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Franz C. Mayer

Jan Palmowski

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European Identities and the EU – The Ties that Bind the Peoples of Europe*

FRANZ C. MAYER
Humboldt-Universität zu Berlin

JAN PALMOWSKI
King's College London

Abstract

This article addresses a crucial issue underlying enlargement and constitutional reform: the ways in which the EU has come to relate to a common European identity. The discussion problematizes the concept of identity in order to distinguish between different types of identities. It proposes that, while a meaningful common European historical identification barely exists, European identities have come to be expressed first and foremost through EU institutions and EU law. The best way for EU institutions, and the Treaty establishing a Constitution for Europe, to respond to and promote such identifications are through enhancing distinctive common citizenship rights and strengthening Europe's supranational institutions.

Introduction

Since the Treaty of Maastricht in 1992, there has been a fundamental transformation in the debate on the process of European integration. A series of referendums from 1993 up to the Irish referendums on the Nice Treaty in 2001 and 2002 as well as the Swedish euro referendum in 2003, have left no doubt that public acceptance of further integration can no longer be taken for granted by the political establishment of the EU Member States (Golub, 1999).

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There are three principal themes to the public debates that took place in the 1990s. One is concerned with the adequacy of EC and EU institutions, given the growing size and complexity of the EU. At issue are, for instance, questions about the bureaucratic nature of decision-making in Brussels (SEC (2000) 901/2; Weiler *et al.,* 1995), unanimity rules in a Union of 25 or more Member States, and the rotating nature of the EU Presidency. A second debate focuses on the policy areas that should be in the sphere of European decision-making.[1] The debate is related to a critique of European competence-grabbing – the EU acting beyond its competences. At the same time, in a number of areas there have been demands for more EU involvement. From the 1990s, for instance, immigration and border controls became more and more central to EU-wide discussions even though this policy arena was not specified in the Treaty of Rome, and the same is true for foreign and security and defence policy. At issue here is the purview of European policy-making, the extent to which matters are best decided at a European rather than national level. Finally, what is being challenged is the democratic legitimacy of European institutions, and so the European Union in general. Given the coincidence of accelerating integration and the lack of public debate on European matters, European integration appeared increasingly as the product of a political elite.

It is striking that these problems have so far been discussed largely in structural terms, in relation to the nature of governance in the EU. When Joseph Weiler edited a special issue of *JCMS* on 'Reassessing the Fundamentals' of European integration, his contributors were asked to focus on 'hard' topics such as institutional reform, social policy and monetary union (Weiler, 2002a). Not one author wrote about the impact of European integration on the evolution of European identities. This is puzzling, because the question of a common identity, at least for the EU Member States, has become one of the central issues facing the EU today. It has become commonplace to assert the disjuncture presented by the accelerated drive for integration and the manifest absence of a popular European 'will', but in essence this is a question of identity. As Valéry Giscard d'Estaing has pointed out, only if there is a meaningful feeling of identification between Europeans can questions about taxation, social policy and the distribution of public funds be settled at a European, rather than national, level (Weiler, 2002a, p. 556).

The question of European identities needs to attract greater scholarly attention, not just in conjunction with the process of deepening integration. With the current wave of enlargement, a European identity has largely been constructed on historic grounds. Overcoming the artificial division imposed

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[1] In spite of the 1992 inclusion of a subsidiarity provision in the EC Treaty, the competence issue has reappeared on a regular basis (see the 2002/2003 Convention Working Groups I and V).

by the iron curtain on a continent with a shared history and culture overrode all the practical problems posed by integrating the different economic and political structures of the eastern European states. However, since for more than 500 years Europe defined itself partially in opposition to the Ottoman Empire, asserting an historic identity for Europe would have profound implications for the question of Turkish accession.

The issue of European identities and their relationship to the European Community is hardly new,[2] but it took on a new twist as the constitutional Convention, set up to prepare major reform of the EU in 2003–04, has given rise to considerable speculation about its impact on the formation of a European identity.[3] The Convention's constitutional agenda was discussed openly and with an invitation to wide popular participation. In this way, the Convention appeared to pave the way for the formation of a Habermasian 'constitutional patriotism': a popular identification with a constitution achieved by continued public reference and debate (Pache, 2002).

Since the issue of European identities has featured so rarely in debates between social scientists, this article analyses some of the most salient issues relating to the formation of European identities. Its central arguments are, first, that a closer look at different types of identities (historical, cultural, constitutional, legal and institutional) strongly suggests that these have been affected by the process of European integration in different ways. When discussing European identities, therefore, scholars need to be much more careful in distinguishing between different types of identity. Second, this article proposes that the strongest identities that exist at a European level are legal and institutional, while a meaningful European historical identity barely exists. In this way, this article warns against exaggerating the possible effects of the Convention and its constitutional proposals on the development of new European identifications. Third, and finally, this article suggests four areas in which European legal and institutional identities already have particular significance: the avoidance of a resurgence in intra-EU nationalism; the mediation of complex and otherwise incompatible sub-identities; the construction of common values through legal practice; and the practical impact of European citizenship.

[2] See the 1973 EC summit document on European identity (Copenhagen summit, 14 December) (EC Bull. 12-1973).

[3] For the result of the Convention's work, see the 'Draft Treaty establishing a Constitution for Europe' of 18 July 2003, Convention document CONV 850/03 (hereafter CE). The Intergovernmental Conference of 2003–04 established a revised version of the text which is IGC document CIG 50/03 (25 November). The political agreement reached on the Constitution is laid down in CIG 81/04 (16 June) and finally CIG 85/04 (18 June), both of which refer to CIG 50/03. A consolidated, preliminary text is available as CIG 86/04 (25 June), with two addenda that include the protocols and declarations to the Treaty, an overall package of more than 700 pages. This text will be renumbered and scrutinized by legal linguists before its signature in Rome on 29 October 2004. All articles quoted here refer to the original draft established by the Convention.

I. Identities

The problem about 'identity' in academic discourse is that the disagreements about its nature are proportional to the proliferation of the term in public and academic debate (von Bogdandy, 2002). From an historical perspective, 'identities' can carry negative connotations as they have usually been invoked by dictators to establish an immediate connection with the people and bypass democracy. In such contexts, 'identity' was used in popular and propaganda discourse precisely because it did not exist. An analysis of the history of political thought further reveals that the contrasting and nefarious conceptions of 'identity' render it almost useless as an analytical category (Niet-hammer, 1998).

In contrast, many sociologists have insisted that an original and persistent concern of the sociological discipline has been a legitimate preoccupation with identities, particularly the social identities inherent in the juxtaposition of community and society (*Gemeinschaft* and *Gesellschaft*) (MacDonald, 1993a). With such self-understanding, sociologists have argued that by the 1990s, the 'quest' for identity had 'become one of the most central characteristics of our civilization's transformation' (Ålund, 1997).

In fact, even European law now formally refers to the concept of identity. Significantly, this identity is referred to in relation to the nation, the Union, and Europe. Art. 6 para. 3 EU, introduced in 1992, reads as follows: 'The Union shall respect the national identities of its Member States'.[4] Art. 2 EU, by contrast, states that the Union shall set itself the objective to 'assert its identity on the international scene', implying the concept of an EU identity. Finally, the preamble of the EU Treaty even seems to presuppose a *European* identity (' … reinforcing the European identity'). In contrast, the preamble of the Treaty establishing a Constitution for Europe (CONV 850/03) refers to a 'reunited Europe' and to the determination to 'forge a common destiny' only. There is no longer an explicit reference to an EU or European identity.

This points to an urgent need for a broad, rigorous and genuine interdisciplinary debate about conceptions of identity which cannot be attempted here. If the importance attached to the existence and manifestations of identities by sociologists and anthropologists justifies the use of the identity concept, its confused application in the EU Treaty makes this need imperative. With this degree of ambiguity in the term 'identity', it is necessary to outline some general assumptions about the nature of identity which underlie the argument of this article.

Identity is understood here as a distinctiveness of an object or a person, a specificity which marks out, but is not necessarily unique to, an object or a

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[4] See Art. I-5 para. 1 CE (CONV 850/03).

person. Identity is essentially janus-faced: it is as much about differentiation and individuality as it is about commonality. As Antonio advised Tasso in the fifth scene of the fifth act of Goethe's *Torquato Tasso*: 'And when you appear to lose yourself completely, compare yourself to others, so that you may recognize yourself'.[5] It is through interaction with each other and with outsiders that individual and group identities are constructed. Certain base co-ordinates such as geographic and familial origin are given, but they obtain their individual meanings through the emotional content gained in interaction with others.

Identities are constructed and mediated constantly, and they require acceptance both within and from without. The importance of external recognition varies, but at its most extreme it is a crucial determining factor in the creation of identities. This has become clear in work on transgender issues, which have noted the importance of the external recognition of sex changes, which was incomplete until recognized by law.[6] This leads to a further, related point: collective identities are established and maintained by rituals through which similarities – and, ultimately, solidarity – are constructed, and these depend on the size and nature of the group (Eisenstadt, 1999). Communication – through words, symbols, or images – becomes more complex as the size of the collective increases, but this does not make it any less necessary.

Identities manifest themselves particularly sharply when challenged at the margins (Norton, 1988). This is critical in two ways. First, as outlined above, collective identities can be observed with relative clarity when juxtaposed against outside groups and norms. It is worth remembering, however, that this may be largely an empirical quirk (MacDonald, 1993a). Just because we can better observe and quantify identities at their boundaries, at the point at which they are challenged, it does not mean that identities that cannot be observed so sharply do not exist. Just because the nature of US national identity could be observed with particular clarity following 11 September does not mean that this identity did not exist on 10 September 2001. Second, not all outside stimuli are the same. As Ignatieff has argued in his reflection on Freud's 'narcissism of minor differences', crises of identity are not induced by perceptions of fundamental differences. It is the minor differences which are threatening to the individual and the collective whole. These cause narcissistic defensiveness and self-absorption (Ignatieff, 1996). For this reason, it is highly misleading to use the binary terms of 'self/other', because not every 'other'

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[5] *Und wenn Du ganz Dich zu verlieren scheinst, vergleiche Dich, erkenne was Du bist.*
[6] See, e.g., the German Law on Transsexuals of 1980, Bundesgesetzblatt 1980 I, p. 1654; see also BVerfGE 49, 286 in that context. For the European level see Case C-13/94, *P / S and Cornwall County Council,* [1996] ECR I-2143 and the ECHR judgment *Goodwin & I* v. *UK,* 11 July 2002; both cases are related to the UK.

has the same significance. Rather, for the formation and articulation of identities, it is much more important to consider the nature of boundaries, the precise point at which identities are challenged and articulated.

A consideration of multiple identities raises important questions about their meaning. For instance, many EU observers writing about identity seek to objectify their conclusions through statistical evidence. *Eurobarometer* polls have been a favourite source, not least owing to the relative continuity of the opinion which they present. *Eurobarometer* polls regularly find that a majority of respondents feel both European and national (Schild, 2001). This perspective may obscure as much as it reveals. From the relatively superficial questions asked by pollsters, it is impossible to gauge the significance which individuals attach to each type of identity. Respondents to the *Eurobarometer* polls may simply have stated the obvious: that they felt German or French or Dutch within the continent of Europe. Put differently, if a European identity is about humanism, small spaces and the historic rivalry between a sacred and a secular order, then all these are, by definition, also inherent in a particular national identity on the European continent. Unfortunately, the draft Treaty establishing a Constitution for Europe is no less ambiguous. Art. IV-1 CE (CONV 850/03) introduces a 'motto of the Union' which shall be: 'United in diversity'. However, if Europe is about 'unity in diversity', then Europe would resemble on a larger scale the Netherlands with its distinctive cultural spheres. The crucial question is whether there is any 'added' value to a European identity which is perceived as such.

Finally, there remains a considerable debate about the relationship between multiple identities and human agency, notably the extent to which they inform individual and collective action. However, it is incontestable that identities form a matrix of possible actions and meanings which, even if ultimately rejected, direct individual and collective actions. Even if the irrational nature of human agency and the fluidity of individual choice are emphasized, this still presupposes the existence of a normative context informed by multiple and collective identities (Kennedy, 1993).

As these considerations make clear, identities are rarely definable in a satisfactory way, especially at a collective level. Even before the work of Anderson, but especially after it, scholars have become aware of the constructed, imaginary nature of collective identities (Anderson, 1990). And yet, of course, an identity that is felt rather than defined is no less real for that.

This article does not embark on a futile and self-contradictory attempt to find a conclusive definition of what European identity is, though it does hope to present a number of constitutive elements. What is much more interesting, and ultimately more fruitful, is an enquiry into the interrelationship between

different types of European identity and Europe's most significant political, legal and institutional manifestation, the European Community/Union.

II. Categories of Identity

History

Since some identities are given, it is not difficult to argue that a European identity exists by virtue of Europe's geographical and historical position alone (Wintle, 2000). Every individual and collective set of identities is embedded in this European context. It is determined through an ensemble of cultural, religious, economic and ideological factors. It is true, however, that these are not necessarily distinctively European as such. Capitalism, Christianity, and humanism are pursued beyond Europe, and often with much greater vigour. Yet, it is their particular historical and cultural specificity that is unique. As Eisenstadt has argued, the combination of the rivalry between secular and religious powers, and the relative strength of the periphery against the centre, created a civilization that was distinctively European (Eisenstadt, 1987).

At different points in time and at different levels, Europe could be defined intellectually through humanism, politically through the peculiar rivalry between the Papacy and the Holy Roman Emperor, and culturally through its courts and the nobility (Ifversen, 1997). However, what matters in their impact on an historical identity is less the common European heritage of Charles V, the (Counter-) Reformation, or imperialism; what matters is the historical memory these legacies have inspired, and in this regard the historical narratives that have emerged have been entirely different. The nationalist movements of the nineteenth and twentieth centuries invented their own historical narrative, and even intrinsically cross-border phenomena such as the industrial revolution, or the Napoleonic wars in which Dutch, Saxon and Bavarian soldiers fought on the side of Napoleon, are still predominantly remembered in their national context. The divisiveness of historical memories has been amplified during the twentieth century. The First World War provided considerable grounds for a common memory of suffering among the Allies, which even stretched as far as the Axis powers (Winter, 1998). However, for most countries this was soon overshadowed by the horrors of the Second World War. For almost all European participants except Britain, this did provide for a common experience of occupation, but the circumstances under which this occurred, and the combination of suffering, resistance and complicity became highly distinct for individual countries or even regions. The memory of the Second World War, and the national myths of uniform heroism created to bolster the post-war regimes of Europe, both helped to differentiate, rather than homogenize, the historical identities of Europeans.

This is not to deny that, following the Second World War, many political and intellectual leaders were inspired to overcome the nadir of European history with a return to European humanist, enlightened and democratic traditions. At the same time, the western part of Europe gained an institutional dimension through the European Coal and Steel Community in 1952 and the EEC in 1958 at precisely the time when a popular European feeling of community was at a low ebb. 1945 left not simply Germany, but the whole of Europe humiliated, as the Dutch were to find out in Indonesia in 1946–7, the French in Indochina in 1954, and the British and French at Suez in 1956. It is quite legitimate, therefore, to consider the foundation of the EEC not as a sign of European strength and an expression of its historical identity, but an admission of weakness, an institutional creation necessitated precisely by the lack of a positive identity that could have sustained itself between the two power blocs of the cold war (Milward, 2000; Serra, 1989, Delanty, 1995; Wintle, 2000).

The absence of a common historical identity not only enabled the realization of Monnet's vision of the EEC as a technocratic creation that would bring about a thoroughly 'modernized' Europe created by an enlightened bureaucracy. The lack of a common European historical identity has meant, for instance, that on 'Europe Day' Europeans have been unable to celebrate any shared memory before the Schuman declaration of 1950. Despite its evident attempts to the contrary,[7] the EU cannot refer to a popular, historic founding myth akin to the US Declaration of Independence, the Glorious Revolution with its cause of parliamentary sovereignty, or Bastille Day (Münkler, 1995). There was no founding moment to define a common, positive and transcendent ideal of what the EEC was about, and what it differentiated itself from.[8]

Since history teaching in school curricula has continued to present largely a national historical narrative, a European historical memory has had little opportunity to develop. Teaching on the history and structure of the EU in schools is paltry compared to the history and government of the nation. European history is still an agglomeration of its national histories, even though scholars in particular areas have emphasized the cross-border dimensions of the industrial revolution (Pollard, 1981) or the Napoleonic wars.[9] It comes, therefore, as little surprise that Europe's most widely used representations,

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[7] Note that Art. IV-1 CE (CONV 850/03) now introduces 9 May as Europe Day that 'shall be celebrated throughout the Union'.

[8] The destiny of the draft Constitutional Treaty established by the Convention is symptomatic: it was not handed over to the Member States – who must hold an Intergovernmental Conference to modify the founding treaties – on one day, but parts of it were submitted on 20 June 2003, the rest on 18 July 2003. The IGC then agreed on the final version of the text on 18 June 2004. It was due to be signed on 29 October 2004, and it is remarkable that no attempt was made to find a symbolic date instead.

[9] Thus the famous first sentence of one of Germany's most famous national histories: 'In the beginning was Napoleon' (Nipperdey, 1992).

euro notes and coins, present fictional, rather than real, monuments of a shared past. The European perception through the national historical lens could not be symbolized more aptly than by the Greek €2 coin. It depicts the founding myth of Europe, the rape of Europa, but this is represented on the coin's *national* side. Even though Europe can be distinguished by a common historical experience, then, the historical memory of this experience has continued to remain divisive. There is no sign that the European Union has made any headway in creating an historical identity amongst the people of its Member States. In other words, European integration has had little discernible relationship to the divergent historical memories prevalent in EU nations.

Culture

The absence of a European historical identity has a deep impact on the question of an overarching cultural identity, of which it is an important part. Owing to the different historical and cultural traditions of its members, it is not surprising that the buildings of the EU's institutions have been inspired by forward-looking modernism. This epitomized the fact that Europe had little success in creating cultural symbols of its own, and made it all the more difficult for the European Union to respond to the cultural challenges of globalization and social atomization (Weiler, 1999). These phenomena led not to a new European cultural identity, but to its antidotes, new ethnic, national and religious identities. In response, the concern developed that the closer the EU tried to link itself to a European identity, the less room there appeared to be for culture as distinguished by individuality and creativity (Sontag in Lützeler, 1998).

Perhaps the most intractable block to the development of a common cultural identity within the EU has been that of language (Labrie, 1993; Bruha and Seeler, 1998; Manz, 2002; Mayer, 2003a). Clearly there is no common language like English or Esperanto. The need to conduct EU business in 11 official languages before the fifth wave of enlargement in 2004 meant that, by 2000, about 3000 translators or interpreters were employed by the institutions of the EU on a full-time basis, with about one-fifth of the Commission's graduate-level employees working as translators or interpreters (Stevens, 2001). Lack of a common language has not only hindered the practical business of the EU, it has also hindered the popular identification of Europeans with their politicians, and with each other.

Europeans, then, can communicate with each other through historical memory and language only with difficulty. A common culture can only be observed in the realm of 'high' culture though, as evidenced by the pan-European attention generated by Euro 2004, football may represent an exception here (Crouch, 1999). Even if one takes a more optimistic view that there are

measurable cultural co-ordinates that are remarkably similar across different European countries beyond cosmopolitan elites (Latin, 2000), the question remains of the extent to which a common heritage of classical music and the visual arts are able to define Europeans against art and music lovers in other continents.

If anything, then, Europe's cultural hallmark has been precisely its heterogeneity and multiplicity. In the realm of popular culture, cuisine, language, or architecture, it appears futile to lament the absence of a common culture when Brussels has identified its cultural agenda as the preservation of Europe's diversity. Even if the European Community was founded first and foremost as an *economic* community, it is striking that there has not been the establishment of a distinctive European 'market ethic' akin to the powerful symbolic nature of the free marketplace in the USA. It is not the case, as some scholars maintain (Delanty, 1995), that the EU has espoused a materialist 'European ideal'. Nor has a common identity been created around a conception of the EU as a bulwark against excessive market orientation. In fact, this notion remains deeply divisive. In some countries and in some political camps, this appears to be the EU's greatest attraction, while for others a social agenda appears to be the EU's greatest vice (Thatcher, 1988).

This implies a particular challenge to those who consider a minimum of homogeneity as a prerequisite not only for the state, but for any social construct from which public authority emanates. Such a view has informed an important strand of German constitutional thought since the work of Carl Schmitt. It has been expressed in a continued scepticism towards dual citizenship in Germany. It has also been reflected in the ideal of a homogenous German *demos* which underlay the German Constitutional Court's concept of democracy, and which manifested itself in its decisions on the participation of foreigners in municipal elections. However, the Court's Maastricht decision was met with vehement criticism, alarmed by what it considered a simplistic view of society and social actors (Weiler, 1995). Indeed, scholars have underlined the importance of heterogeneity as a determining feature of any social construct (Tully, 1995). This approach, which may also be seen as the core element of most theories of federalism, is not without its problems, either, not least because of the analytical difficulty in determining the relationship between the heterogeneous parts. This important debate demonstrates that heterogeneity is clearly a conceptual problem for any notion of identity, as identity has an inbuilt feature of similarity and community.

In contrast to a more narrowly defined historical narrative, whose national context was often mutually exclusive and divisive at a European level, Europe's cultural diversity may not be detrimental to the formulation of a European identity, if it is this diversity in itself that is considered European as

such. However, it is difficult to see how Europe's pronounced heterogeneity can provide for a positive cultural identification. Cultural identities, therefore, scarcely provide for a popular and substantive identification at a European level to reflect and support ever closer political integration.

Constitution

The constitutional process and the ensuing Convention were clearly more than a response to the practical difficulties of an expanding EU. As Weiler has stated, constitutions are also expressions of the moral and political identity of the *demoi* they seek to define (Weiler, 2002b). In this context, it is a moot point whether the Convention's final document is a constitution from the point of view of constitutional theory or not (Kirchhof, 2002, 2003). The constitutional process and the constitutional rhetoric inherent in the work of the Convention have been closely related to an attempt to express a European identity.

The 2001 Laeken declaration recognized a debate on a European constitution which had entered the realm of operative politics a few years earlier, not least through Joschka Fischer's Humboldt speech of May 2000 (Fischer, 2000), which triggered a series of contributions by acting foreign ministers and heads of government (Chirac, 2000; Verhofstadt, 2000; Blair, 2000). In the process, they took up a debate initiated by the founders of the Communities themselves. The official explanations by the German government annexed to the ECSC Treaty in 1951 and to the EEC Treaty in 1957 stated in identical terms that the respective Treaty was about creating a 'European entity of constitutional nature' ('*ein europäisches Gebilde verfassungsrechtlicher Gattung*') (Ophüls, 1966).[10] In the decades following the creation of the Communities, however, constitutional references were increasingly avoided out of what has been coined 'semantic prudence' (Magnette, 2000): European integration became dissociated from any reference to the vocabulary linked to the nation-state: there are no European laws but regulations and directives; there is no government, but a commission; the whole construct was coined a Community, later a Union, but not a federation and certainly not a state (Mancini, 1998; Weiler, 1998).

The Convention renamed the regulations and directives European laws and European framework laws,[11] and proposed to introduce a European minister of foreign affairs. Some semantic prudence subsists in the notion of a constitutional treaty ('Treaty establishing a Constitution') that was suggested by the Convention. In fact, the notion of a constitutional treaty does not make

[10] Deutscher Bundestag Drucksache 2401, 1. Wahlperiode; Deutscher Bundestag Drucksache 3440, 2. Wahlperiode.
[11] Art. I-32 CE (CONV 850/03).

sense: either it is a constitution in the substantive meaning, or it is a treaty in the sense of public international law (Schmitt, 1928; Grimm, 1995). Nevertheless, it is striking that even those who so far have been considered rather reluctant to engage in further integration – such as the UK government – have begun to refer with greater ease to a concept of a European constitution.[12] In the first years of this century, there has been a growing acceptance of a common constitution in clear recognition of the far-reaching political and ethical dimensions of European integration.

It is important to note that the constitutional Convention's attempts at finding expression for a European identity has hardly been the outcome of a constitutional patriotism (*Verfassungspatriotismus*) in a Habermasian sense. The relationship between constitutions and identity has been examined elsewhere (von Bogdandy, 2002). However, it is important not to exaggerate the prospects of strengthening whatever kind of European identity exists by means of a text. The Nice referendums in Ireland in 2001 and 2002 illustrated the limits of European identity-formation generated by a European constitutional debate, and they provided ample demonstration of the pitfalls inherent in holding constitutional referendums about European issues.

Clearly, neither the Convention nor the Constitution are the outcome of a European constitutional debate, nor is there much evidence that it has generated the kind of public discussion envisaged by its creators. Instead, it is difficult to imagine the Convention without the constitutionalization of European law that preceded it. EU law claims primacy over national law,[13] even if that national law is protected by a national constitution.[14] European law affects the individual directly in his or her legal status. Indeed, the most visible evidence of that aspect of the constitutional dimension of European integration, which was recognized by national constitutions[15] and constitutional court rulings,[16] is the fundamental rights protection granted by the European Court of Justice (ECJ) against European acts.[17] The Convention, therefore, is best understood not in relation to a 'public sphere', but as a formal recognition of the constitutional – and moral – dimensions inherent in the process of Euro-

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[12] See the contribution by the British government representative in the Convention, Peter Hain 'Constitutional Treaty of the European Union', CONV 345/02.

[13] Case 6/64, *Costa/ENEL,* [1964] ECR 585 (English special edition). See Art. I-10 para. 1 CE (CONV 850/03) for the codification of the principle as suggested by the Convention.

[14] Case 11/70, *Internationale Handelsgesellschaft,* [1970] ECR 1125; Case C-473/93, *Commission* v. *Luxembourg,* [1996] ECR I-3207.

[15] See Art. 23 of the German Constitution or Chapter 10 § 5 of the 1975 Swedish constitution, as amended in 1994, both referring to the protection of fundamental rights at the European level.

[16] See the German Constitutional Court's *Solange II* decision (BVerfGE 73, 339), the *Maastricht* decision (BVerfGE 89, 155) and the *Banana* case (BVerfGE 102, 147).

[17] The ECJ has developed fundamental rights protection based on general principles of law, see Case 29/69, *Stauder,* [1969] ECR.419; Case 4/73, *Nold,* [1974] ECR 491; Case 44/79, *Hauer,* [1979] ECR 3727 and today Art. 6 para. 2 EU.

pean integration. This explains the apparent paradox that, in a *Eurobarometer* survey of 2002, respondents strongly approved of a constitution (with 65 per cent of respondents in favour), while the Convention attracted the trust of only 29 per cent of respondents. Indeed, over half of French respondents had not even heard of its existence.[18] The impact of an evolving European constitution on the formation of European identities is important not so much as a text as in the institutional and legal processes which helped bring the Constitution about, and which the Constitution in turn seeks to enshrine.

Institutions

At a first glance, it appears that the institutions of the European Union have done their best to remain detached from any expression of a single identity. Their offices remain scattered all over Europe, as the European agencies or the ECB have been located outside Brussels, Luxembourg and Strasbourg, and their competences *vis-à-vis* national polities have remained non-transparent. Moreover, the European Community has created structures and administrative processes that are unique in their nature and complexity. In any language, it is almost impossible to fathom what the Ecofin Council, the Coreper, the 'Antici', the Euro group, the DG RELEX, and the troika actually do and what exactly they mean.

    Despite this, public approval for the institutions of the European Community is remarkably high. By 2002, it had recovered from its low point following the resignation of the Santer Commission in 1999, with 59 per cent of *Eurobarometer* respondents placing their trust in the European Parliament, 54 per cent in the European Court of Justice, and 53 per cent in the European Commission. In most cases, these approval ratings are still significantly lower than for the respective national institutions, but they are remarkable in two ways. First, consistently high approval ratings for national institutions and variable ratings for European institutions show that it is possible to identify with both national and European institutions, but the rate of change in the latter is relatively unaffected by the former. Identification with European institutions is not directly linked to national attachment. Second, approval ratings for European institutions, including the relatively young European Central Bank (49 per cent), is higher than general approval for the Council, even though this body is composed of government representatives who are much more visible to the general public. At a European level, therefore, individuals identify more with European institutions than with their own national representatives.

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[18] See «http://www.europa.eu.int/comm/public_opinion/archives/eb/eb58/eb58_de.pdf», and «http://www.europa. eu.int/comm/public_opinion/archives/eb/eb58_summ.pdf».

A crucial reason for the popular acceptance of European institutions lies in their system effectiveness (Dehousse, 1995; Wallace and Smith, 1995; Banchoff and Smith, 1999; Hansen and Williams, 1999; Lord and Beetham, 2001). The high approval ratings scored by the European Commission and the European Parliament in the *Eurobarometer* polls are only explicable in conjunction with the fact that, on a range of issues, citizens trust EU institutions more than national institutions. Clearly, this is partly the result of the EU institutions facing fewer hard choices than national governments (Moravcsik, 2002). At the same time, the perceived value of European institutions may lie less in the scope of their policies than in the importance attached to them by the public. If, for instance, there is a wide consensus that the EU should regulate environmental protection and animal welfare, then these may not be among the classic responsibilities of government. By resolutely pursuing these issues, however, European institutions respond to public anxieties, and in this way help express concerns which people increasingly identify as European.

Since the introduction of the co-operation and co-decision procedures from the Single European Act onwards, the European Parliament has consistently sought to maximize its political effectiveness at the risk of democratic legitimacy. Such a choice was not faced by the European Commission, the technocratic guardian of the treaties. From the 1990s, the Commission became increasingly visible to the individual as a guardian of consumer rights in the spheres of environmental protection and competition legislation. Sometimes it related directly to the individual citizen even against her own government's pursuit of the 'national interest'. Especially since the creation of the Single European Act, and the extension of areas under the EC's purview, the European Commission has succeeded in creating an independent, popular image for itself, even if this was not always positive.

EU institutions have managed to create a distinctive profile. These may have particular manifestations in different Member States, but they nevertheless serve as a common reference point for the peoples of the EU. The ability of European institutions to express a common identity is also rooted in the nature of the EU. Since there is no European historical narrative on which a common identity could be founded, European institutions could themselves become carriers of a European historical myth. Where extreme policy differences used to be contested through military conflict, they are now expressed through late-night bargaining in supranational institutions, based on the rule of law. In this sense, European institutions can even be seen as the decisive expressions of a 'new' European post-1945 identity, as guarantors of Art. 6

EU,[19] and in the Charter of Fundamental Rights of December 2000, which has become Part II of the Constitution established by the Convention (CONV 850/03). Since their creation, then, European institutions reinforced the democratic legitimacy of each Member State, and in turn became the manifestation and guarantor of a European 'tradition' of rationality and enlightenment in international relations that was in fact quite new and that, as recent events surrounding the US-led invasion of Iraq have shown, is still not uncontested.

Law

The principal way in which European institutions have transformed European national relations is through the law. Hallstein's notion of a community of law (*Rechtsgemeinschaft)* captures best this feature of European integration (Pernice, 2001). As in Europe, so in all Member States of the EU, the rule of law or *Rechtsstaat* or *Etat de droit* – although slightly varying concepts – have a particular defining role. National law emanates from the supremacy of the national constitution, be it a text or a functional equivalent. These in turn define the political, social, economic and cultural foundations that characterize each individual state. For this reason, the creation of a European body of law that has acquired constitutional status has been a singular success story that had a crucial effect on the nature of European integration (Burley and Mattli, 1993). Beginning with the rulings that established the direct effect of European law at the national level (*Van Gend en Loos,* 1963) and the primacy of European over national law (*Costa*, 1964), European law has gained constitutional status by affecting the legal status of the individual directly, in terms of rights and duties, and in this way expresses what Europe is and what it aspires to be. The existence of European fundamental rights [20] illustrates the particular nature of European law, precisely because no international organization provides for fundamental rights protection against its *own* acts.

There are, of course, important practical reasons for the ECJ's particular significance, which have been well established. The ECJ has been considered more independent than the Commission and has, therefore, been able to help states avoid situations of the prisoner's dilemma by determining outcomes that are to every member's benefit in the long run (Shapiro, 1999). Many landmark decisions were taken with reference to Art. 234 EC (ex Art. 177), which successfully enmeshed national and Community legal concerns by instrumentalizing the national and regional courts, which were granted the rights – and duties – of initiation and implementation (de la Mare, 1999).

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[19] Para. 1: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.
[20] European fundamental rights were established by the ECJ as general principles of European law long before the 2000 Charter of Fundamental Rights (see Art. I-7 CE (CONV 850/03)).

Perhaps most importantly, the ECJ has benefited from a sense of inertia from Member State governments, even if they were often reluctant to accept its verdicts. Member States were often content to accept an assumed rationality of the law. Moreover, reversing an ECJ decision requires a change in EU law. This in turn has to be approved in the Council by a majority of votes at best, and by unanimity in conjunction with the European Parliament, or even a modification of the treaties at worst (Stone Sweet and Caporaso, 1998).[21] Because of the ECJ's independence, its pronouncements are also much less subject even to informal sanction from national Member States than the decisions of other European institutions, such as the Commission or the European Parliament.

Despite, or perhaps because of, its relative independence, the ECJ has been acutely aware of the public acceptability of its decisions. It has used the legal service of the Commission to ascertain the acceptability of particular decisions (Mattli and Slaughter, 1998). In this way, following the heady days of the 1970s and 1980s, the ECJ's pronouncements became much less integrationist as it mirrored the more sceptical public mood of the 1990s. An example of the Court's sensitivity towards the perception of European integration is the Court's opinion on EC membership of the European Convention on Human Rights (ECHR).[22] Here, the Court held that the EC could not accede to the ECHR without prior modification of the treaties, emphasizing the 'constitutional nature' of such an accession, which reflects the concern about the boundaries of the EU's powers expressed by the German Constitutional Court some time earlier in its Maastricht decision.[23] A more recent example is the Court's ruling in the *Dory* case, where the Court clearly stated that the specific modalities of military service in a Member State – in Germany, only men are drafted – is outside the realm of European law.[24]

Contrary to the perception of some critics, the Court has been increasingly sensitive in exercising its powers to monitor EU powers and competences.[25] For this reason, the Convention's proposals for the issue of powers and competences has neither led to a fundamental reshuffling of the competence provisions nor of the system to control the exercise of competences.[26]

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[21] An example of treaty modification overruling the ECJ is the protocol to Art. 141 EC, overruling the *Barber* decision, Case C-262/88, *Barber* [1990] ECR I-1889.
[22] Opinion 2/94, *ECHR*, [1996] ECR I-1759.
[23] BVerfGE 89, 155 (188).
[24] Case C-186/01, *Alexander Dory* [2003] ECR I-2479. The case can be seen as a follow-up to the British *Sirdar* case (Case C-273/97, *Angela Maria Sirdar* [1999] ECR I-7403) or the German *Kreil* case (Case C-285/98, *Tanja Kreil* [2000] ECR 69), where women were given access to the military.
[25] See, e.g., the *Tobacco* case, Case C-376/98, *Germany/EP and Council* [2000] ECR I-8419. For a detailed account, see German ECJ Judge Colneric's contribution in Colneric, N., *Europäische Zeitschrift für Wirtschaftsrecht* 2002, p. 709.
[26] See the rather unspectacular result of the Working Groups I and V of the Convention and Arts. I-9 to I-17 CE (CONV 850/03).

More recent examples of the Court's lack of judicial activism are its reluctance to refer to the Charter on Fundamental Rights, promulgated in December 2000 as a merely political, non-binding instrument. One may argue that the Charter has some legal relevance as it consolidated existing law (Menéndez, 2002) and required self-obligation of the institutions. However, in disagreement with the Court of First Instance[27] and the Advocates-General,[28] the Court has been eager not to appear as interfering with the political process underway in the Convention in 2002–03, whose agenda also included the legal status of the Charter.[29]

This suggests strongly that, as the ECJ has sought to respond closely to the public sphere, its pronouncements can be seen as expressing a general popular consensus which may not be synonymous with the will of national governments. In the final analysis, the main reason why individual states have been either unable or insufficiently willing to overturn the ECJ's interpretations is because of a lack of sufficient popular pressure to do so. Consequently, even if the ECJ was at times perhaps a step ahead of many a political elite, this does not mean that its integrationist leanings were necessarily out of step with public opinion in the Member States. In this way, the ECJ has become pivotal in helping to articulate substantive aspects of a European identity.

Because of the constitutional implications of direct effect and primacy, European law has become intrinsic to national constitutional debates and political discourse in addition to its immediate application. Just as at a national level law can be considered as a cultural and political artefact which, for its effectiveness, needs to represent a majoritarian consensus, so European law, for its effectiveness, has had to represent a popular consensus beyond the political realm (Haltern, 2001). The ECJ could not have embarked on its integrationist phase in the 1970s and 1980s had this contradicted a majoritarian consensus amongst the peoples of Europe, just as it had to moderate its judgments in the 1990s in order to reflect a changed public mood. Beyond the common points of reference provided by other European institutions, the ECJ, through its pronouncements on social, cultural and economic rights, has established inalienable foundations for an identity common to all Europeans living within the EU.

III. Identities between Europe and the Nation

This article has argued that the European Community and then the European Union have been singularly successful at shaping and expressing European

[27] Case T-54/99, *max.mobil,* [2000] ECR II-133.
[28] AG Tizzano 8.2.2001, Case C-173/99, *BECTU*, [2001] ECR I-4881.
[29] See Working Group II of the Convention, Final report CONV 354/02/WG II 16. The Charter finally became Part II of the Constitution (CONV 850/03).

identities. It is not insignificant that, within Member States, the term 'Europe' has become increasingly synonymous with the institutions of the European Union (for better or worse). Of course, the EU is not synonymous with the European continent, yet clearly one major motivation for the central and eastern European countries in joining the EU was the desire to be 'part of Europe' again. Partaking as a full member of EU institutions became an expression of a country's belonging to Europe. The institutional and legal mechanisms of the European Union have enabled Europe to overcome its historical divisions, and to 'invent' a new identity based on popular notions of justice, and the legalization of intra-European conflict.

If we finally ask about the ways in which European institutions have shaped identities to make them distinct from other, national or cultural identities, at least four areas can be identified. First, the EU has helped in the construction of common values through its mediation between other forms of individual and collective identities. Through its norms and institutions, the EU has become indirectly the final reference point for the negotiation of individual and collective sub-identities. This has been the case through Community legislation such as Regulation 1408/71 or Directive 76/207, as well as the pronouncements of the European Court of Justice in that field, the landmark decisions on the equal treatment of men and women being the most famous.[30]

Perhaps more complex has been the impact of the European Union on cultural identities. European institutions can relate to Europe's heterogeneous cultural identities most meaningfully in both a composite *and* a mediating function. In an age of globalization and cultural marginalization, particular cultural identities that would normally be endangered can be protected and promoted better at the European level. In line with the principle of subsidiarity, the European Union can help harmonize what is necessary at a supranational level precisely in order to safeguard, protect and nurture what is specific to the local level. The success of this approach is clearly evident in the rise of regional nationalisms from Scotland to Catalonia, whose main shared characteristic is a common reference to the European ideal institutionalized by the European Union.

The third and fourth ways in which the European Union has helped shape a distinctive, 'value-added' European identity is closely related to the persistence of national identities. The aftermath of 9/11 made clear that, globalization notwithstanding, it is the nation-state that continues, with some notable exceptions, to be the primary frame of reference for the community. The emotional tenacity of the nation-state is complemented by its legal inescapability (*Unentrinnbarkeit*). Individuals cannot really freely choose their nationality and the national identity that results from this: it is given to them, and they

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[30] The landmark case is Case 43/75, *Defrenne II* [1976] ECR 455.

may be able to exchange it for another nationality only after an arduous, cumbersome and difficult process. In its conception, nationality is an exclusive concept. No matter whether defined by territory or blood, one tends to have only one nationality – multiple national identities are largely possible through differences in the way states define nationality. Legally as well as emotionally, nationality is a property that can be neither freely chosen nor freely rejected.

European identity is closely tied to national identity, but it can and does move beyond it, in two ways. First, European identity is – obviously – common to all Europeans, it complements national and regional identities. As a composite identity made up of a large number of national identities, it is both the same as and more than each individual national identity. A European identity does not resolve the exclusivity of nationalism, but it moderates it. Rights such as consular protection in third countries by any Member State consulate or embassy to any EU citizen do not level national distinctiveness, but create a sense in which EU nationalities are less exclusive in relation to each other than they are to outside nationalities. This has become evident in the past decade. The 1990s witnessed a remarkable increase in nationalist fervour worldwide. Against this trend, the EU Member States and its applicants for membership underwent a process of dramatic integration, and all the EU experienced was a crisis of confidence. Many of the EU's Member States had to contend with their own share of right-wing populism, but so enmeshed had the national establishments become with the EU that aggressive nationalism could never become a majority position in any of the Member States. It is easy to overlook what is not there. Bearing in mind Ignatieff's argument about the 'narcissism of minor differences', it would be natural to expect inner-European rivalries to have been augmented rather than diminished in recent decades. The fact that this has not happened is a major achievement on the part of the EU itself. It has happened by placing the narcissism of minor differences outside the EU. This process is not complete, as a look at the foreign perspectives of British newspapers will reveal with depressing regularity.[31] However, the internal mediation of Member State differences through the EU has been accompanied by a marked and continuing reduction in friction between national identities. The lack of a hostile, competitive nationalism between the countries of Europe has been a truly remarkable achievement by the EU, both in the context of the continent's history and its geopolitical environment. National identities still matter, but within the EU the barriers between them have become permeable.

[31] A recent example is the British taboid newspaper, the *Sun's* coverage of the Convention in 2003 ('1000 Years of British Sovereignty Threatened').

Finally, and this is the fourth point, even before Maastricht and the formal creation of a European Union citizenship, the European Community guaranteed equal access to social and employment rights for all citizens of EU Member States. The principle of non-discrimination on the grounds of nationality is the core of European law. Article 12 EC states: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'. This means that European integration has reduced dramatically this concept of the inescapability of the state. It may take decades for a Scot to acquire German citizenship, and it may be forever impossible to gain popular acceptance as such – but it is only the EU that has created, and continues to protect, the freedom of movement, the freedom to provide services and the freedom of establishment in other EU Member States and thus the right to settle anywhere in the Union. European citizenship, then, has severely limited both the exclusivity of nationality and the inescapability of the state. The numbers of those who actually settle down in another Member State or who move around the Union may (still) be relatively small. Nevertheless, European citizenship has generated the right to move and settle freely across the European Union. European citizenship, as the *sine qua non* for a meaningful European identity, allows every EU citizen to live freely and equally among the citizens of any other EU Member State. European identities have acquired their principal meaning in that they shape the individual's educational, legal and socio-economic horizon, thereby giving her the wherewithal to appropriate emotionally and legally any state and region within the EU.

Conclusion

Identification with the European continent has always been linked to the continent's history, geography and culture. However, the current, particular and 'value-added' meanings of a European identity have been reshaped, expressed and amplified through the process of European integration since the 1950s. The treaties have provided ever-growing spheres of institutional communication which have become the prime reference points in the evolution of a European identity over the past 40 years. By transforming international and intercultural disputes into internal arguments resolved through the mediation and the rule of law, the treaties manifested and amplified a post-war myth of humanism, civilization and culture, which was integral to the successful nation-building attempts of most Member States. European law helped European institutions mediate their composite individual and collective identities. It was also instrumental in shaping a majoritarian consensus about common values and norms, expressed through the careful mediation of the ECJ. In this way,

European identity has become identifiable and meaningful, as European institutions and the law articulated commonly held values beyond, and often in opposition to, the context of 'national interest', and as they impacted on a growing number of collective sub-identities within their purview.

At least four policy conclusions follow. First, in recent years, opponents to enlargement have invoked a supposed historical and cultural identity, especially with regard to Turkey. This is a crucial issue for the EU, since in 2004 the decision on the formal opening of negotiations on EU membership will be taken. Some of the implications of Turkish membership are discussed elsewhere (Lenski, 2003). What can be said here is that, since a European identity is not based on a common historical memory, it is difficult to argue that Turkey should be excluded on those grounds. As long as Turkey can fulfil the institutional, economic and legal requirements for membership, all of which are necessary to meet other conditions such as human rights, Turkey is not principally excluded from a European identity which has been shaped so decisively by the institutions and the law of the EU.

A second policy conclusion applies to the powers and competences that will be attributed to the EU. What would best respond to a European identity is not so much that the EU will receive more of the 'traditional' state powers such as taxation. Instead, when considered from the perspective of identities, this article builds on Weiler's point that the EU will need to receive clearer powers in areas that respond to the 'European' identities of the population (such as environment, human rights, and possibly defence), and it needs powers of enforcement (Weiler, 2002b).

Third, it is important to emphasize that the constitutional proposals deliberated by the Convention, and the Treaty establishing a Constitution for Europe agreed upon by the ensuing Intergovernmental Conference, will be less significant as a text, and more for the actual institutional reforms which they aim to initiate. In particular, reform proposals that risked destroying the institutional balance between the Commission and the Council by more or less abolishing the distinct role and function of the Commission were endangering the entire integration project:[32] a European President or a *de facto* merger of Commission and Council would have been as threatening to an institution- and law-induced European identity as cutting back judicial review on European acts by restricting the jurisdiction of the European Court of Justice (Art. 46 EU). In the long run, such institutional and legal questions are much more important for the development of a European identity than more explicit con-

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[32] In that context, see Arts. I-18 to I-31 CE (CONV 850/03). Note that there was no working group on institutional questions, which explains to some extent why institutional issues were the main focus of the Intergovernmental Conference that started in October 2003 and that ended in June 2004.

structions of the Union's historical, cultural and religious identities in the preamble.

Finally, the process described here of the emerging link between EU institutions and the law, on the one hand, and identities, on the other, is not irreversible. Even though in early 2003 public opinion within the EU on a US-led invasion of Iraq was remarkably homogenous, the shortcomings of the common foreign and security policy (CFSP) meant that this could not be translated to an institutional level. It is conceivable that the political divisions that have followed – if they became entrenched – would have effects beyond the immediate ability to construct a common foreign policy (Mayer, 2003b). It could challenge the very essence of a recently evolved European identity, based, as it is, on institutional mediation and the rule of law.

Correspondence:
Franz C. Mayer
Humboldt-Universität zu Berlin
Walter Hallstein-Institut für Europäisches Verfassungsrecht
Unter den Linden 6
10099 Berlin, Germany
Tel: +49 (0) 30 2093 3368   Fax: +49 (0) 30 2093 34449
email: fmayer@aya.yale.edu

Jan Palmowski
School of Humanities
King's College London
London WC2R 2LS, England
Tel: +44 (0)20 78482114   Fax: +44 (0)20 78482089
email: jan.palmowski@kcl.ac.uk

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