(59) See Somek, 'Equality and Constitutional Indeterminacy. In Interpretative Perspective on the European Economic Constitution' (2001) 7 *European Law Journal* (forthcoming).

(60) See Scharpf, *Governing*, above n 24 at 50.

(61) Just see Rubenfeld, 'Affirmative Action' (1997) 107 *Yale Law Journal* 427.

(62) To a considerable extent, therefore, legislation by the Community that is aimed at clearing the level playing field of the Internal Market, is substantially committed to the spirit of negative integration. See Scharpf, *Governing*, above n 24 at 51.

(63) At times, such legislation may fail, as did the Product Liability Directive (85/374, [1985] OJ L210/28) by leaving Member States the choice between conflicting standards of liability. See Weatherill, 'Consumer Policy' in: P.P. Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (1999) 693 at 714.

(64) For a similar perspective, see Alexander Schubert, *Der Euro. Die Krise einer Chance* (1998).

(65) See Cass R. Sunstein, *Free Markets and Social Justice* (1997) at 151-166

(66) For an overview, see Robert R. Geyer, *Exploring European Social Policy* (2000) at 58-71; Catherine Barnard, *EC Employment Law* (2d ed 1999) at 1-5.

(67) See, in the general context, Gillian More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right' in P. P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (1999)

517 at 540-547

(68) See Streeck, above n 48.

(69) See Jones, 'Economic and Monetary Union: Playing with Money' in: A. Moravcsik (ed), *Centralisation or Fragmentation? Europe Facing the Challenges of Deepening, Diversity, and Democracy* (1998) 59 at 82-83.

(70) As Paul Pierson puts it, European social policy has a "hollow core". What can be accomplished is, at best, the incremental mutual accommodation of levels of social protection, for the Community lacks the formal competence and the political capacity for central guidance. See Pierson, above n 30 at 144.

(71) For a more thorough analysis, see Streeck, 'Neo-Voluntarism: A New Social Policy Regime?' (1995) 1 *European Law Journal* 31.

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