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Altneuland: The EU Constitution in a Contextual Perspective

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Armin von Bogdandy
The European Constitution and European Identity: A Critical Analysis of the
Convention's Draft Preamble

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The European Constitution and European Identity: Potentials and Dangers of the IGC's Treaty Establishing a Constitution for Europe*

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1. Theme and Premises

a. Scope and Development

Since the beginnings of European integration, many have asserted that establishing a European identity is essential.¹ They consider citizens' identification with the supranational organization necessary to expanding it into a viable political community. Official efforts were already directed toward this goal by the early 1970s, finding a first peak in the declaration of the heads of state and government on European identity of 1973.² The only moderate success of identity politics³ thus far has significantly contributed to current efforts toward a written European constitution, which is "to bring citizens closer to the European design and European Institutions."⁴

Not all scholars agree that Union citizens' identification with the Union is actually required, in order for it to attain its objectives in the long run. Certainly, a viable community cannot consist of irreconcilable religious, ethnic, or social groups.⁵ This, however, merely implies a

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¹ E.B. Haas, *The Uniting of Europe*, 16 (1958); U. Meyer-Cording, "Die Europäische Integration als geistiger Entwicklungsprozeß," ArchVR 10 at 42, 45, 49, 58ff., 68 (1958); for the recent debate, see M. Zanichelli, "L'Europa come scelta," *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 31 at 917 (2002).

² Document on European Identity, adopted by the Foreign Ministers of Member States of the European Communities on 14 December 1973 in Copenhagen, Europa-Archiv Folge 2/1974, D 50 (in the absence of institutionalization by the European Council, formal adoption rested with the Foreign Ministers).

³ Detailed data on this point can be found in the "Eurobarometer," available: http://europa.eu.int/comm/public_opinion/archives/eb/eb59/eb59_en.htm (07.03).

⁴ Preface, European Convention, Draft Treaty establishing a Constitution for Europe (18 July 2003).

⁵ See especially H. Heller, *Politische Demokratie und soziale Homogenität*, in *Gesammelte Werke*, Vol. 2, 421 (1971). According to Heller, the Weimar Republic depended on a single circumstance: the ruling classes needed to convince the proletariat that it could improve its material well-being within the process of the Weimar Constitution. Contrary to the famous quotation by the Federal Constitutional Court in its even more famous Maastricht judgment (BVerfGE 89 at 155, 186), Heller disregards the integration function of substantial

civil form of interaction, but not a common identification of citizens with the political organization (that is, a “We”).⁶ Assertions that such an identity is necessary for its viability are generally not well-proven conclusions of empirical research, but rather of an axiomatic nature in normative theories which advocate communal spirit and public unity.⁷ The term “identity” is attractive for such theories because it allows concealing of normative premises.⁸

Nonetheless, the scientific debate affords sufficiently plausible support for the following assertion: the development of a collective identity *can* be helpful for the viability of a political community. Note, however, that this assertion does not allow normative conclusions. The basic rights to freedom of conscience, speech and association make any legal requirement to identify highly problematic⁹ as it would touch the core of an individual’s autonomy and dignity. Thus, even if there *were* (which is not the case) a proven need for a common political identity, normative conclusions would still face important obstacles. With focus on hermeneutics, prognosis, and to some degree ideological critique, this article surveys some relevant aspects of the Treaty establishing a Constitution for Europe (“TeCE”) as determined by the Intergovernmental Conference on 18 June 2004,¹⁰ highlighting some significant changes with respect to the draft presented by the European Convention in July 2003 (dTeCE).¹¹

homogeneity. The factors for integration and identity (*e.g.*, common language, history, and culture), which the Federal Constitutional Court considers as decisive and for which it refers to Heller, are considered by Heller as phenomena of the past. *Id.* at 429.

⁶ The conceptual counterpart, which is skeptical of identity, would focus instead on the decision-making processes, which must accommodate the many forms of diversity, in detail, A. von Bogdandy, “Europäische und nationale Identität: Integration durch Verfassungsrecht?” VVDStRL 62 at 157, 178ff (2003).

⁷ For evidence that the need for collective identity is often overestimated, see F. Neidhardt, “Formen und Funktionen gesellschaftlichen Grundkonsenses,” in Schuppert & Bumke (eds.), *Bundesverfassungsgericht und gesellschaftlicher Grundkonsens*, 15, 16f., 26f. (2000). See also H.H. Bohle *et al.*, “Anomie in der modernen Gesellschaft,” in Heitmeyer (ed.), *Was treibt die Gesellschaft auseinander?*, 29, especially 54ff. (1997); R. Dahrendorf, *Gesellschaft und Demokratie in Deutschland*, 161ff., 174f. (1965); E. Denninger, “Integration und Identität,” KJ 34 at 447 (2001).

⁸ For a sharp and well founded critique of the use of the term *identity* in many discourses, see L. Niethammer, *Kollektive Identität. Heimliche Quellen einer unheimlichen Konjunktur*, 33ff (2000).

⁹ E.-W. Böckenförde, “Das Grundrecht der Gewissensfreiheit,” in E.-W. Böckenförde, *Staat, Verfassung, Demokratie*, 200, 219, 226f., 241f. (1991); E. Denninger, “‘Streitbare Demokratie’ und Schutz der Verfassung,” in Benda, Maihofer, & Vogel (eds.), *Handbuch des Verfassungsrechts*, 2nd Ed. §16, Nr. 75 (1994). The ECtHR puts strict limits on repressive attempts to foster collective identity, ECtHR, decision of 30 January 1998, *Unified Communist Party of Turkey (TBKP) et al./Turkey*, Appl.Nr. 19392/92, para. 57; decision of 10 July 1998, *Sidiropoulos et al./Greece*, Appl.Nr. 26695/95, para. 44; decision of 8 Dec. 1999, *Party for Freedom and Democracy (Özdep)/Turkey*, Appl.Nr. 23885/94, para. 44; decision of 2 Oct. 2001, *Stankov and the United Macedonian Organisation Ilinden/Bulgaria*, Appl.Nr. 29922/95 und 29225/95, para. 102; for an analysis, see J. Ringelheim, „Identity Controversies Before the European Court of Human Rights: How to Avoid the Essentialist Trap?” *German Law Journal* Vol. 3 No. 7, <http://www.germanlawjournal.com> (2002).

¹⁰ Conference of the Representatives of the Governments of the Member States, CIG 86/04, 25 June 2004 (02.07).

¹¹ Among the early analyses of the Draft Constitution, cf. F. Chaltiel, “Une Constitution pour l’Europe, An I de la République Européenne,” *Revue du Marché commun et de l’Union européenne*, Nr. 471 at 493 (2003); P. Craig, “What Constitution does Europe Need? The House That Giscard Built,” *The Federal Trust* (August 2003); M. Dougan, “The Convention’s Draft Constitutional Treaty: A ‘Tidying-Up Exercise’ that needs some tidying-up of its own,” *The Federal Trust* (August 2003); J. O. Frosini *et al.*, “I lavori della Convenzione europea,” *Quaderni costituzionali* at 387 (2003); D. Halberstam *et al.*, “Making It Our Own, A trans-European proposal on amending the draft Constitutional Treaty for the European Union,” <http://www.umich.edu/~inet/euc/MiscHTML/EUnews.html> (08.11.03); F. Kauff-Gazin & M. Pietri, “Premières analyses du projet de Constitution Européenne,” *Europe - Éditions du Juris-Classeur*, Nr. 3 (2003); B. Mathieu & M. Verpeaux, “Brèves remarques sur le projet de ‘Constitution Européenne,’” *La Semaine Juridique* Nr. 45 at 1909f. (2003); A. Maurer, “Schließt sich der Kreis? Der Konvent, nationale Vorbehalte und die

b. Collective Identity—What is It?

Phenomena of social identity are regarded as *collective* identity and establish a “We,” insofar as human beings understand themselves to be members of a group.¹² The essential element of collective identity is—according to social psychology—a mutual perception of belonging.¹³ *Cognitive* processes account for the phenomenon of collective identity.

Social psychology explains it thus: every perception brings about an act of categorization which then organizes the object of perception into discontinuous classes. This categorization provides clarity in an otherwise diffuse world by grouping the potentially infinitely diverse stimuli into a limited number of categories. Individuals arrange themselves and others within their system of classification. It is, then, not merely a matter of deciphering what one perceives, but also of self-locating. The individual’s self-concept is based on her or his (self-) assignments to particular categories. Social identification is the “internalization of a social category,” the transformation of a given social category into an internal designation. In metaphoric terms, collective identity is based on “entries,” which compose a sort of “collective dictionary” (as core elements of the discourse of a group), which must exist for every group.¹⁴ A change in the categories, by which an individual defines his or her own identity, will resultantly influence this identity. Correspondingly, current social psychology considers social identity to be a relatively fluid construction rather than a stabile entity.

Collective identity is social affiliation that is conscious and reflexive. In exactly this sense, European identity politics strive to shape the European citizen. He or she should conceive of him- or herself as being part of the group of Europeans which is organized by the supranational organization and should then act accordingly in the social sphere. Given that identity is based on social constructs, the formation of such a European identity, based on a constitutional document, appears to be possible¹⁵; such a position does not require recourse to the philosophy of constitutional patriotism.¹⁶

Regierungskonferenz,” Teil I, <http://www.swp-berlin.org/pdf/brennpunkte/eukonvregkonfanalyse01.pdf> (08.11.03); J. Meyer & S. Hölscheidt, “Die europäische Verfassung des Europäischen Konvents,” *EuZW* at 613 (2003); J. Martín y Pérez de Nanclares, “El proyecto de Constitución europea: Reflexiones sobre los trabajos,” *Revista de Derecho Comunitario Europeo* at 527 (2003); M. Pinto-Duschinsky, “All in the translation – What the proposed European Constitution means for Britain,” *TLS* at 3 (13 June 2003); T. Oppermann, “Eine Verfassung für die Europäische Union,” *DVBl.*, Part 1 at 1165, Part 2 at 1234 (2003); J. Schwarze, “Ein pragmatischer Verfassungsentwurf,” *EuR* at 535 (2003).

¹² The linkage of collective identity to psychological processes of individual citizens appears advisable in order to avoid problematic essentializations, U. Neumann, “Wissenschaftstheorie und Rechtswissenschaft,” in Kaufmann & Hassemer (eds.), *Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart*, 6th Ed., 422, 430ff. (1994); this parallels methodic individualism, H. Albert, “Methodischer Individualismus und historische Analyse,” in Acham & Schulze (eds.), *Teil und Ganzes*, 219 (1990).

¹³ On the following, see O. Angelucci, *Zur Ökologie einer europäischen Identität*, 33ff. 53ff. (2003), which bases itself on the theory of social identity (foundational: H. Tajfel, *Human groups and social categories: Studies in social psychology* (1981)) and the theory of social representation (foundational: S. Moscovici, *La Psychanalyse, son image et son public* (1961); Farr/Moscovici (eds.), *Social Representations* (1984)).

¹⁴ This terminology is well established, e.g. Cerruti/Rudolph (eds.), *Un’anima per l’Europa. Lessico di un’identità politica* (2002).

¹⁵ It seems almost impossible to predict the number of years before a collective identity is established. The decade would probably be a proper unit of measurement. But O. Angelucci, *supra* note 13, at 160f., 163f., shows that demonstrable changes can occur during a period of five years.

¹⁶ On this philosophy, see J. Habermas, “Geschichtsbewußtsein und posttraditionale Identität,” in J. Habermas, *Eine Art Schadensabwicklung*, 173ff. (1987); D. Sternberger, “Verfassungspatriotismus,” in *Schriften*, Vol. X, especially 17ff., 24, 30f. (1990); see also J.H.H. Weiler, “Federalism without Constitutionalism: Europe’s Sonderweg,” in Nicolaidis & Howse (eds.), *The Federal Vision*, 63 (2001).

A constitution, certainly, can only be *one* element in a broad, social evolution that shapes the identities of citizens.¹⁷ It is, moreover, a long way from a constitution, which is initially a mere constitutional *text*, to the psychological processes of self-categorization by citizens. It is useful to distinguish between *direct* and *indirect* effects. A constitution *directly* affects identity formation, if it is a *per se* criterion for the relevant identity process. This would require that the large majority of citizens identify and affiliate with their group on the basis of the constitution as such or of specific constitutional principles. In turn, constitutional law *indirectly* affects identity formation when it shapes or creates the relevant criteria which then form identity. In any event, a constitution's identity-forming force depends on suitable starting-points for citizens' identification processes. This article analyzes the TeCE's potential from this perspective.

2. Elements for Identity in the TeCE

a. A Common Origin

Research on nationalism shows that an important "entry" in the "Dictionary of Collective Identity" is a common history.¹⁸ A "We" is most often anchored in a common past. Such a historical "entry"—to borrow from Jean-François Lyotard—can be characterized as a "great narrative."¹⁹ Many examples can be cited, as to how an intellectual elite construed a "narrative" out of amorphous historical material, which they then used as a common "Whence" (or "Where we are from") for a planned, emerging, or existent group.²⁰

"Whence" narratives circulating within European societies vary greatly from nation to nation. This is not astonishing, since they did originate at a time when mutual dissociation was politically desired by most European states. At present, no socially anchored, pan-European narrative unites most Union citizens under a persuasive, common "Whence."

Considering the contingency and construal of the current narratives, a project to write a new and common European history seems possible—if it can sustainedly pursue the (re)interpretation of the historical materials with proper instruments. In text-centered cultures (such as Europe's) it stands to reason that the contours of a group's "Whence" can be written into the fundamental document of its political structure. To the extent that a constitution is supposed to contribute to such a narrative, the preamble is particularly well-suited.²¹ Indeed,

¹⁷ This can be demonstrated by comparison with the Federal Republic of Germany, in which the identity-forming role of the Basic Law seems rather important. See J. Gebhardt, "Verfassungspatriotismus als Identitätskonzept der Nation", *Aus Politik und Zeitgeschichte* B 14/93, 31, 33f.(1993); M.R. Lepsius, *Interessen, Ideen und Institutionen*, 63, 77f.(1990); H. Rausch, "Politisches Bewußtsein und politische Einstellungen im Wandel," in Weidenfeld (ed.), *Die Identität der Deutschen*, 119, 130 (1983). On the relevant role of the Federal Constitutional Court, see the articles in Schuppert & Bumke, *supra* note 7; U. Haltern, "Integration als Mythos," *JöR* 45 (1997); J. Isensee, "Die Verfassung als Vaterland," *Allmanach*, 71 (1988).

¹⁸ B. Anderson, *Die Erfindung der Nation*, (1996); K. Deutsch, *Nationenbildung – Nationalstaat – Integration*, (1972); E. Gellner, *Nationalismus und Moderne*, (1995); E. Hobsbawm, *Nationen und Nationalismus*, 2nd Ed. (1992); H. Schulze, *Staat und Nation in der europäischen Geschichte*, 2nd Ed. (1995).

¹⁹ J.-F. Lyotard, *Das postmoderne Wissen*, 4th Ed., 63ff., 112 (1999); J.-F. Lyotard, *Der Widerstreit*, 2nd Ed., 12, 251ff. (1989).

²⁰ On the difficulties of such constructions, especially in a European context, see F. Hanschmann, "Geschichtsgemeinschaft," *Rechtsgeschichte* (forthcoming 2004).

²¹ On the functions of preambles, see P. Häberle, *Europäische Verfassungslehre*, 273ff. (2001-02); H. Dreier, in H. Dreier (ed.), *Grundgesetz*, Vol. I, "Präambel," Nr. 8ff. (1996); J. Isensee, "Staat und Verfassung," in J. Isensee & Kirchhof (eds.), *HbStR*, Vol. I, 2nd Ed., § 13, Nr. 4ff. (1995); C. Starck, in v. Mangoldt, Klein &

the TeCE attempts in its preamble—as in many of the new constitutions of Central and Eastern Europe—to establish the contours of such a narrative. The preamble can directly affect identity formation through the reading and promulgation of the preamble itself. Or it can indirectly influence the relevant “narratives” and, thereby, constructions of reality by providing an origin for further constructions, such as are found in educational materials.²²

At this point, one encounters a most remarkable difference between the TeCE and the Convention’s draft. The Convention tried to anchor a common European narrative in a myth which was deleted by the Intergovernmental Conference. The Convention puts at the inception of the dTeCE not words but a picture. For the formation of identity, this appears to have been a shrewd move, since a picture, as is often said, is worth a thousand words. A picture can often deliver a thought with much greater impact than can language. This is especially true in the multilingual European Union with its translation problems. On opening the Convention’s dTeCE, the Union citizen sees two lines of ancient Greek letters. Since only a small, vanishing segment of the population still has knowledge of ancient Greek, most Union citizens do not perceive a thought, expressed in words, but an image with various associations. One might assume that this picture—assisted by the name Thukydides—evokes “ancient Greece.”

For most Europeans, “ancient Greece” represents a myth. A myth is a founding narrative, a story told to illuminate the present by the light of its origins, told to orient oneself in time and space. A myth contains a truth of a higher order, thus providing normative standards with formative power.²³ It can unite separate individuals by way of a shared self-conception and shared knowledge into a “We”: not only in jointly binding rules and values, but also in memory of a shared past.

The Hellenic enthusiasm of the late 18th and early 19th centuries still largely determines the content of this mythical Greece. Ancient Greece is the “realm of beautiful freedom,”²⁴ evocative of dashing heroes like Hercules, Achilles, and Odysseus,²⁵ of a world that crafted eternal works of art, philosophy, and science, of free and virtuous citizens prepared to fight despotism. The world of ancient Greece represents the “Other” to our present, petty-minded epoch, which nevertheless is still bound to its standards. It is no mere coincidence that the most celebrated, Western cultural critic was a classical philologist: Friedrich Nietzsche. It is no mere coincidence that Whitehead described the whole of Western philosophy as footnotes to Plato.²⁶ Scholarly research into the far less luminous reality of ancient Greece has hardly dimmed the myth’s radiance.²⁷

The image as introduction to the “Constitution for Europe” evokes an attractive and accessible idea of where “We” come from and which moral and cultural standards “We” consider

Starck (eds.), *Das Bonner Grundgesetz*, Vol. 1, “Präambel,” Nr. 29ff. (1999); H.-D. Treviranus, “Preamble,” in Bernhardt (ed.), *EPIL*, Vol. III 2 at 1097f. (1997); A. von Bogdandy, “Preamble,” in de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, at 3, http://europa.eu.int/futurum/documents/other/oth020403_en.pdf (08.11.03).

²² See J. Aldebert, *Europäisches Geschichtsbuch. Geschichtliches Unterrichtswerk für die Sekundarstufe I und II* (1992).

²³ J. Assmann, *Das kulturelle Gedächtnis*, 3rd Ed., 52, 75f. (2000).

²⁴ G.W.F. Hegel, *Vorlesungen über die Philosophie der Weltgeschichte I*, J. Hoffmeister (ed.) 249 (1955).

²⁵ In this sense, the Ode, which underlies the anthem of the Union (Art. IV-1, Subpara. 2), sings of an especially radiant figure of Greek mythology.

²⁶ *Prozeß und Realität*, 91f. (1979) (English original: *Process and Reality* (1929)).

²⁷ On the recent research, cf. W. Schuller, *Griechische Geschichte*, 82ff. (1980).

authoritative.²⁸ Although many countries claim to be ancient Greece's heirs, most Europeans will agree that their "claim" is the "strongest"; this is one facet of the European idea that is universal and particular at the same time. The image symbolizes a narrative that relates to widespread and positive associations and common knowledge. This symbolism is maintained in no small part by the entertainment industry—almost always with positive depictions. With its introductory image, the dTeCE professes its allegiance to this myth and claims it as its own.

All this has been completely deleted from the TeCE. Instead, it starts by referring to the heads of state of the Member States (and the Hungarian parliament). Rather than basing the Union's constitution on a distant myth, it is based on the highest political representatives of the Member States. The TeCE then follows with the "cultural, religious and humanist inheritance of Europe," but these words do not evoke any myth, and no "golden age."

Moreover, the past to which the TeCE links is quite different, and it is a past which the Convention largely neglects. The Convention's preamble lacks any clear allusion to the genesis of European integration: the catastrophes of the 20th century and particularly World War II. Such a reference could also provide a useful answer to the question "Why?"; the architects of Europe emerged from the horrors of the Second World War determined to prevent even the possibility that something similar could reoccur.²⁹ To draft these experiences and this resolve in a constitutional document with a formulation which is accessible and agreeable for *most* citizens of *all* Member States, seems to be the most important challenge for the preamble to a European constitution which attempts to offer a persuasive "Whence" narrative. One might object that the Convention's preamble does refer to "the ancient divisions" which are to be "transcended," and Art. I-3, Para. 1 declares that the "Union's aim is to promote peace." Both, however, are insubstantial, abstract formulations, which squander the persuasive power of the catastrophic imagery.

The Intergovernmental Conference introduced into the Convention's third recital of the preamble (now the second of the TeCE) the words "after bitter experiences."³⁰ With these words, "bitter experiences," the TeCE links to innumerable personal narratives, persevering within many families, of the catastrophic events of the 20th century; they appear to be a possible ground for a common interpretation of crucial historic events that might also imbue the European Union with a deep significance. Perhaps the objection will arise that the formula "bitter experiences" provides only a "minimal reading" since neither names nor events are indicated nor is there any allocation of responsibility. Yet, this small common ground might present a better base for a European identity than the glorious, but distant myth of ancient Greece.

An echo of the catastrophe resounds in the event, which Art. I-6a, Subpara. 5 TeCE (Art. IV-1, Subpara. 5 dTeCE) celebrates as Europe day, in an attempt to establish a rite of memory to

²⁸ To what degree ancient Greece represents a similar myth to the muslim world is an entirely separate topic.

²⁹ U. Everling, "Die Europäische Union im Spannungsfeld von gemeinschaftlicher und nationaler Politik und Rechtsordnung," in von Bogdandy (ed.), *Europäisches Verfassungsrecht*, 847, 848ff. (2003); preamble to the ECSC Treaty of 18 April 1951 (BGBl, Part II, 447 (1952)) fifth recital.

³⁰ The English version reads "reunited after bitter experiences"; similar to the French and Italian, "désormais réunie," other versions, however, are not so euphemistic. In the German, for example, there is no previous stage of European unity: "nunmehr geeintes Europa"; the Hungarian version proposes a further aspect by considering Europe as "újraegyesülö," i.e. as "reuniting."

form or sustain identity.³¹ The TeCE implicitly recalls French Foreign Minister Robert Schuman's declaration of 9 May 1950, which led to the (now expired) ECSC Treaty. Schuman's declaration could be interpreted as the point in world history at which the traditional concept of the nation-state was overcome and, thus, Europe again took its position as the spearhead of "world spirit." But this reading seems improbable; the declaration could just as well be understood not as a collectively European, but as a unilaterally French act, as politically calculated,³² and not resulting from the overwhelming will of the European peoples, or even as their own action. The celebration of this event could also be read as bowing to the primacy of French diplomacy, further fueling resentment.³³ With such a backdrop, a persuasive rite of celebration of the European Union or its constitution—as an important means for grounding it in public discourse and, thus, in the self-conception of the citizenry—can hardly be established.

b. Who We Are

A community of destiny

A common history is undisputedly an important element in forming a group out of individuals. Conceptions vary as to further relevant elements. One line of research suggests that the perception of common group membership is only possible with positive, emotional bonds: a "We" requires that people—pointedly—"like" each other.³⁴ Sociopsychological research, however, attributes little importance to such bonds: the formation of a group and the corresponding identity depend on the perception of belonging to a single social category, not on an emotional disposition.³⁵ The mental mechanisms of perception, not their positive evaluations, are the basis of group formation. The latter position—when freed from the clutches of social romanticism—is thoroughly plausible: bitter political opponents such as Oskar Lafontaine and Gerhard Schröder will consider themselves patriotic and responsible Germans. Accordingly, amiable feelings from the majority of the Dutch towards the Germans are not a prerequisite for a Dutch self-perception of belonging to a common group with the Germans.

The TeCE's designation is perhaps its strongest contribution to promoting a sense of group membership among Union citizens. Considering the public debate which accompanied the Convention and the ratification of the TeCE, a majority of Union citizens will consider the use of the term "constitution" as symbolic that there is a political community to which they belong. Many will see the shift from "treaty" to "constitution" as the will of their national representative institutions to form a *single* group among European peoples.

Certainly, the terminology used to designate the document is remarkably ambivalent: it is called "*Treaty* establishing a *Constitution* for Europe." Given the relevant public debate, "treaty" suggests much less a "We" among Union citizens than does "constitution." Thus, the ambivalence in the terminology is actually an ambivalence over the Union's course of

³¹ On the significance of rites of memory, see Assmann, *supra* note 23, at 56ff.; on the function of (national) holidays, see P. Häberle, *supra* note 21, at 18, 124, 183f., 493; E. Klein, "Die Staatssymbole," in Inensee & Kirchof (eds.), *HbStR*, Vol. I, 2nd Ed. § 17, Nr. 1, 11 (1995).

³² For the background, see e.g., B. Olivi, *L'Europa difficile*, 30ff. (1998).

³³ On resentment, see L. Siedentop, *Democracy in Europe*, 113ff. (2000).

³⁴ J.H.H. Weiler, "To be a European citizen: Eros and civilization," in J.H.H. Weiler, *The Constitution of Europe*, 324, 338f. (1999); U. Haltern, *Europäischer Kulturkampf, Der Staat*, 37 at 591, 620 (1998); M. Zürn, *Regieren jenseits des Nationalstaates*, 257, 348 (1998).

³⁵ Angelucci, *supra* note 13, 44f.

development. The designative compromise, “Treaty establishing a Constitution,” seems to allow for both courses of development. Many provisions even suggest an understanding that is more one of international law than constitutional law: for example, the provisions on ratification and revision in Arts. IV-7 f. TeCE (Arts. IV-7 f. dTeCE). The Intergovernmental Conference strengthens this reading significantly by placing the heads of state (and the Hungarian parliament) at the head of the Preamble.

Nonetheless, usage seems to be settling on the designation “constitution” rather than “treaty” or “constitutional treaty.” The concise designation “constitution,” suggested forcefully even by the graphic design of the Convention’s document, has apparently prevailed in the public debate. If this term becomes commonplace—and, more importantly, if “constitution” becomes an important rhetorical term for European politics, as is *Grundgesetz* (“Basic Law”) in the Federal Republic of Germany—then the Constitution will become a powerful “entry” in the “Dictionary of European Collective Identity.” Union citizens would frequently come across a term that consistently promotes their self-conception as a group, organized by the European Union.

Such an understanding finds further support in the TeCE. First, it asserts that the *different* peoples of the Member States form *one* society (Art. I-2, sentence 2).³⁶ Moreover, the third recital of the preamble (formerly fourth recital of the dTeCE) states that “the peoples of Europe are determined . . . united ever more closely, to forge a common destiny.” The preamble thereby evokes one of the strongest concepts for the formation of a group: the “community of destiny.”³⁷ The singular “common destiny,” applied to all of the involved peoples, implies that future challenges will not belong to any specific people; rather, all European peoples fundamentally share *one* common future. A common destiny also seems capable of bringing persons together into a group even where those persons’ emotional bonds are weak.

The TeCE’s formulation, “forge a common destiny,” suggests an unusual idea. Destiny is “experienced” or “suffered” because the term implies a future that is already largely determined.³⁸ Only an open future can be “forged.” With the combination of “destiny” and “forge,” the TeCE may indicate that European peoples can no longer hope for a course of development independent of each other, but that a common course of development—thanks to the Union—is forgeable. The concept of a European community of destiny is powerful. It is associated with a widespread worldview among Europeans: that of a struggle between the various regions of the world.

The introduction of the concept “community of destiny” exposes the proudly proclaimed victory of supporters of national competence as only a victory of a minor battle. Indeed, the TeCE’s preamble lacks the finality of the “ever closer union among the peoples of Europe” which is enshrined in the first recital of the E(E)C Treaty.³⁹ This triumph is hollow because

³⁶ The TeCE skillfully uses the potentials offered by the conceptual pairs *people – society* and *culture – civilization*.

³⁷ Among the prominent French intellectuals, see e.g., E. Morin, *Penser l’Europe*, (1987) (the Italian edition, *Pensare l’Europa*, 129ff. (1990), is cited here).

³⁸ Destiny: “a *predetermined* course of events often held to be an *irresistible* power or agency.” Merriam-Webster Online, <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=destiny> (02.03.04) (emphasis added); on the French *destin*: “Puissance surnaturelle qui fixerait le cours des événements,” Petit Larousse illustré, 312 (1979).

³⁹ See H.-J. Blanke, “Essentialia des Entwurfs des Europäischen Verfassungsvertrages,” *Rivista europea di cultura e scienza giuridica*, Nr. 1-2/2003 at 95, 147 (2003).

the preamble contemplates the determination of the peoples of Europe (and not merely of the heads of state, as in the EEC Treaty) “to forge a common destiny.” Moreover, the preamble to the Charter of Fundamental Rights, which forms part II of the TeCE, reuses the language of “an ever closer union” (first recital). Even more importantly: if the collective perception that Union citizens belong to a Union-organized community of destiny is one day firmly established, that would provide a much stronger impetus for the future expansion of Union competences than the “determination” of the heads of state, as in the EC Treaty, could ever provide.

This concept of “community of destiny” is supported by another term, which has ever increasing importance in European law and the representation of European politics: the concept of “area.”⁴⁰ The Union—like a state—is invisible as such: one can see neither an organization nor a legal person. Thus, the printing of maps, which visually render a state as a colorful zone and thereby as an *area*, has been extremely important to the establishment of nations. The TV news feeds German identity daily with a weather-map which isolates Germany as an area.

The Single European Act introduced the legal concept of area in the definition of the internal market (Art. 13 SEA; Art. 14, Para. 2 EC; Art. III-14, Para. 2 TeCE). The next stage was the Treaty of Amsterdam’s “area of freedom, security and justice” (Art. 2, Indent 4 EU; Art. I-3, Subpara. 2 TeCE).⁴¹ With the Treaty of Amsterdam, the Union also became a defensible area (Art. 11, Para. 1, Indent 1 EU, “integrity of the Union”; Art. I-40 TeCE). The TeCE makes of it “a special area of human hope” (fourth recital). The dTeCE even starts with an areal reference, namely, the *continent* of Europe; however, the IGC deleted this without substitution.⁴² A shift in association of “Union” from an organization in Brussels to an area, in which Union citizens live, would be a significant step toward a European identity.

A chosen community

Although not absolutely necessary, it is useful to identification if the relevant group is connoted positively. The history of nationalism has many examples of social constructions, in which a group allocated superiority to itself above all other groups.⁴³

The TeCE contains components, from which one might construe a European self-perception as an exceptional group. A first such instance can be found in the now deleted first recital of the dTeCE, which describes Europe as a (though not *the*) “continent that has brought forth civilisation.” The fourth recital (fifth of the dTeCE) is especially striking in its description of Europe as “a special area of human hope.” The possible implication here is much clearer in the French version: “un espace privilégié de l’espérance humaine.” Europe would apparently be the best chance for realization of the hopes of not merely Europeans, but of humankind as a whole. Accordingly, the verses to which Beethoven composed the music—which,

⁴⁰ Conclusions of the Presidency of the Tampere European Council, Bull. EU 10-1999, 7ff.; on the darker implications of the *Großraum*, see C. Joerges, “Europe a *Großraum*? Shifting Legal Conceptualisations of the Integration Project,” 167, 189ff., and J. McCormick, “Carl Schmitt’s Europe: Cultural, Imperial and Spatial Proposals for European Integration, 1923-1955,” 133, 140f., both in C. Joerges & N.S. Ghaleigh (eds.), *Darker Legacies of Law in Europe* (2003).

⁴¹ On the history of the “area of freedom, security and justice,” see http://europa.eu.int/comm/justice_home/key_issues/step_by_step/step_by_step_09_2002_de.pdf (08.11.03).

⁴² Here, the Draft Constitution employs a half-truth: Europe is not a continent but a subcontinent.

⁴³ Cf., e.g., V. Gioberti, *Del primato morale e civile degli italiani* (1843); G.W.F. Hegel, *Vorlesungen über die Philosophie der Geschichte*, H. Glockner (ed.) 135, 137f. (1928).

according to Art. I-6a, Subpara. 2 TeCE (Art. IV-1, Subpara. 2 dTeCE), shall be the Union's anthem—speak of the Daughter of Elysium, the Island of the Blessed.⁴⁴

Further, the flag (as determined in Art. I-6, Subpara. 1 TeCE, Art. IV-1, Subpara. 1 dTeCE) strongly, if also subtly, confirms the vision of Europeans as an exceptional, even chosen people. Here, the circle of twelve golden stars is of particular importance as it elicits connotations of Europeans as a chosen people in the Christian tradition.

The circle—a line that infinitely returns to itself—is simultaneously the simplest and the most complete geometric form. Without beginning or end, it is a representation of eternity, as are the stars that compose it. That there are *twelve* stars is not a miscount (there are 25 Member States) but part of an intentional scheme. As the number of the closed circle, twelve is the most symbolic of all numbers: the twelve tribes of Israel, Christ's twelve apostles, the heavenly Jerusalem's twelve gates. And twelve stars, arranged as a wreath, form the crown of the apocalyptic woman. The Revelation of John 12.1-2 reads: "And there appeared a great wonder in heaven; a woman clothed with the sun, and the moon under her feet, and upon her head a crown of twelve stars: And she being with child cried, travailing in birth, and pained to be delivered." Prominent readings interpret the crown of twelve stars as a sign of the birth of the Messiah, of the people of God,⁴⁵ or of a universal, new beginning of history itself.⁴⁶ The flag encompasses a promise of salvation, election, and predestination.

A community of values

It is a widely held belief that the declaration of values in the fundamental document of the Union is particularly well-suited to fostering European identity and citizen identification with the Union.⁴⁷ In the language of this article, such values might be further "entries" in the "Dictionary of European Identity." Social scientists confirm this belief and recommend promulgation of highly abstract values.⁴⁸ Thereby, similarly oriented processes of categorization could be stimulated, while the abstract nature of such values would keep dissent hidden. In constitutional theory, this is described as a constitution's "manifesto function."⁴⁹

This approach has had great effect in European constitutional politics. The efforts to represent the Union as an expression of the ethical convictions of Union citizens explains the rise of the term "value" as a key constitutional concept. Its first spectacular appearance was in the year 2000 in the first recital of the Charter of Fundamental Rights (now integrated into

⁴⁴ For more on the final movement of Beethoven's Ninth Symphony, converted in 1972 by H. von Karajan into the European anthem, see C. Clark, "Forging Identity: Beethoven's 'Ode' as European Anthem," *Critical Inquiry* 23 at 789ff. (1997). On the symbols, see generally M. Göldner, *Politische Symbole der europäischen Integration: Fahne, Hymne, Paß, Briefmarke, Auszeichnungen*, (1988).

⁴⁵ C. Brüsch, *Die Offenbarung Jesu Christi*, 56ff. (1955); A. Winkenhauser, *Die Offenbarung des Johannes*, 92f. (1959); M. Damerau, *Die Offenbarung des Johannes. Nach einem Kommentar des Reformtheologen Johannes Hagen (de Indagine)*, Vol. II, 120 (1984); J. Behm, *Die Offenbarung des Johannes*, 64f. (1949); E. Lohse, *Die Offenbarung des Johannes*, 62 (1960).

⁴⁶ J. Ellul, *Apokalypse*, 76f. (1981).

⁴⁷ J. Schwarze, *supra* note 11, at 535, 539ff.; B. Wägenbauer, "Die Europäische Verfassung, (k)ein Platz für abendländische Werte?," *EuZW* 609 (2003).

⁴⁸ F. Neidhardt, *supra* note 7, at 15, 27f.; on the role of principles, see D. Fuchs, "Demos und Nation in der Europäischen Union," in Klingemann & Neidhardt (eds.), *Zur Zukunft der Demokratie*, 215, 230ff. (2000); on the social functions of promulgating highly abstract values, see G. Degenkalbe, "Über logische Struktur und gesellschaftliche Funktionen von Leerformeln," *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 17 at 327, 333 ff. (1965).

⁴⁹ G. Frankenberg, "Die Rückkehr des Vertrags," *FS Habermas*, 507, 513ff. (2001).

the TeCE), which declares “common values” to be the basis of the Union. The term is also the hub of the TeCE’s first recital and even found its way into a prominent position in its operative part (Arts. I-1, Para. 2 and I-2 TeCE).⁵⁰

“Values” are normative convictions of a highly abstract order and are a part of the social identity of the individual.⁵¹ With its recourse to values, the TeCE asserts its roots in the ethical convictions of an overwhelming majority of Union citizens. It presents the entire Union citizenry and the Union itself as a “community of values.”⁵² Scholars of European law will recognize that this is the representation of the status beyond Walter Hallstein’s (mere) legal community. It would not be difficult to press this toward the further assertion of normative homogeneity, the advancement of which could then become an aim of the EU, pursuant to Art. I-3, Para. 1 TeCE. Exactly at this point, the duty to respect national identities (Art. I-5, Para. 1 TeCE) must perform its limiting function.⁵³

With the term “value,” the TeCE posits an identity of Union citizens in the sense of similar expectations of the political system *and* of civic behavior: “These values are common to Member States in a society in which pluralism, non-discrimination, tolerance, justice and equality between man and woman prevail” (Art. I-2, sentence 2 TeCE). This does not yet imply a collective identity in the sense of identification with the Union. Rather, the strategy behind such identity politics seems to be the *stimulation* of processes of identification by citizens with the Union by way of a “manifestation” of these values and implementing legal principles.

At this point, the IGC rejects another most dangerous, and possibly even foolish proposal of the Convention. In selecting democracy as the theme of the introductory quotation (which the IGC deleted), the Convention distinguishes democracy as the highest value of the Union. This primacy, though, arises not solely from the prominent placement. It may soon become widely known that the quotation comes from Pericles’s funeral oration for the soldiers who died in the Peloponnesian War—in which speech democracy is elevated as the value that even justifies sacrifice of human lives.⁵⁴

To suggest democracy as the Union’s primary value is risky. Certainly, most Union citizens value democracy highly, yet the introductory use seemingly intimates that the Union—at least as the dTeCE would have it—exists for the purpose of realizing democratic ideals. Many

⁵⁰ In contrast, one can also infer the Union’s lack of rootedness from the prominence of the values. This, however, only confirms the constructive will which underlies the TeCE.

⁵¹ The history of the concept value is complex. See, e.g., C. Starck, “Zur Notwendigkeit einer Wertbegründung des Rechts,” 47, and E.-W. Böckenförde, “Zur Kritik der Wertbegründung des Rechts,” 33, 45f., both in Dreier (ed.), *Rechtspositivismus und Wertbezug des Rechts* (1990); N. Luhmann, *Gibt es in unserer Gesellschaft noch unverzichtbare Normen?*, 18ff. (1993); J. Habermas, *Faktizität und Geltung*, 5th Ed. 312 (1997); A.-J. Arnaud, *Pour une pensée juridique européenne*, 23 (1991). For a good overview, see also G. Brunner, *Grundwerte als Fundament der pluralistischen Gesellschaft*, 109ff. (1989).

⁵² Art. I-2: “These values are *common* to the Member States in a [*i.e.*, a single] society...” (emphasis added).

⁵³ See A. von Bogdandy, “The European Union as a human rights organization? Human rights and the core of the European Union,” *CML Rev.* 37 at 1307, 1317 (2000).

⁵⁴ Thus, shortly thereafter in Pericles’s funeral oration: “I believe that a death such as theirs has been the true measure of a man’s worth; it may be the first revelation of his virtues, but is at any rate their final seal.” Thucydides II, <http://www1.umn.edu/humanrts/education/thucydides.html>, R. Hooker (ed.) (02.03.04)) Further: “For a man’s counsel cannot have equal weight or worth, when he alone has no children to risk in the general danger.” *Id.* Especially in American constitutional theory, willingness to sacrifice sometimes considered as a key to a collective identity, P. Kahn, “American Hegemony and International Law,” *Chicago JIL* 1 at 1, 8 (2000); for a similar viewpoint, see also U. Haltern, “Gestalt und Finalität,” in von Bogdandy (ed.), *supra* note 29, 803, 817ff.

citizens, however, may—rightly—believe that democracy’s status in the Union is not fully satisfactory; moreover, considering the institutional alterations, the TeCE is unlikely significantly to improve this democratic deficit. Thus, discord would have been likely between the dTeCE’s most prominent declaration and the everyday experience of Union citizens. This would not have helped to foster identity, but rather alienation and cynicism.

Even the understanding of democracy, as becomes apparent from the translations, seemed more likely to promote alienation rather than identification. The German translation delivers an understanding of democracy, with which Wilhelm II or Benito Mussolini would find little fault. Here, democracy means the orientation of policies towards the majority—which (over)extends democracy to include paternalistic, technocratic, or even authoritarian forms of government, so long as the eventual output was for the public good.⁵⁵ In the French text, in contrast, democracy is formulated as majority rule, which immediately effected concern among the smaller states.⁵⁶ Confirming their concern, German Foreign Minister Joseph Fischer, shortly following the finalization of the document, urged his Finnish counterpart not to raise any objections to the text of the dTeCE. By deleting the quote, the IGC has avoided substantial pitfalls.

The TeCE contains a hypertrophy of values: “respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights” as well as “pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men” in Art. I-2. The dTeCE even added “equality of persons, freedom, respect for reason” in the preamble’s first recital, though it has been replaced with a more concentrated formula. Nevertheless, the declaration of values seems rather diffuse and powerless. No manifesto, for which Europe stands, is discernible. “The spirit, the will, and the quill” to formulate a well-suited and persuasive statement were failing. Equally weak is the Union motto: “United in diversity” (Art. I-6a, Subpara. 3 TeCE; Art. IV-1, Subpara. 3 dTeCE) hardly affords any further ground for common identification, especially since it describes the Union as an end in itself, instead of connecting with the ethical convictions of Union citizens. In the entire document, there is no formulation that might become a convincing maxim to adorn building entrances or frontispieces in books and passports.

Who we are not—On Anti-Americanism

Collective identity requires *identification* with one’s in-group and *dissociation* from out-groups.⁵⁷ Like an “I” needs and implies a “You,” a “We” needs a counterpart group. A group must be cognizant of its own peculiarity. This does not suggest that a group necessarily defines itself as opponent of other groups, much less as enemy, as Carl Schmitt influentially postulated in regard to political communities.⁵⁸ Other groups are not “the Other” but are merely different(iated) in certain respects. The untenability of the radical position is proven by successful cooperation among self-cognizant groups or by the regular functioning of multiple, social identities. An adequate understanding of group formation thus does not

⁵⁵ The second sentence of Art. I-44 confirms such a thoroughly problematic understanding of democracy. This sentence, however, in light of Arts. I-2 and I-7, Paras. 2-3, can be interpreted as a partial, by no means complete definition of the principle of political equality.

⁵⁶ This reference is thankfully credited to participants in a seminar with Prof. Martti Koskenniemi in Helsinki in August 2003.

⁵⁷ Angelucci, *supra* note 13, at 40.

⁵⁸ C. Schmitt, *Der Begriff des Politischen*, 6th Ed., 26f., 29f., 50ff. (1996).

negate that which unites all humans, as shown by the universal possibility of communication and normative agreement.

Distinguishability is nonetheless necessary if Europeans are to form a group. This insight has formed the basis of European identity politics since the 1970s; it has teeth but does not bite. Art. B EU Treaty allowed it access to primary law. The TeCE attempts to substantiate the uniqueness of Europeans among “the wider world” (Art. I-3, Para. 4; more conspicuously in the French text of the dTeCE: “le reste du monde,”). Exceptional among the greater part of the world, Europe self-pleasingly distinguishes itself as “a special area of human hope” (fourth recital).

Yet the United States of America also claims this privilege, in a way which Europeans can hardly ignore. Therefore, all further elements, by which the TeCE tries to establish Europeans as extraordinary, refer inescapably (though not explicitly) to the United States. The TeCE thereby affirms conceptions that Europe can find its identity only in delimitation from, perhaps even by standing against America.⁵⁹ The delimitation arises, on the one hand, from the European social model. The second recital finds Europe striving “for the good of all its inhabitants, including the weakest and most deprived.” The last six words are the revealing ones. Building thereon, Art. I-3, Para. 3, Subpara. 2 establishes *social* justice and protection, not justice alone as in the U.S. Constitution, as an objective. The delimitation arises, on the other hand, from the position relative to international law. “[The Union] shall contribute . . . to strict observance and to development of international law, including respect for the principles of the United Nations Charter” (Art. I-3, Para. 4); this commitment is significant, particularly in the wake of disputes over the International Criminal Court, the Kyoto Protocol, and the war in Iraq. It is difficult to interpret it as anything but delimitation from the United States.

There is danger in this path. These elements might be used to foster an anti-American self-image among Europeans. The currently prevalent self-perception of a common “Western world” might be weakened by attempts to realize a “multipolar” world, dear to France, Russia, and China in particular. This would not only be threatening to international stability. It is also quite possible that systematic antagonism to the United States would divide rather than unite the Union.⁶⁰ The IGC attenuated these features. The first recital of the preamble now refers to those “universal values” which form the basis of the ungeographic West which includes most of Europe and the US. By deleting the initial quote the Europeans also avoid the impression of claiming the exclusive right of the Greek inheritance which might have caused substantial irritation in the Atlantic relationship.⁶¹

Yet, the need for distinguishability remains. From the aspect of identity formation, much will depend on the operation of Title V of Part III “the Union’s External Action.” A European identity will be substantially strengthened if the new procedures will present Europeans as a group that acts with respect to other political communities. This has always been a core element of what “Eurospeak” considered “European identity.”⁶² In this regard, the TeCE defines European identity: whereas Art. 2 EU requires the Union to assert its identity

⁵⁹ Cf. C. Koch, “Europa – nur gegen das amerikanische Imperium,” *Merkur, Sonderheft Europa und Amerika*, 617/618 at 980ff. (2003).

⁶⁰ C. Bertram, “Stärke und Schwäche,” *Merkur* 647 at 200, 206 (2003).

⁶¹ Charles Fried and Anne-Marie Slaughter suggested this insight.

⁶² See the document on European identity (note 2).

internationally, Art. I-3, Para. 4 TeCE, which takes its place, requires the Union to “uphold and promote its values and interests.”

c. Political Institutions and Political Participation

If the external aspect of European identity politics requires a European foreign policy, the internal aspect demands institutions which allow political participation at the Union level, thereby stimulating processes of identification of the participating citizens. In the republican tradition, the inclusion of citizens in political decision-making is considered paramount to the formation of collective identity.⁶³ Over the years, the provisions on the European Parliament, on political parties, and on European citizenship were introduced with this finality. Yet, these amendments have so far not triggered a substantial European identity among most citizens.

Many attribute the relative failure to diffuseness of the European institutions and their lack of transparency. Most Union citizens are not familiar with even the basic logic of the political processes, nor are those processes associated with the respective, responsible persons. In liberal, democratic polities, citizens’ identification processes are greatly facilitated, where political decision-making processes are understood and where responsibility for results is personalized. Particularly significant, in this respect, are the focus on heads of government and the shift away from the traditional parliamentarian model in most EU Member States.⁶⁴

The Convention, according to the preface, believes that the dTeCE “simplif[ies] the decision-making processes” and “mak[es] the functioning of the European Institutions more transparent and comprehensible.” This may be the case with respect to the expansion of the co-decision procedure and the slightly simpler mode of weighing votes in the Council (Art. I-24, Para. 1 TeCE); yet, the multiplicity of complex procedures persists, as evidenced by Part III of the TeCE. Much of what initially seems to be simplification for transparency’s sake (e.g., the provisions on legal instruments in Arts. I-32 to I-36 TeCE) could in application actually *decrease* transparency and thus disappointingly fail to meet expectations. Above all, however, the extensive insulation of the most powerful political institution, the European Council, from the mechanics of political and legal responsibility (*cf.* Arts. I-21, Para. 2 and III-282, Subpara. 1 TeCE)⁶⁵ will, at the very least, not encourage identification with the Union.⁶⁶ And it seems, at best, still open, whether a convincing personalization of European politics will succeed within the triangle of President of the European Council (Art. I-21), President of the Commission (Art. I-26), and Foreign Minister (Art. I-27), or whether quarrels over competences will further alienate. Another open question is whether the preconditions for a convincing personalization of European politics even exist—one thinks immediately of the language issue.

⁶³ Cf. G. Frankenberg, *Die Verfassung der Republik, especially* 32ff., 133ff., 213ff. (1997); G. Frankenberg, “Tocquevilles Frage. Zur Rolle der Verfassung im Prozeß der Integration,” in Schuppert & Bumke, *supra* note 7, at 31, 44ff. Also impressive in this line of thought, L. Siedentop, *supra* note 33, at 25ff.

⁶⁴ K. von Beyme, “Die Entstehung des Ministerpräsidentenamtes in den parlamentarischen Systemen Europas,” PVS 10 at 249ff. (1969); K. von Beyme, *Die parlamentarischen Regierungssysteme in Europa*, 589ff. (1970); A. von Bogdandy, *Gubernative Rechtsetzung*, 129f. (2000).

⁶⁵ There is, however, a chance that this deficit will be addressed, at least in terms of legal responsibility. In a proposal, dated 06 October 2003, the Italian Council Presidency suggested that Art. III-270, Para. 1 allow for a basic appealability of acts of the European Council, <http://ue.eu.int/igcpdf/en/03/cg00/cg00004.en03.pdf>, (13.11.03).

⁶⁶ Also in this respect, the IGC improves substantially the Convention’s proposal, as now an action under Art. III-270, Para. 1 TeCE might be brought against the European Council if an act is “intended to produce legal effects vis-à-vis third parties.”

The republican tradition not only demands transparent institutions; collective identity is considered to flow from active participation of citizens. There are traces of this understanding in the TeCE: Part I, Title VI (“The Democratic Life of the Union”), catalogues an array of provisions aimed at fostering identity by way of political involvement.⁶⁷ However, whether and to what degree they will become the groundwork for a widespread custom of civic and political engagement may be the most disputed issue regarding the nature and future of the European Union. Unquestionably, the development of such a custom will be protracted and difficult.

3. Obstacles along the Way from Elements for Identity to Collective Identity

The TeCE has an ambiguous potential with respect to European identity. Some of its elements may strengthen or even create social categories which foster European identity. In contrast, other components seem ill-suited; the IGC deleted some outright counterproductive elements.⁶⁸ Generally, state-oriented terminology (*e.g.*, constitution, law, democracy) burdens the Union with expectations which will be difficult to fulfill.

The limited, available potential of the text alone cannot forge identity. A legally binding document is only *one* step on the long and winding road from a political design for collective identity to a socially embedded institution which actually fosters identity: an “entry” in the “Dictionary of European Identity.” A further step would be the stable grounding of the TeCE in public discourse across the political community. This could be achieved on a ceremonial level through presentation of the European constitution as a symbol of European unity; political rhetoric might have this strategy in mind. The citizenry, however, reacts quite skeptically to political rhetoric, at least to that of the established political parties. A truly effective grounding, then, may depend primarily on the operativity of the constitution as a paramount normative point of reference in political and social debates.

Whether this will be achieved is an open question. The opening principles, after all, cannot easily be operationalized in legal controversies. The success of Germany’s Basic Law in this respect rests to a great extent on two phenomena: firstly, the political practice of conducting important disputes as debates over constitutionality and, secondly, the development of the German legal order since 1950 that has actually placed the Constitution at its very center.⁶⁹ Whether the Union will similarly develop is debatable, especially since Germany’s development has largely been a response to National Socialist dictatorship.

It is also by no means certain that Europe’s constitutional treaty would credibly establish a paramount normativity which is indispensable to a credible “entry.”⁷⁰ Making the European Council the highest institution will hardly benefit an awareness of paramount normativity: like the German monarchs of the 19th century, the Council is largely beyond European legal and political checks and consequently could operate without sanctionable obligation to

⁶⁷ For an attempt to bring these most diverse provisions in one conceptual framework, see A. Peters, “European democracy after the 2003 Convention,” CML Rev. 41 at 37 (2004).

⁶⁸ Some elements, which arguably might foster identity, were not introduced; the most often discussed omission is a reference to God; on this, J.H.H. Weiler, *Ein christliches Europa* (2004). Yet, as pointed out, the flag carries a powerful religious message.

⁶⁹ E. Schmidt-Abmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, 39ff., 56ff.(1998); R. Wahl, “Der Vorrang der Verfassung,” in R. Wahl, *Verfassungsrecht, Europäisierung, Internationalisierung*, 121ff. (2003). On the influence of the basic rights on all areas of the legal order, see H. Dreier, Vorb. Art. 1, Nr. 15, 18, 57, in H. Dreier, *GG*, Vol. 1 (1996).

⁷⁰ M. Neves, *Symbolische Konstitutionalisierung*, 79ff., 104 (1998).

constitutional law.⁷¹ Perhaps even more important, though, is the handling of the Maastricht 3% deficit criterion for national budgets. If, as foreseen in Art. III-76, Para. 2, this criterion becomes formal constitutional law,⁷² and if this duty—which carries high symbolic significance—is breached with impunity, then it may become impossible to portray the TeCE as a source of paramount normativity.⁷³ Moreover, such a constitutional breach could undermine the strict understanding of constitutional law in Member States, itself a most important achievement of the second half of the 20th century.⁷⁴

4. A Focus on Rational Self-Interest as an Alternative to Identity

Confronted with so many questions and so much doubt, it would seem desirable, in both constitutional theory and constitutional politics, to orient the European project not toward collective identity, but toward the—at first glance, less demanding—long-term self-interest of citizens. Thus, one would follow more of a liberal, contract-oriented model of European constitutional law.⁷⁵ This would shift the focus, firstly, to the actions and achievements of the Union. In Art. I-3's hodgepodge of objectives, the TeCE imposes only *one* substantial obligation: in Art. I-3, Para. 2, the Union shall “offer” an area of freedom, security, and justice as well as a single market. Elsewhere it merely “promotes,” “works,” “combats,” and “respects.” Because it is the only domain in which the Union is sufficiently likely to succeed, this obligation should be displayed to citizens as the center of the Union. Secondly, such an orientation would shift the constitutional focus toward the European decision-making processes, with the precise focus on whether these processes sufficiently serve the long-term interests and expectations of the Union's citizens. Therein lies the key to the Union's future.

⁷¹ M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Vol. 2, 102ff.; see also H.A. Zachariä, *Deutsches Staats- und Bundesrecht*, Vol. 1, 75f., 290 (1853). *But cf.* the promising development discussed *supra* note 65.

⁷² Compare the stability criteria, presently grounded in primary law, in Art. 104 EC in connection with Protocol Nr. 20 to the EC Treaty “on the excessive deficit procedure.” Detailed rules and definitions for the application of this protocol were laid down in Regulation (EC) Nr. 3605/93 of the Council of 22 November 1993 (Official Journal Nr. L of 31.12.1993 at 7). On the binding “Stability Pact,” see European Council Resolution on the Stability and Growth Pact of Amsterdam of 17 June 1997 (Official Journal Nr. C 236 of 02.08.1997 at 3).

⁷³ Most important ECJ, judgment of 13 July 2004 in case C-27/04, *Commission v. Council on excessive government deficits*.

⁷⁴ See E. García de Enterría, *La constitución como norma y el Tribunal constitucional* (1981).

⁷⁵ This, according to a Kantian dictum, stating that even devils could found a state, if they have reason. See I. Kant, *Perpetual Peace* (1795); see also I. Kant, *Die Religion innerhalb der Grenzen der blossen Vernunft, Werke in zehn Bänden* (Weischedel Edition), Vol. 7, 751ff., 753 (1968); on Kant's continued relevance, see P. Niesen, *Volk-von-Teufeln-Republikanismus*, FS Habermas, 568 (2001).