



Justice, only justice shalt thou pursue...(Deut.XVI:20)

---

## THE JEAN MONNET PROGRAM

*Professor J.H.H. Weiler*  
*European Union Jean Monnet Chair*

in cooperation with the

## WOODROW WILSON SCHOOL OF PUBLIC AND INTERNATIONAL AFFAIRS AT PRINCETON UNIVERSITY

*Provost Christopher L. Eisgruber*  
*Laurance S. Rockefeller Professor of Public Affairs*

### Altneuland: The EU Constitution in a Contextual Perspective

Jean Monnet Working Paper 5/04

Michel Rosenfeld

The European Treaty – Constitution and Constitutional Identity.  
A Comment on Professor von Bogdandy

Papers included in this collection should be cited according to the following format.

Michel Rosenfeld, The European Treaty-Constitution and Constitutional Identity: A Comment on Professor von Bogdandy, *in* Weiler and Eisgruber, eds., *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, [<http://www.jeanmonnetprogram.org/papers/04/040501-19.html>]

All rights reserved.  
No part of this paper may be reproduced in any form  
without permission of the author.

ISSN 1087-2221  
© Michel Rosenfeld 2004  
New York University School of Law and  
Woodrow Wilson School of Public and International Affairs at Princeton University

***The European Treaty-Constitution and Constitutional Identity:  
A Comment on  
Professor von Bogdandy***

By Michel Rosenfeld\*

***I. Introduction***

After his thorough and masterful critical review of how the Treaty establishing a Constitution for Europe (“TeCE”) draws upon, and seeks to further build, a European collective identity, Professor Armin von Bogdandy reaches a startling conclusion. For the European constitutional experiment to succeed, the focus should be less on collective identity and more on individual self-interest; less on community and more on the market; less on a transnational merger and more on a contract<sup>1</sup>. Does this mean that in spite of the massive effort at constitutionalization the dream of European integration and the project to consolidate a functioning political union must be radically scaled down? Does von Bogdandy’s assessment lead to the conclusion that the best hope is a return to an economic union, albeit a somewhat deeper and more democratically accountable one extending over a far greater territory than that of the original six members of the European Community?<sup>1</sup>

The TeCE itself certainly raises more questions than it provides answers. Is it more a constitution or a treaty? And in this respect, how significant is the change in the preamble from the Convention draft (“dTeCE”) of July 2003 to the TeCE adopted by the Intergovernmental Conference of June 18, 2004? The dTeCE preamble refers to the peoples of the European Union as the constituent power<sup>2</sup>, whereas the TeCE refers to the heads of state as the contracting parties<sup>3</sup>. From the standpoint of content, both the dTeCE and the TeCE contain all essential features found in modern constitutions: governance and apportionment of powers provisions, institution of a rule of law regime for the

---

\* Justice Sydney L. Robins Professor of Human Rights, Benjamin N. Cardozo School of Law, New York City.

<sup>1</sup> See Armin von Bogdandy, *The European Constitution and European Identity Text and Subtext of the Treaty establishing a Constitution for Europe* (“von Bogdandy”), in this issue at, \_\_\_\_.

<sup>1</sup> The European Community, which later became the European Union was established by the 1957 Treaty of Rome.

<sup>2</sup> See Preamble, Art. I., dTeCE, July 18, 2003.

<sup>3</sup> See Preamble, TeCE, June 18, 2004.

European Union, and a charter of fundamental rights<sup>4</sup>. But is that sufficient for the establishment of a fully functioning constitutional regime?

Professor von Bogdandy is right that without a common identity, it is not likely that the European constitutional project will result in a successful working constitution. The key question is: what kind of identity? Professor von Bogdandy analyzes various aspects of European identity: common origins; common values; common destiny; and common differentiation from American identity. And he finds them all wanting. The aspects of collective identity discussed by Professor von Bogdandy are all important, but what is ultimately determinative is whether Europe can forge a workable *constitutional identity*. Such identity must draw upon existing aspects of collective identity, but it must also be future oriented, and adapt and transform what it incorporates. How much constitutional identity must recast or reinvent collective identities depends on contextual factors and on the constitutional model involved. As we shall see, one can distinguish four different constitutional models emerging at the level of the nation-state. These models give rise to different constitutional identities, and may provide useful insights into the feasibility of a workable constitutional identity operating on a transnational European scale.

In what follows, I will assess Professor von Bogdandy's analysis of a European collective identity from the standpoint of forging a working constitutional identity. Section II briefly defines "constitutional identity," and introduces four different existing constitutional models, that operate at the level of the nation-state. Section III examines the elements of European collective identity discussed by Professor von Bogdandy from the standpoint of constitutional identity and of the four existing constitutional models. It then considers the plausibility of the TeCE leading Europe toward a workable constitutional identity and of the viability of a new European transnational constitutional model.

## *II. Constitutional Identity and the*

### **Four National Constitutional Models**

Constitutional identity draws on national, ethnic, cultural, historical and political identity, but it remains distinct from all of these<sup>5</sup>. Specifically, constitutional identity is constructed over time

---

<sup>4</sup>See Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity* in CONSTITUTIONALISM IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 4-5 (Michel Rosenfeld, ed. 1994).

<sup>5</sup> For a more extended discussion of constitutional identity, see Michel Rosenfeld, *The Identity of the Constitutional Subject*, 16 Cardozo L. Rev. 1049 (1995).

through a dynamic process that involves negation of these other identities accompanied by a rearrangement and reincorporation of salient features of the latter. Constitutional identity, moreover, is in part conscious, and in part unconscious. Although the process of formation and evolution of constitutional identity is varied and complex, the constitution-making moment usually involves a conscious act of negation --e.g., overthrow of the Ancient Regime -- accompanied by unconscious acts of incorporation --e.g., the vision of the French Revolution and of the constitutional order it fostered was universal in scope<sup>6</sup>, but constrained in practice by the sheer weight of French civilization and history, including its developing sense of nationhood and the firm imprint of the centralized and unitary state consolidated during the period of absolute monarchy<sup>7</sup>.

Since Europe appears to be at the constitution-making stage, it is of course impossible to provide an account of its yet to be constructed constitutional identity. What can be attempted, however, is to investigate how the TeCE may be construed as an initial act of negation and whether, and how, the collective identities discussed by Professor von Bogdandy might provide material susceptible of becoming integrated into a working constitutional identity.

Constitution-making involves an act of negation, a break with a pre-constitutional past<sup>8</sup>. Such a break took place in connection with the French and American Revolution in the Eighteenth Century, the post-World War Two Constitutions in Germany and Japan, and the Spanish 1978 Constitution, among others. Can any similar break be detected in the case of the European Constitution?

Key to answering this question is the distinction between treaty and constitution. Both the dTeCE and the TeCE straddle this distinction, with the TeCE, by introducing the heads of state of member states as the constituents in the preamble,<sup>9</sup> coming closer, at least formally to a treaty than to a constitution. If the TeCE is ultimately a treaty rather than a constitution, two important consequences follow. First, since the European Union has been built on a series of successive treaties going back to

---

<sup>6</sup>The 1789 Declaration of the Rights of Man and the Citizen is indeed universal in tone and tellingly similar in content though not in reach to the 1948 Universal Declaration of Human Rights.

<sup>7</sup>Note in this respect, the contrast, originating in their respective eighteenth century constitution, between French unitary centralism and American federalism's split of the atom of sovereignty between the Union and the States.

<sup>8</sup>Even a constitution may be "pre-constitutional" in this context if the new constitution radically departs from it and supersedes it. In this sense, a Soviet style constitution would be "pre-constitutional" in relation to a subsequent liberal-democratic constitution.

<sup>9</sup>*See supra*, at \_\_\_\_.

the 1957 Treaty of Rome, the TeCE provides no real break with the past. Second, and perhaps more importantly, treaties are inherently distinguishable from constitutions as the former regulate external relations among two or more distinct sovereigns whereas the latter regulate internal relations within a unified whole. At least in their respective paradigmatic form, a constitution establishes, modifies or reestablishes a common unit with an identity of its own; a treaty in contrast, carves out a discreet common project among sovereign parties with each retaining its own distinct identity<sup>10</sup>.

Under the surface of this basic distinction, however, matters are more complex. Some contemporary multilateral treaties, like the European Convention on Human Rights, involve an (external) interstate relationship in relation to a subject matter, fundamental rights, that is typically internal. From the standpoint of fundamental rights, the European Convention looms as a hybrid between a treaty and (part of) a constitution: a treaty in form; part of a constitution in substance. Moreover, enforcement of the European Court of Human Rights “ECHR” decisions holding that a state has violated a Convention right of one of its citizens reflects the hybrid nature of Convention rights. Unlike the decision of a national supreme or constitutional court, which is binding on, and must be enforced by, all the relevant organs of the national government, ECHR decisions are not automatically enforceable against member states. Instead, the state held in violation of the Convention, must decide whether to abide by the ECHR decision and to redress the violation it has been adjudged to have perpetrated against its own citizen. Nevertheless, when the state as a matter of policy regularly acts in conformity with ECHR decisions, the citizen vindicated by the ECHR is in much the same substantive position as the citizen vindicated by her country’s supreme or constitutional court<sup>11</sup>.

Conversely, constitutions cannot be conceived exclusively as the purely internal expression of a polity that coheres as a unified whole. As mentioned, constitution-making requires a break with the past, thus setting the future polity against the past polity, shattering the temporal unity of the whole. Perhaps even more importantly, constitution-making as an act of negation also requires a break with the polity’s prevailing conceptions of collective identity. In other words, it is not enough to overthrow the Ancien Regime, it is also necessary to differentiate the constitutional “we” from the pre-constitutional and extra-constitutional “we”.

---

<sup>10</sup>For example, a treaty between countries A and B to guarantee the security of country C creates a joint project not a merger.

<sup>11</sup>See Henry J. Steiner and Philip Alston, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 797-802 (2d ed. 2000).

Constitutions are often portrayed as social contracts, as pacts among individuals within the polity. Consistent with this metaphor, constitutions are imagined as contracts among individuals within a state while treaties are, in fact, contracts among states. Typically, contracts establish external relationships, and commercial contracts external relationships among strangers. As Max Weber stressed, contract is the means whereby strangers from different communities could engage in commercial exchanges at market <sup>12</sup>. Thus conceived, contract, stands in contrast to custom and tradition. Similarly, the social contract imagined by the likes of Hobbes, Locke and Rousseau, marks a transition from relations based on pre-rational customs and traditions (the state of nature) to consensual relations based on reason and rational self-interest (civil society and self-government for Locke and Rousseau and a self-imposed Leviathan for Hobbes).

A commercial contract abstracts --in the etymological sense of “pulling away” -- the individual market trader from his social and cultural milieu -- e.g., it does not matter from the standpoint of a market exchange if buyer or seller are married or divorced, religious or secular, politically on the right or left, etc. Similarly, in relation to the social contract, the citizen is abstracted from his or her mores and cultural, ethnic or religious milieu<sup>13</sup>. In a constitution viewed as a social contract, therefore, settling a structure of governance, apportioning state powers, embracing of the rule of law and establishing fundamental rights must be set against an order defined by prevailing pre-constitutional mores and traditions. In this sense, constitution-making is clearly an act of negation.

Constitutions, however, cannot function through pure negation any more than contracts can through pure exchange cut off from any desire for that which is subject to being exchanged. The constitutional edifice will remain empty unless it can be filled with a substratum extracted from existing collective identities and reshaped to fit within the new institutional structures. Accordingly, both negation and reincorporation are essential for a constitution to materialize in form and substance.

The TeCE certainly provides a plausible constitutional form. The key question is whether the collective identities of the European Union and/or of its member states are likely to provide the requisite substance. Before turning to the national constitutional models that may shed useful light on the latter question, it is necessary to make a couple of observations concerning form. In practice, neither negation and reincorporation nor form and substance can be disentangled from one another as

---

<sup>12</sup> See Max Weber, *ECONOMY AND SOCIETY* 635-39 (G. Roth & C. Wittich, eds., 1968).

they are mutually determining. For example, a constitution's choice of a structure of governance is a matter of form, but the choice between a presidential and a parliamentary system cannot be accounted for without reference to matters of substance. Logically, however, negation precedes reincorporation and form prefigures substance.

From the standpoint of the logic of constitutions, neither Habermas' "constitutional patriotism" (which Professor von Bogdandy finds wanting<sup>14</sup>) nor von Bogdandy's focus on self-interest and market relations<sup>15</sup> can provide the substratum of constitutional identity. Indeed, constitutional patriotism, even if it bore the emotional intensity of ordinary patriotism, is but the expression of a Kantian argument for the imperative of constitutionalism as a precondition for personal autonomy and mutual respect. Logically, that argument relates to constitutional form and calls for negation of irrational drives that animate collective identities, and in particular ethnocentric identities such as those fostered by the Nazis, or religious fundamentalist ones. In other words, constitutional patriotism is a call for creation or reinforcement of constitutional rule, not material that may be incorporated into the substratum of constitutional identity.

Similarly, von Bogdandy's focus on self-interest and markets amounts to an argument for contractual relations<sup>16</sup>. It is, as it were, a prolongation of Habermas' argument, as contractual relations in an idealized Kantian sense are the vehicles for consensual interaction among autonomous individuals who treat one another with mutual respect. Consistent with this, constitutions can be regarded as political contracts designed to set a regime of contractual relationships among members of the polity. Even if from a practical standpoint markets can function without constitutional democracy<sup>17</sup>, from an ideal Kantian viewpoint, a constitutional contract and everyday contract go hand in hand and inform constitutional negation and constitutional form.

Both Habermas and von Bogdandy provide strong arguments indicating why a European Constitution is called for, without furnishing a vision of a constitutional identity which would endow

---

<sup>13</sup> Cf. for example, Rawls' hypothetical contract behind a "veil of ignorance". See John Rawls, *A Theory of Justice* 136-42 (1971).

<sup>14</sup> See von Bogdandy, *supra*, at \_\_\_\_.

<sup>15</sup> *Id.*, at \_\_\_\_.

<sup>16</sup> Cf. Roberto Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 625 (1983) ("A regime of contract is just another legal name for a market").

<sup>17</sup> Indeed, authoritarian rule such as that of Franco's Spain or of present-day Singapore do not seem to preclude a vigorous market economy.

such constitution with substance. Moreover, to the extent that the European Union's member-states have functioning democratic constitutions and protect market relationships, either directly through their own constitution, or indirectly through constitutional provisions that grant Union treaties priority over domestic legislation<sup>18</sup>, it is altogether questionable whether realization of the Kantian ideal shared by Habermas and von Bogdandy requires constitutionalization at the transnational Union level.

Whether necessary or merely desirable, the possibility of a successful European Constitution depends on development of a workable constitutional identity. In order to better assess whether or how the elements of collective identity discussed by Professor von Bogdandy might figure in the construction of such an identity, it is useful to briefly describe four constitutional models conceived on the scale of the nation-state, and to explore how they may shed light on the project to establish a trans-national constitution.

These four models are respectively the French, the German, the American and the Spanish<sup>19</sup>.

The principal difference between the French and the German model is traceable to their contrasting conception of the nation. In the words of Ulrich Preuss, "whereas in the French concept the nation is the entirety of the *demos*, in the German and East European concept the nation is a group defined in terms of ethnicity – the nation is *ethnos*"<sup>20</sup>. From the standpoint of constitutional identity, the French *demos* and, its universal tendency, its individualism and the conception of abstract citizenship that accompanies it provide the negative pole in the construction of a new constitutional identity. France as an already formed, though not yet completed, nation-state, and the French language<sup>21</sup>, civilization and culture, were to provide the substratum to be molded so as to endow the emerging constitutional order with content.

In the German model championed by Karl Schmitt, the universal conception of democracy typical of the French model is replaced by an ethnocentric democracy – by the ideal of self-governance

---

<sup>18</sup>See, e.g., Art. 55 of the 1958 French Constitution.

<sup>19</sup> For a more extended discussion of these models, see Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 *Cardozo L. Rev.* 1891 (1998).

<sup>20</sup>Ulrich K. Preuss, *Constitutional Power-making for the New Polity: some Deliberation of the Relation Between Constituent Power and the Constitution* in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES* 150 (Michel Rosenfeld, ed. 1994).

<sup>21</sup>As Preuss emphasizes although the absolute monarchy had created a centralized state, the French nation was not fully formed in the late eighteenth century. A significant portion of the population did not speak French, and the imposition of French throughout the country became a major administrative task in the 1790's. See Ulrich Preuss, *supra*, at 151-52.

by an ethnic group<sup>22</sup>. This constitutional model based on *ethnos* was set against the Weimar constitution, which embodied the liberal ideals of the French and American revolutions<sup>23</sup>. In the German model, therefore, recourse to *ethnos* provide the means for negation, and reconfiguration of mores, traditions and institutions in line with the purposes of an ethnocentric democracy must be pursued to endow the constitutional order with content<sup>24</sup>. Consistent with this, moreover, the German model emerges as the converse of the French model. In the German model, the particular *ethnos* is predominant and it circumscribes the *demos*; in the French model, the universal *demos* achieves preminence, but it can only become deployed within the confines of a nation-state glued together by a common *ethnos* (which in this case revolves mainly around language and culture).

The American model is closer to the French than to the German. But unlike in France, where the nation was already in existence -- through not yet fully adapted to the needs of the new constitutional order -- in the United States, the constitution set the frame-work for the state and antedated the nation. The “We the People of the United States” of the Preamble of the 1787 U.S. Constitution is largely a construct projected into the future. Indeed, at the constitution-making moment, it is the peoples of the various states whose confederation was becoming manifestly no longer viable who embraced the mantle of a united undivided people prior to the creation of the state that would hold them together, and prior to the formation and consolidation of the nation. That nation would be formed and consolidated through extended absorption and integration of large waves of immigration coming from a multitude of different nations and diverse cultures -- a process that continues to this day. “We the People” is therefore the principal vehicle of negation in as much as it stands in contrast to the peoples (of the several states) who can no longer properly function through their confederation, and in contrast to the nation which does not yet exist. Moreover, the U.S.

---

<sup>22</sup> *Id.*, at 153.

<sup>23</sup> *Id.*

<sup>24</sup> It may seem that ethnocentric self-government is more akin to a natural, quasi-organic, phenomenon than to a constitutional construct involving negation and reincorporation. Nevertheless, as the transition from Weimar to Nazi Germany indicates, imposition of an ethnocentric order -- albeit a non-democratic one -- requires both dismantling existing institutions and mores and constructing new ones. Schmitt himself was concerned with suppressing pluralism, but little with democracy as he thought that what was essential was realization of will of the *ethnos* which could be achieved through dictatorship. For those who are serious about ethnocentric constitutionalism, however, the *ethnos* must circumscribe the polity, but the requisite elements of constitutionalism and democracy must be cobbled together from available institutional framework and mores found or developing within the polity. Significantly, the post-World War Two German constitutional model departs substantially from that advanced by

Constitution and the identity it fosters is pivotal in the process of ongoing transformation that produces “*E Pluribus Unum*”. Constitutional identity is therefore much more central to national identity in the United States model than it is in the French or German model. In short, in the German model, the constitution is supposed to provide the means to give political expression to an existing national identity; in the French, to transform and redirect an already grounded and significantly developed national identity; and in the United States, to provide the basic tools for blending a multiplicity of nationalistic elements into a single nation in the process of formation<sup>25</sup>.

Finally, the Spanish model differs from the preceding three in two principal respects: it sets a framework for a multi-ethnic polity<sup>26</sup>; and it incorporates transnational norms into the prescriptive order of a multi-ethnic nation-state<sup>27</sup>. The Spanish model involves a double negation: a rejection of the unity imposed by authoritarian means; and, a repudiation of the separatist tendencies exacerbated by the forced unity. Moreover, regardless of the motivation for incorporating external norms, internally such norms allow for mediation of internal conflicts through construction of a new constitutional identity<sup>28</sup>.

### *III. European Collective Identities and The Prospects*

## **Of a European Constitutional Identity**

---

Karl Schmitt. See Norman Dorsen, et al., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 44-45 (2003).

<sup>25</sup> In practice, as all identities involved, including ethnic ones, are constructs, the processes of identity formation at the constitutional or national level are dynamic in nature and they require constant give and take. Nevertheless, the above distinctions hold true when matters are considered from an overall perspective.

<sup>26</sup>The United States is also a multi-ethnic society, but consistent with the metaphor of the “melting pot”, ethnic differences have no constitutional, and for the most part, little political, weight. In contrast, after ruthless suppression under the Franco regime, the 1978 Spanish Constitution gives constitutional and political recognition to “autonomous regions” such as Cataluña and the Basque region. See 1978 Spanish Constitution Arts. 143-158.

<sup>27</sup> Because Spain’s 1978 Constitution was crafted with an eye toward future admission to the European Community, it incorporated some of the liberal-democratic norms of the latter into its new constitution. Moreover, such incorporation may also have been useful to devise a workable compromise on regional autonomy within Spain. See Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 *Cardozo L. Rev.* 1891, 1918 (1998).

<sup>28</sup> Several more recent constitutions appear to conform, at least in part, with the Spanish model. These include, the 1982 Canadian Constitution, several of the post-socialist constitutions in central and Eastern Europe, and the 1996 South African Constitution.

All four constitutional models discussed above involve similar processes of negation and reincorporation, attempt harmonizing *ethnos* and *demos*, and seek to adapt norms that are external to the relevant constitutional locus or that exceed it in their scope<sup>29</sup>. The main difference between these models relates to the relative importance that each gives to particular elements, such as *demos* or *ethnos*, and to how each model combines or approaches the elements common to all.

Consistent with these observations, on first impression, the European constitution-making project suffers from many handicaps. As demonstrated by Professor von Bogdandy's discussion of existing collective identities, Europe appears to lack a sufficient common *ethnos*. Moreover, although the TeCE significantly increases the powers of the European Parliament, intergovernmental institutions may well retain too much power for the development a workable *demos* -- an impression that is symbolically reinforced by the shift from the dTeCE's reference to the peoples of Europe to the TeCE's reference to the European heads of state as contracting parties<sup>30</sup>. Finally, if the Treaty--Constitution is regarded as ultimately yet another European treaty that takes further incremental steps as did the treaties of Maastricht (1992), Amsterdam (1997) and Nice (2000), then it may well lack the negative punch that all new constitutions must have vis à vis *the status quo ante* in order to become successful.

While it is possible that the current European constitutional project will fail because of these reasons, this need not be the case. Indeed, as illustrated by the American model, a constitutional order and constitutional identity can be predominantly projected into the future. A barely existent American people made a constitution setting a state for a future nation and laid down the mere outlines of a constitutional identity that would become essential not only for the future success of the constitution, but for the self image of the emerging nation. Why would an adequate future-oriented constitutional model along similar lines not work for Europe?<sup>31</sup>. Furthermore, whereas the process of negation associated with successful constitution-making has often originated in a violent struggle, it need not be so. The French and American revolutions and World War Two for contemporary Japan and Germany provided such violent tear against various forms of authoritarian rule. In the case of Spain and of other

---

<sup>29</sup>Tailoring universal rights to fit the needs of the French nation-state is an example of the latter type of adaptation. *See supra*, at \_\_\_\_.

<sup>30</sup> *See supra*, at \_\_\_\_.

<sup>31</sup>For a discussion of a similarities and differences relating to constitution-making in Europe and the United States, *see* Michel Rosenfeld, *The European Convention and Constitution-Making in Philadelphia*, 1 Intl. J. of Con. Law (I.CON) 373 (2003).

more recent successful constitution-making undertakings, however, transitions have been peaceful, and pre-existing institutions of the authoritarian regime have been adapted and coopted for purposes of giving birth to a new democratic constitution<sup>32</sup>. Cannot a similar peaceful transition lead to transcendence of the pre-constitutional order in Europe? And this, particularly since the relevant negation is not to be directed against the nature of the pre-constitutional order (after all, all member states of the Union are functioning constitutional democracies) but against imprisonment of the prevailing constitutional order in Europe within the confines of the nation-state.

To answer these questions, it is important to keep in mind what common features to the four constitutional models may extend to a European constitution, and what others may not be necessarily applicable to the latter. It seems obvious that form and substance and negation and reincorporation as well as the elaboration of a workable constitutional identity are as indispensable to a European constitution as they are to any constitution falling within any of the four models examined above. At the very least, a European constitution must be something other or beyond the constitutions of the member states and the various treaties that link them as distinct nation-states. Hence, an unmistakable need for negation. Similarly, a European constitution cannot do without some (re)incorporation of a collective substratum into a common constitutional identity, for otherwise its various provisions could not be given concrete applications<sup>33</sup>. On the other hand, it is by no means clear that the entity to be governed by a European constitution need have the characteristics of the nation-state. Indeed, the entity in question may conceivably be a species of “supra-national nation-state”, that is, a multi-ethnic state within a greater area, and encompassing a far greater number of languages and cultures than traditional multi-ethnic nation-states like Belgium, Canada or Spain. Or, it may be an altogether different kind of entity, one that complements the nation-state rather than being a super-sized version of it. Whereas it is easy to imagine Europe as a super-sized nation-state, it is difficult to envision it as an altogether new constitutional order complementing, and coexisting with, that of its member states.

---

<sup>32</sup> Significantly, in Spain, Franco’s Parliament, the Cortes, filled by his cronies, was used to generate a democratically elected constituent assembly. In addition, King Juan Carlos groomed by Franco to ascend the throne after the latter’s death, used his power and influence to promote the smooth advent of constitutional rule. See Michel Rosenfeld, *Constitution-Making, supra* at \_\_\_\_.

<sup>33</sup> It is instructive in this respect to refer to the judicial resolution of difficult constitutional issues, such as the protection of hate speech, which depend, on the level of the nation-state, on recourse to some aspects of common identity. For example, that the United States has far greater tolerance of hate speech than Canada is difficult to understand without reference to the difference between the U.S.’s self-conception as an individualistic “melting pot” and the Canadian self-image as a group-based

Nevertheless, in as much as both European constitutional governance and the establishment of a European constitutional identity are at this point only projections into the future, neither of these two alternatives can be ruled out.

The negation associated with successful constitution-making need not take place in a single moment in time. For example, the 1787 American Constitution depended on two key moments of negation: rejection of the British system and British rule through the 1776 Revolution, and repudiation of the 1781 Articles of Confederation through the making and the ratification of the 1787 Constitution. Similarly, assuming the European Constitution lives to become successful, its process of negation may well loom as gradual and as tracing all the way back to the 1957 Treaty of Rome. Under this hypothesis, the target of the relevant process of negation is the Europe of nation-states standing against one another that was responsible for triggering two world wars. Moreover, within this perspective, and through a process of retrospective reconstruction, the series of treaties that culminate in the TeCE could be regarded as a gradual moving away from the older order to clear the way for the installment of a new supra-national constitutional order. In this protracted process of negation, Habermas' constitutional patriotism and von Bogdandy's market-based perspective definitely find a role: constitutional patriotism as the negation of patriotism *tout court*; and, market-based contractual relations as the negation of the internal bonds that make the nation-state impervious to variable supra-national integration.

Within this same perspective, the fact that the European Constitution is born out of a treaty rather than out of a constituent act of the peoples of Europe acting as one may not be that significant. That seems especially true if the new European Constitution establishes an altogether new constitutional model that is radically different from all models tailored to the particularities of the nation-state. One can imagine, for example, relations among the peoples involved, among the member-states, and among the multiple institutional features deployed by the TeCE to be neither purely vertical nor purely horizontal, neither purely external nor purely internal. In that case, the distinction between contract and treaty would most likely lose much of its importance for the new European order, thus eventually minimizing the relevance of whether the TeCE is a treaty or a constitution.

The difference between treaty and constitution seems more significant in case the European Constitution promotes a supra-national version of any of the four models tailored to nation-states, or a

---

“multicultural mosaic”. See Michel Rosenfeld, *JUST INTERPRETATIONS: LAW BETWEEN ETHICS*

hybrid of some, or all, of these models. But even in that case the difference need not be *that* significant. It could be of virtually no significance, if the TeCE were ratified by referendum in each of the member-states. But even without such ratification, it is conceivable that the TeCE would allow for the development of an adequate European *demos*, and that a suitable European constitutional identity could emerge to lead a gradual evolution of originally external treaty-based relations into internal ones sustained by a working European democracy and a sufficient common identity. It is, of course, also conceivable, that the requisite transition away from predominantly treaty-based relationships will not materialize, in which case the current European constitutional project would seem bound to fail. In short, success is certainly possible, but only time will tell.

On the question of incorporation of elements of collective identity to forge a workable constitutional identity, and of achieving the substantive conditions necessary to reach a viable relationship between *demos* and *ethnos*, one must be even more tentative and speculative. Professor von Bogdandy is right that neither existing elements of common European identity nor those projected or imagined by the TeCE provide a sufficient solid basis for the success of the European constitutional project. Nevertheless, it is possible, at least within the confines of the American model, to project constitutional identity and the substance of nationhood into the future. Accordingly, it is worth assessing briefly whether the elements of collective identity discussed by Professor von Bogdandy might contribute to forgoing a European constitutional identity and to developing the equivalent of nationhood within the ambit of the nation-state on the scale of the European Union.

If the American model is useful in exemplifying the possibility of leaving crucial aspects of identity formation for the future, its relevance to European constitution-making is nonetheless limited. This becomes most apparent by comparing, as does Professor von Bogdandy, the American motto “*E Pluribus Unum*” to the Union motto espoused in the TeCE, “United in diversity”. The American motto projects a dynamic and evolving image: with the constitution acting as a catalyst, the American melting pot will over time forge one nation from the multitude of diverse foreign nationals who have landed on American shores in successive waves of immigration. In contrast, the European motto, which Professor von Bogdandy aptly characterizes as “weak”<sup>34</sup>, is static and flat. Either the European peoples are already united in their diversity, in which case it is difficult to understand why their constitutional project is so problematic; or, the unity in question is a hope for the future, but it rings hollow because

---

*AND POLITICS* \_\_\_\_ (1998).

nothing in the TeCE or the current political atmosphere suggests how this abstract aspiration may be transformed in a concrete process of adaptation.

There may be another plausible interpretation of “unity in diversity” which could prove more productive. In that interpretation, the unity in question would not merely refer to some kind of aggregation of member states. Instead it would symbolize a dynamic process against Balkanization within, and, by extension, among, nation-states. Consistent with this view, unity at the European level may serve to defuse tensions within multi-ethnic states and between individual states and their own ethnic minorities. By transferring some powers from member-states to the Union, more room may be made for greater regional autonomy and diversity. Thus, if the TeCE were eventually to lead in that direction, it would prove conducive to the development of future identities. In that case, moreover, the identities in question would seem more consistent with the multi-ethnic Spanish model than with its American counterpart.

None of the specific aspects of collective identity discussed by Professor von Bogdandy appear suitable for immediate incorporation into a workable European constitutional identity. Nevertheless, his analysis provides insights into what aspects of collective identity may be eventually transformed into appropriate material for a constitutional identity. A narrative concerning common origins is a crucial component of a viable constitutional identity, and the reference to Europe’s “bitter experiences” introduced into the TeCE’s preamble by the Intergovernmental Conference provides a promising starting point. Professor von Bogdandy is right that this reference is “minimal”<sup>35</sup>, but that may be more a virtue than a vice<sup>36</sup>. The reference itself does not provide a sufficient narrative, but it opens the door to one.

It is clear that Nazism and Soviet communism are both European phenomena and the main culprits for most of the human caused misery perpetrated in the twentieth century. Moreover, the European project arose on the ashes of Nazism and has been recently extended to incorporate formerly communist countries of Eastern Europe within the Union. Accordingly, a European constitutional identity could easily ground its narrative of origins on a repudiation of Nazism and Soviet communism and on the need to create a political order that would minimize the return of tyrannical totalitarian rule.

---

<sup>34</sup> See von Bogdandy, *supra*, at \_\_\_\_.

<sup>35</sup> See von Bogdandy, at \_\_\_\_.

Such repudiation serves as a negation of the pre-constitutional order -- that is, “pre-constitutional” from the standpoint of Europe, not from that of the individual Union’s member-states -- that could not ward off totalitarian rule.

From the standpoint of constitutional identity, origins depend in part on negation. In the French case, it was negation of the absolute monarchy; in the American, negation of colonial rule. Negation alone, however, is insufficient to create a distinct image of origins. In the European case, rejection of the political order that could not ward off Nazism or Soviet communism certainly looms as a propitious starting point. It does not of itself suggest, however, why a transnational constitutional order would be needed rather than a series of sound national constitutional regimes.

If Nazism is regarded as involving a pathological and highly disproportionate promotion of *ethnos*, and Soviet communism as fostering excessive suppression of it, a narrative of origins could link the above mentioned rejection to the building of a transnational multiethnic order. Such order would promote a proper equilibrium among a multiplicity of diverse ethnicities. It would resemble the Spanish multiethnic model to some extent, but by remaining transnational it would avoid the seeming pitfalls of national multi-ethnic constitutional orders, such as that of Belgium or Canada<sup>37</sup>. In order words, if transnational constitutionalism can create a space that is particularly well suited for the coexistence of a multiplicity of ethnicities while minimizing the potential excesses of *ethnos*, then rejection of the “bitter experiences” coupled with the need for a lasting commonly shared framework that neither unduly magnifies nor unduly represses *ethnos* provide a seemingly viable narrative of origins susceptible of successful incorporation into an emerging European constitutional identity.

The inclusion of German Chancellor Gerhard Schröder and Russian President Vladimir Putin at the recent commemoration of the 60 year anniversary of the D day invasion of Nazi-occupied Europe in Normandy<sup>38</sup> is consistent with the narrative of origins sketched above. The Allies who disembarked in Normandy in 1944 were waging war against Germany. Remarkably, however, Chancellor Schröder stated that the Allied military success had not been a “victory over Germany, but

---

<sup>36</sup> Indeed, remembering *that* the experiences were “bitter” is undoubtedly a potent incentive for cooperation and unity. Dwelling on *who* was ultimately responsible and on *what* led to the “bitter” experience, in contrast, is still likely to be quite divisive.

<sup>37</sup> The increasing tensions between French-speaking and Flemish-speaking population had led to an increasing fragmentation of the constitutional order in Belgium. *See* \_\_\_\_\_. In Canada, Quebec has yet to officially accept the 1982 Canadian Constitution, and periodically considers secession from Canada. *See Reference re Secession of Quebec* 2 S.C.R. 217 (Supreme Court of Canada 1998).

<sup>38</sup> *See Leaders and Veterans Mark D-Day*, BBC News UK Edition, June 6, 2004.

a victory for Germany”<sup>39</sup>. Clearly, such a statement would seem most unlikely absent deployment of a narrative of new origins along the lines suggested above<sup>40</sup>.

The other elements of collective identity referred to in the TeCe and discussed by Professor von Bogdandy, namely Europe as “a community of destiny”, as “a special area of human hope”, and as a “community of values”, could well eventually figure in a European constitutional identity. They sound hollow at this juncture, however, because they remain abstract and largely generic. But this does not mean that over time common threads found in the history and culture of the various member-states could not be woven together into, for example, a distinct and sufficiently differentiated “community of destiny”. Or that disparate threads could not be gathered together and aggregated to sketch a “special area of human hope”.

Constitutional identity like national identity can also be defined in part by who “we” are not as opposed to who we are. Professor von Bogdandy is right to point out that anti-Americanism has a role to play in circumscribing a European identity<sup>41</sup>. Moreover, anti-Americanism can play a significant role in constructing a European *constitutional* identity. American constitutional identity is adamantly fixated on the nation-state and reticent vis à vis international and transnational norms that are constitutional in substance if not in form<sup>42</sup>. In contrast, the starting point for a new European constitutional identity is the rejection of a constitutional order imprisoned within the nation-state and the search for harmonization between national, supra-national and international constitutional norms. To be sure, a similar harmonization is sought under the Spanish model, which is tailored to the nation-state. Nevertheless, if one adds to existing transnational institutional arrangements within the Union its transnational constitutional aspirations, the contours of a plausible European constitutional identity begin to emerge.

In conclusion, it is quite possible that the TeCE will create a European constitutional identity and lead to a new transnational European constitutional model. That model, like the American would

---

<sup>39</sup>*Id.*

<sup>40</sup> The new origins at stake in the construction of a European Constitutional identity require reinterpretation of the “bitter experiences” of the twentieth century, but not of the many European wars that preceded them. For example, it seems highly implausible that a French President would characterize the decisive 1815 victory over Napoleon in Waterloo as a “victory for France”.

<sup>41</sup> See von Bogdandy, at \_\_\_\_.

<sup>42</sup> Cite.

be future-oriented, and like the Spanish it would be multi-ethnic. Furthermore, for the European model to foster “unity in diversity” it would most likely not do for it to become a supra-national version of a nation-state model. Instead, the European model would have to promote novel vertical and horizontal apportionments of powers allowing supra-national, national and infra-national governance to work in harmony without being constrained by traditional forms of federalism or confederalism. The European model would have to find its own balance between *demos* and *ethnos* -- a balance that would not be like the French or the German. Whether a European constitutional identity and a European constitutional model will emerge depends on the TeCE giving rise to a genuine constitutional practice and culture. Whether that will actually happen, however, is still very much an open question.