



# TranState Working Papers

THROUGH THE FUNHOUSE  
LOOKING GLASS:  
EUROPE'S SHIP OF STATES

Stephan Leibfried  
Susan M. Gaines  
Lorraine Frisina

No. 90

Universität Bremen • University of Bremen  
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Staatlichkeit im Wandel • Transformations of the State  
Sonderforschungsbereich 597 • Collaborative Research Center 597



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## **ABSTRACT**

What is the nature of the European Union? Does it have the characteristics of a state, and if so, which? We employ a single image—a poster that won a Marshall Plan competition in 1950—to examine the various legal perspectives of the EU that have emerged over the past six decades. Created as a symbol of European unity at the outset of European integration, the image was used half a century later on the book cover of Andrew Moravcsik's instant classic on intergovernmentalism. Here, we reinterpret the image yet again—in four different ways. This attempt to sort out the legal perspectives of the EU was inspired by the Lisbon Treaty Case that is currently before the German Constitutional Court and will be decided in May 2009.

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## **Through the Funhouse Looking Glass: Europe's Ship of States\***

La vingtième siècle ouvrira l'ère de fédérations  
ou l'humanité recommencera un purgatoire de mille ans.  
The twentieth century will herald the age of federalism,  
or humanity will enter another thousand years of purgatory.  
(Pierre- Joseph Proudhon [1809-1865] 1863: 108)<sup>1</sup>

Der tiefste Grund für den Aufstieg wie auch für die Gefährdung Europas liegt vielleicht  
in dieser immerwährenden Suche nach der verlorenen, der geahnten und gehofften  
*aurea aetas*, die stets gleich hinter dem Horizont beginnt.  
The most profound reason for Europe's ascent, as well as for its perilous position, lies  
in this never-ending search for the lost, the anticipated and hoped for  
"golden age" that always begins just over the horizon.  
(Hagen Schulze [born 1943] 1999: 24)<sup>2</sup>

Europe cannot and should not be a "superstate"; nor can it be a kind of revival of the  
European nation state which is threatened by globalisation. Even less can it be a com-  
munity of post-national deliberators as Jürgen Habermas would have it. Europe should  
be constructed as an entity of its own which responds to the heterarchical relational  
logic of fragmentation which characterises post-modernity and globalisation of which it  
is a part. It cannot be its counterpart. Europe does not need a "constitution", and it does  
not need a "people" either.  
(Karl Heinz Ladeur [born 1943] 2008: 147)<sup>3</sup>

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\* To appear in GERMAN LAW JOURNAL, 2009 (vol. 10, no., 4), pp. 311-333. The essence of the ideas presented here first appeared in: Stephan Leibfried, *Das Schiff Europa: Über eine Kippfigur der Integration*, FRANKFURTER ALLGEMEINE ZEITUNG, no. 53, N3 (March 4, 2009). We wish to thank Lisa Adler, Armin von Bogdandy, Horst Bredekamp, Linda Christensen, Abigail Collins, Peggy L. Dillard, Karen Donfried, Bernhard Ebbinghaus, Christian Joerges, Claudio Franzius, Peter A. Hall, Jonathan Hall, Roger Haydon, Nicole Hegener, Thorsten Hüller, Markus Jachtenfuchs, Andrew Moravcsik, Brigitte Leucht, Ulrich K. Preuß, Christoph Schönberger, Sebastian Schief, Hendrik Steven, Jana Wagner, Gerd Winter, and Dieter Wolf for their valuable feedback on and support for this project.

<sup>1</sup> PIERRE-JOSEPH PROUDHON, DU PRINCIPE FEDERATIF ET LA NECESSITE DE RECONSTITUER LE PARTI DE LA REVOLUTION (1863).

<sup>2</sup> HAGEN SCHULZE, DIE IDENTITÄT EUROPAS UND DIE WIEDERKEHR DER ANTIKE (Bonn: Zentrum Für Europäische Integrationsforschung, Discussion Paper C34, 2009) available at [http://aei.pitt.edu/310/01/dp\\_c34\\_schulze.pdf](http://aei.pitt.edu/310/01/dp_c34_schulze.pdf). With *aurea aetas* Schulze is referring to the "Four Ages" in Ovid's *Metamorphoses*.

<sup>3</sup> Karl-Heinz Ladeur, 'We, the European People . . . '—*Relâche?*, 14 EUROPEAN LAW JOURNAL 147-167 (2008). See also PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION (Karl-Heinz Ladeur ed., 2004).

It is no semantic accident that the word *government* derives from the Latin word, *gubernare*, which means to steer or pilot a ship, and that *gubernare* derives from the Greek word for rudder, *kybernaein*. The ship as pictorial and linguistic metaphor for the state dates back to at least the fifth century B.C., when we find explicit reference to the "whole ship of the *polis*" in Aristophanes' (ca. 445-388 B.C.) play *The Wasps*, and seems to have maintained a place in the collective Western psyche throughout the millennia.<sup>4</sup> Certainly, there is no dearth of examples to be found in the literature, political commentary and cartoon pages of the past couple of centuries: Longfellow's 1850 poem about building the American ship of state, which Franklin D. Roosevelt later passed on to Winston Churchill, who quoted it in one of his famous wartime radio addresses; a classic 1890 British cartoon showing Bismarck disembarking the German ship under the watchful eye of the Kaiser has inspired generations of German political commentators to produce corollaries; dozens of 1930s cartoons show FDR skippering the American ship through the rough seas of the depression, throwing Congress and the Court overboard when they objected to his New Deal experiments;<sup>5</sup> a 2005 cartoon depicted Angela Merkel being welcomed aboard an EU ship run aground on the rocks of referenda; a 2008 web image featured George W. Bush at the helm of a sinking ship, ordering his drowning economic crew to "stay the course"; and a November 2008 *New Yorker* illustration shows Barack Obama standing capably at the helm of a large passenger ship, spyglass at the ready.<sup>6</sup>



Image 1: 1950 Marshall Plan Poster Contest Winner, by Reyn Dirksen<sup>7</sup>

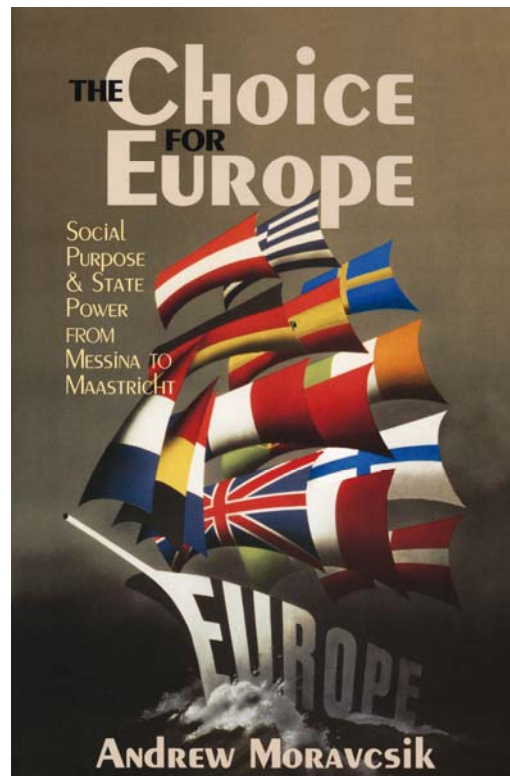


Image 2: Book cover, Cornell University Press, Ithaca, New York, USA 1998

<sup>4</sup> For a more in-depth discussion see Norma Thompson, *The Ship of State. Statecraft and Politics from Ancient Greece to Democratic America* (2001), especially pp. 167-172.

<sup>5</sup> <http://www.nisk.k12.ny.us/fdr/FDRnewdeal.html>.

<sup>6</sup> Stephan Leibfried, *Die Galerie des Staatsschiffs – ein Gruß ins Neue Jahr* (Bremen: University of Bremen, Collaborative Research Center Transformations of the State 2008), at 22-23, 44-53.

<sup>7</sup> First Place winner of the Marshall Plan Contest, Fall 1950; George C. Marshall Foundation (GCMF), Lexington, Virginia, Catalog ID 1020; German Historical Museum, Berlin, inventory no. 1988/1442.3.



The word *state* itself derives from the Latin verb *stare* which means "to stand," and the noun *status*, meaning the "manner of standing"; its use in the sense of "polity" seems to have arisen during medieval times, when it was used to describe the fortified standing armies and stationary seats of government and taxation that emerged when the roving royal administrations began to settle.<sup>8</sup> Already, in its semantic formulation, the ship of state implies an almost oxymoronic blend: movement, direction, and control, on the one hand, and stationary coherence and stability on the other. It is a metaphor that lends itself to broad interpretation, reinterpretation and transubstantiation: precisely what we need, if we are to give face to the European Union's seemingly endless identity crisis.

The two images of a European ship of state depicted here—one from a 1950 poster, the other from a 1998 book cover—appear, at first glance, to be almost identical. And yet, they represent two very different perceptions of European integration. We will take a closer look at both images, and at how they represent the full spectrum of state-like and unstate-like qualities that have been assigned to the European ship.

## A. ONE SHIP, TWO PORTRAITS OF INTEGRATION<sup>9</sup>

The first of our two European ship-of-state images was the winner of a 1950 contest that was sponsored by the U.S.-based Economic Cooperation Administration (ECA) as part of its public relations campaign for the Marshall Plan.<sup>10</sup> Secretary of State George C. Marshall had mentioned his idea for an ambitious, long-term plan to rebuild war-ravaged Europe at a gathering of alumni and faculty during Harvard's commencement activities in 1947. Ernest Bevin of the United Kingdom and Georges Bidault of France immediately recognized their opportunity and set about organizing the potential European participants into some sort of joint effort, leading to creation of the Committee of Economic Cooperation (CEC) with 16 members. But it was not until April 1948 that Marshall and his team was able to convince the U.S. Congress to pass the necessary legislation. The CEC was turned into the Organization for European Economic Cooperation (OEEC, precursor to the OECD),<sup>11</sup> and the Marshall Plan went into effect immediately. Administered by the ECA, with the OEEC as its European counterpart, the plan invested some 13 billion dollars over a four year period and had a profound effect on the post-war reconstruction of Europe.<sup>12</sup>

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<sup>8</sup> See, *supra*, note 7; and *Staat und Souveränität*, in: GESCHICHTLICHE GRUNDBEGRIFFE: HISTORISCHES LEXIKON ZUR POLITISCH-SOZIALEN SPRACHE IN DEUTSCHLAND, vol. 6, 4-154 (Otto Brunner, Werner Conze & Reinhart Koselleck, eds. 1990), in particular, Werner Conze, *Ständegesellschaft und Staat*, 4-25, at 8. REINHART KOSELLECK, KRITIK UND KRISE: EINE STUDIE ZUR PATHOGENESE DER BÜRGERLICHEN WELT (1973) = CRITIQUE AND CRISIS: ENLIGHTENMENT AND THE PATHOGENESIS OF MODERN SOCIETY (1988), chapters 1 and 2.

<sup>9</sup> For other visual conceptions of Europe see: DEUTSCHES HISTORISCHES MUSEUM, IDEE EUROPA: ENTWÜRFE ZUM "EWIGEN FRIEDEN"; ORDNUNGEN UND UTOPIEN FÜR DIE GESTALTUNG EUROPAS VON DER PAX ROMANA ZUR EUROPÄISCHEN UNION; EINE AUSSTELLUNG ALS HISTORISCHE TOPOGRAPHIE (KATALOGBUCH ZUR GLEICHNAMIGEN AUSSTELLUNG DES DEUTSCHEN HISTORISCHEN MUSEUMS, BERLIN, ZUR NEUERÖFFNUNG DER AUSSTELLUNGSHALLE VON I. M. PEI, 25. MAI BIS 25. AUGUST 2003) (Marie-Louise von Plessen, ed., 2003); HAGEN SCHULZE, STAAT UND NATION IN DER EUROPÄISCHEN GESCHICHTE 318-341 (2004), at 327 presents the historical context in a nutshell.

<sup>10</sup> On the Marshall Plan see the literature review by Niall Ferguson, *Dollar Diplomacy. How much did the Marshall Plan really matter?*, *New Yorker*, August 27, 2007 (with Reijn Dirksen's poster as illustration) available at: [http://www.newyorker.com/arts/critics/books/2007/08/27/070827crbo\\_books\\_ferguson](http://www.newyorker.com/arts/critics/books/2007/08/27/070827crbo_books_ferguson).

<sup>11</sup> The OEEC started with 18 members: Austria, Belgium, Denmark, France, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey, United Kingdom, and Western Germany (originally as two members, the Bizone—the American and British occupation zone—and the French occupation zone). In 1949 West Germany became a full member. The Anglo-American Zone of the Free Territory of Trieste was also admitted in October 1949.

<sup>12</sup> The Marshall plan was undoubtedly a foreign policy instrument but the extent of its economic impact has been a matter of debate: Werner Abelshauser cites decisive factors that predated the Marshall Plan (*Wiederaufbau vor dem Marshallplan. Westeuropas Wachstumschancen und die Wirtschaftsordnung der zweiten Hälfte der vierziger*

In the fall of 1950, the ECA conducted an art competition in the thirteen Marshall Plan countries, offering prizes for the best posters to express the theme "Intra-European Cooperation for a Better Standard of Living." A jury comprised of one prominent graphic artist from each of the participating countries chose twenty-five winning posters from over 10,000 entries, with one prize for first through third place, seven tied for fourth place, and fifteen for fifth. Dutch artist Reyn Dirksen's<sup>13</sup> European ship won the first prize, garnering the then-considerable award of \$1,500.<sup>14</sup>

The insight—and foresight—of Dirksen's vision becomes apparent when we consider some of the other winning posters, and the post-war context in which they were created. Most of the other artists had focused on the contest's stated theme of a "better standard of living" for Europe. In many of the winning posters, the Marshall Plan and American aid were portrayed, either explicitly or implicitly, as the key to salvation. In one German entry, for example, Europe is a multi-national cook eagerly stirring the brew in a massive pot. The poster conveys a rather humble hope for sustenance after the hunger and scarcity of the post-war years, and might even be construed as a plea for a European common market—but the pot is, tellingly, inscribed with the acronym of the American aid program (ERP, for European Recovery Program, the Marshall Plan's official name; see illustration).<sup>15</sup> Similarly, a British contribution bears the slo-

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*Jahre*, 29 VIERTELJAHRESHEFTE FÜR ZEITGESCHICHTE 545-578 (1981). Alan S. Milward maintained that economic recovery would have gone forward with or without U.S. funding (THE RECONSTRUCTION OF WESTERN EUROPE, 1945-1951 90-125 (1984) at 90-125. Michael Hogan stressed its significance for economic reconstruction (THE MARSHALL PLAN: AMERICA, BRITAIN AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947-1952 (1987)). Charles S. Maier, *The Two Post-War Eras and the Conditions for Stability in Twentieth Century Western Europe*, in: IN SEARCH OF STABILITY: EXPLORATIONS IN HISTORICAL POLITICAL ECONOMY 153-184 (Charles S. Maier ed., 1987). For an overview of the debate see Michael Cox and Caroline Kennedy-Pipe, *Special Forum: The Marshall Plan and the Origins of the Cold War Reassessed*, 7 JOURNAL OF COLD WAR STUDIES 97-134 (2005). BARRY MACHADO, IN SEARCH OF A USABLE PAST: THE MARSHALL PLAN AND POWSTWAR RECONSTRUCTION TODAY (2007); THE MARSHALL PLAN: LESSONS LEARNED FROM THE 21ST CENTURY (Eliot Sorel & Pier Carlo Padoan, eds., 2008). THE MARSHALL PLAN: FIFTY YEARS AFTER (Martin A. Schain ed., 2001). THE MARSHALL PLAN: A RETROSPECTIVE (Stanley Hoffmann & Charles Maier, eds., 1984).

<sup>13</sup> Reyn (Reijn) Dirksen was born in Haarlem, Netherlands on May 29, 1924, and died in the same city on September 29, 1999. He studied at the Amsterdam Design Academy (*Kunstnijverheidsschool*) and was briefly employed by the advertisement agency Kühn en Zoon in Rotterdam before going to work as a freelance graphic artist. Dirksen became interested in ship motifs in the late 1940s, and did a lot of work for the Holland America Line, including advertisements for the passenger ships Maasdam, Ryndam, Nieuw Amsterdam, and Statendam. He did a lot of illustrations for other shipping lines as well, including the Europe-Canada Line, Royal Interocean Lines, Nederland Line-Royal Dutch Mail, Rotterdam Lloyd Royal Mail Line, and the Holland Africa Line. He also did advertisements for the Dutch tourist industry, including a classic illustration of a windmill, each blade with a different Dutch landscape, for Verkade Drops, for various beverage companies (e.g. Hellebrekers Genever & Likeuren, Oranjeboom beer) and the apparel industry (Bontweek, i.e. fur week). He won several prizes with his posters, including one from the Turkish Red Cross. A number of his posters are on display at the Dutch Poster Museum in Hoorn, and others can be found on auction websites. He also illustrated the children's book TOOS VROS, HET POPPENKASTBOEK (195-?). The Marshall Plan prize was Dirksen's most important award. According to his wife, Loes Dirksen, in 2009, "He had no particular European outlook or affiliation. At that time, after the war, people were, of course, very positive about the Marshall Plan. So we were too." Thanks are due to Karen van Elderen in Amsterdam for her help in tracking down this biographical information and to Loes Dirksen for providing details.

<sup>14</sup> Second prize went to Pierre Gauchat (1902-1956; see HELMHAUS ZÜRICH, PIERRE GAUCHAT, DER GRAPHIKER, 23.1.-28.2. 1960 (1960)), whose poster shows a poppy growing out of a tree stump that is wrapped in European flags.

<sup>15</sup> Twenty of the twenty-five prize-winning posters from 1950 are available at the GCMF Library in Lexington, Virginia <http://library.marshallfoundation.org/posters/library/posters/marshall.php>. In a brochure about the posters, ECA (ECONOMIC COOPERATION ADMINISTRATION), INTRA-EUROPEAN COOPERATION FOR A BETTER STANDARD OF LIVING (1950), it is noted that "Full color reproductions of the twenty-five prize posters have been distributed

gan "You hold the key" and shows a giant key inscribed with sheaves of wheat, its blade lined with European flags, and "ERP" in large red letters in the middle of the key ring. In a Swedish poster, a pair of red, white and blue pruning shears labeled "Marshall Aid" lie across a strand of barbed wire; in an Austrian contribution, a broken off tree with an American flag near its roots sprouts new growth and doves build a nest of European flags; another Dutch artist portrayed a windmill with many blades comprised of European flags, and the American flag as rudder; and in a poster by a Turkish artist, an ethereal celestial body comprised of American stars and stripes beams a shaft of light down on a dead tree stump, and a sheaf of wheat sprouts out the side (see illustrations).



Image 3 to 5: Marshall Plan Posters, 1950: Fourth and Fifth Prize Winners<sup>16</sup>

While they are all attractive and evocative, few of the posters engage the more complex notions of peace-keeping and nation-building that were on the minds of European and American politicians in the aftermath of the war. The deadly manifestations of nationalism had just ravaged the entire continent: the problem that was center stage was how to simultaneously rebuild *and* stabilize the region. The metaphor of the ship of state, as employed by Dirksen, offered a new, utopian, and yet utterly familiar, solution: a European structure that resembled traditional formulations of statehood, but was comprised of individual member nations, which, together, would guide and propel Europe on a single course.

Dirksen's imagined Europe is a sturdy vessel at full mast. The wind fills its fifteen sails, and it moves confidently through the waves, emerging from the dark mists of a stormy past. It was an idealistic, post-war vision of a European integration that had yet to be construed, the epitome of supranational cooperation. Allusion to the United States is notably absent in Dirksen's poster. The sails comprise most, but not all, of the flags of the Marshall Plan participants. (Switzerland and Sweden are missing.)<sup>17</sup> From our con-

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throughout Western Europe, and it is anticipated that 10,000,000 Europeans will see these graphic expressions of European recovery and aspirations under the Marshall Plan." Records of the Economic Cooperation Administration are available at <http://www.archives.gov/publications/record/1998/09/marshall-plan.html?template=print>

<sup>16</sup> Marshall Plan Posters from left to right: by Alfred Lutz (b. 1919 Villingen; see Charlotte Fergg-Frowein, ed., *Kürschners Graphiker Handbuch* (Berlin: de Gruyter 1959), at 111), from Germany, GCMF Catalog ID 1006; by Ies Spreekmeester, from The Netherlands, GCMF Catalog ID 1011; and, by Kenan Temizan, from Turkey, GCMF Catalog ID 1017. Temizan worked as a graphic artist in Germany from the 1920s until the Second World War (for magazines, movie makers and the automobile industry), and later taught at the State Academy of Fine Arts in Istanbul.

<sup>17</sup> Sails are mounted as followed, top to bottom. Fore-sails: Netherlands, Belgium, and Luxembourg. Foremast: Austria, [West] Germany, France, and U.K. Main-mast: Greece, Turkey, Portugal, and Italy. Mizzen-mast: Iceland, Ireland, Norway, and Denmark. Switzerland joined the OECC and participated in the Marshall Plan, but did not need or receive funds. Sweden's participation in the Marshall Plan was nominal, limited to a few small loans.

temporary vantage point, we might be surprised to see the flags of Iceland, Norway, and Turkey, as none of the three have yet acceded to the European Union. Iceland is only considering full EU membership now that it is in dire straits, on the verge of receivership. Norway joined the European Economic Area on January 1, 1994, but its early bids to become a member of the EU were vetoed by France, and membership applications in 1972 and 1994 were defeated in referenda by its own electorate.<sup>18</sup> Turkey received the right to apply for membership with its initial EEC Association Treaty in 1963, has been an applicant for EC membership since 1987, and was officially recognized by the European Council as a candidate for EU membership in 1999. It would not have occurred to Dirksen to leave Turkey off the ship in 1950, but despite the fact that Turkey is culturally, politically and economically closer to Europe than it was in 1950, doubts now abound about whether it belongs there.

In May 1950, the French foreign minister Robert Schuman (1886-1963) presented Jean Monnet's (1888-1979) conception of European integration to the French parliament; the European Coal and Steel Community (ECSC) was established the following year and began operation in 1952. The European Defense Community—which would have added the monopoly of force to Europe's state-like functions—was defeated by a few votes in the French Parliament in 1954 and the European Economic Community (EEC, now the "EC pillar" of the EU) itself did not actually become operational until 1958, but in those first postwar years, European integration was in the air and a European ship of state seemed an apt replacement for the archaic symbol of the goddess Europa sitting on a bull.<sup>19</sup> Given the long history of the ship-of-state metaphor, it might seem a radical choice—a straightforward symbol of a federal state<sup>20</sup> for what had been, until recently, a horde of squabbling nations with shifting affinities and transient affiliations. But if we step through the looking glass of contemporary European politics, it becomes something else altogether.

Nearly half a century after Dirksen's European ship of state won the Marshall Plan Poster Contest, a Harvard political scientist adapted it for the cover of a book that took another view altogether of European integration. Certainly, by this time, Europe was no unaffiliated horde of nations. But according to Andrew Moravcsik's instant classic, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, 1998), it was a far cry from a unified federal state. As chance would have it, the EU had precisely fifteen member states in 1998: the illustration on the book cover is almost identical to Dirksen's original, except that Turkey, Iceland and Norway have been replaced by Spain, Sweden and Finland. But for Moravcsik, now at Princeton University, it is not a sturdy European ship of state, but rather a collection of varied and colorful flags. And indeed, on closer examination, we notice that Dirksen's ship lacked both a superstructure and a hull—that they were only implied by the billowing sails and the name "EUROPE," and by the little winged figurehead that has been removed in Moravcsik's rendition.<sup>21</sup> Neither the EU, nor the EEC before it, he maintains, have ever had any state-like

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<sup>18</sup> Norway, Iceland and Switzerland are among the few former European Free Trade Association countries that are still members of the European Economic Area, but have not joined the EU; this means that the European *acquis communautaire* obtains but they have no voice in law-making and other decisions at the European level.

<sup>19</sup> LUISA PASSERINI, *IL MITO D'EUROPA. RADICI ANTICHE PER NUOVI SIMBOLI* (2007).

<sup>20</sup> There is some confusion about use of the terms federation and federal state. The latter is an ambiguous English construction, as it may refer either to an individual member state in a federal system or to the system as a whole. In this essay, we employ "federal state" only in the latter sense. In some contexts federation and federal state are used interchangeably, but in discussions about the EU, the two terms are often distinguished, with federation referring to a less centralized, less nation-state emulating version of federalism than federal state. In this essay, we will avoid use of the word federation so as to minimize the confusion.

<sup>21</sup> When asked about his choice of the image Moravcsik says: "I chose it because I liked the design aesthetically, because since I was a kid I've loved flags, and because, as you note, it described a project propelled forward by the dynamic power of the member states—which remain the legitimate authors of the project—hence they are the elements in the picture that are colored, bright, and on which you focus your attention. The fact it came from the Marshall Plan is happenstance—a distraction. I don't deal with that period—nor do I particularly subscribe to the

qualities. It is the member states who are in full control. Looked at in this manner, the EU is more like a commonwealth of nations or simple confederation than a true state—a vehicle for international cooperation similar to NAFTA, or ASEAN, though, perhaps, a bit more ambitious.<sup>22</sup>

Between the idealized ship-of-state view of Dirksen's illustration and Andrew Moravcsik's confederate-style one, lurks a kaleidoscope of variously contorted and colored views of European integration—all of them conceivable interpretations of Dirksen's ship.

## B. ONE SHIP ... OR A DRUNKEN ARMADA? A BIT OF HISTORY

Even if we focus only on the sails and dismiss the hull as inconsequential, as Moravcsik does, Dirksen's image of Europe presumes the existence of a European *Gestalt*: it is a single ship making its way, floundering or sinking, as the case may be, in a tempestuous sea. In this sense, the image serves as a sort of meta-narrative for contemporary views of European integration. But despite the idealistic talk of supranational cooperation in the postwar years, a European *Gestalt* was markedly lacking in the actual implementation of European integration during the fifties and sixties. Not one, but three separate European Communities were created, each with a different legal regime: the ECSC, the EEC, and the European Atomic Energy Community (EAEC, Euratom), which latter went into effect at the same time as the EEC in 1958. These effectively divided Europe into three special purpose administrative associations,<sup>23</sup> much like those

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theory that the US is responsible for the EU, though there may be some small truth in it." (personal communication)

Dirksen's poster is, in fact, often used as a symbol of American post-war aid, but it contains no reference to the Marshall plan or the U.S. The significance of the figurehead or billet-head, if any, is unclear, though we might speculate that it represents the winged cap of Hermes or Mercury, messenger of the gods and patron of trade and commerce. Moravcsik says he removed the billet-head from his book cover image because he thought it was a stylized representation of a bald eagle, the American national emblem, used on the Great Seal of the United States. For figurehead traditions see: L. G. CARR LAUGHTON, *OLD SHIP FIGURE-HEADS & STERNS: WITH WHICH ARE ASSOCIATED GALLERIES, HANGING-PIECES, CATHEADS AND DIVERS OTHER MATTERS THAT CONCERN THE "GRACE AND COUNTENANCE" OF OLD SAILING-SHIPS* (1991); GIANCARLO COSTA, *CARVING ON SHIPS FROM ANCIENT TIMES TO TWENTIETH CENTURY* (1981); Hans Jürgen Hansen, ed., *ART AND THE SEAFARER: A HISTORICAL SURVEY OF THE ARTS AND CRAFTS OF SAILORS AND SHIPWRIGHTS* (Faber 1968).

<sup>22</sup> For early reflections down these lines see: Stanley Hoffmann, *Reflections on the Nation-State in Western Europe Today*, 21 *JOURNAL OF COMMON MARKET STUDIES* 21-37 (1982).

<sup>23</sup> This formulation (*Zweckverband* in German) comes from HANS-PETER IPSEN, *EUROPÄISCHES GEMEINSCHAFTS-RECHT* (1972), at 196, 1055.

Ipsen even wrote a poem about it:

Zweckverband Funktioneller Integration  
Gemeinschaft steht für "Zweckverband"  
Und nicht für Staatlichkeits-Modell,  
weil sie prozeßhaft Leut' und Land  
zur Einheit führt – "funktionell"  
Integration mit kleinen Schritten  
Betreibend, nur als letztes Ziel  
Europa wieder einzurücken  
Ins weltpolitische[s] Kräftespiel.

In: *'Signalwörter'. Gedichtsfragmente zu juristischen Begriffen von Hans-Peter Ipsen*, in: HANS-PETER IPSEN 1907-1998 (Fachbereich Rechtswissenschaft der Universität Hamburg, ed., 2001; SCHRIFTENREIHE DES FACHBEREICHS RECHTSWISSENSCHAFT DER UNIVERSITÄT HAMBURG, vol. 1), at 49; on the concept: Ulrich Everling, *Vom Zweckverband zur Europäischen Union – Überlegungen zur Struktur der Europäischen Gemeinschaft*, in: HAMBURG · DEUTSCHLAND · EUROPA. BEITRÄGE ZUM DEUTSCHEN UND EUROPÄISCHEN VERFASSUNGS-, VERWALTUNGS- UND WIRTSCHAFTSRECHT 595-615 (Rolf Stödter & Werner Thieme, eds., 1977). On the deep,

formed at a more local level within nations for the provision of services such as garbage disposal or flood management—what policy wonks in the United States and the United Kingdom might call "quangos" (for QUasi-Autonomous Non-Governmental Organization).<sup>24</sup> In this extra-national environment, however, such a legal structure provided none of the consistency or coherence that legal experts were familiar with at the nation state level and made "integration through law" as perceived by some legal scholars difficult if not impossible to achieve.<sup>25</sup>

The concept of an institutional and political *Gestalt* did not return to the political limelight until the mid-eighties, when EC-President Jacques Delors began lobbying for a single market.<sup>26</sup> The signing of the Maastricht Treaty in 1992 (effective 1993) was the first step toward creating a single frame of reference for the different legal regimes of European integration,<sup>27</sup> a process that the 2007 Lisbon Reform Treaty would finally complete. If ratified, the Lisbon Treaty will fuse Europe's legal regimes into one, replacing the EU "quangos" with one general purpose organization that represents a unified regime of political rule.<sup>28</sup>

## C. IN THE FUNHOUSE: ONE SHIP, MANY LEGAL INTERPRETATIONS

Returning now to our meta-narrative of European integration, we will employ Dirksen's image to illustrate four very different perspectives of the EU, with very different implications for a European end state.<sup>29</sup> These views emerge in large part from the German legal discourse, but they address the archetypi-

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dark historical roots of these concepts, see Ulrich K. Preuß, *Europa als politische Gemeinschaft*, in: EUROPÄISCHE RECHTSLEHRE 489-539 (Gunnar Folke Schuppert, Ingolf Pernice & Ulrich Haltern, eds., 2005). DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 182-184 (Christian Joerges & Navraj Singh Ghaleigh, eds., 2003).

<sup>24</sup> THE QUANGO DEBATE (Frederick F. Ridley & David Wilson, eds., 1995).

<sup>25</sup> INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti, Monica Secombe & Joseph H.H. Weiler, eds., 1985-1988; 8 vols.).

<sup>26</sup> Delors (born 1925) was Commission President from 1985 to 1995. EU legitimacy has been an issue since this time: see Liesbet Hooghe and Gary Marks, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, 39 BRITISH JOURNAL OF POLITICAL SCIENCE 1-23 (2009).

<sup>27</sup> See Armin von Bogdandy, *The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System*, 36 COMMON MARKET LAW REVIEW 887-910 (1999).

<sup>28</sup> Giandomenico Majone later suggested that this unit of general political rule was no more than a glorified, extremely comprehensive regulatory agency in the American style; see Giandomenico Majone, *The rise of the regulatory state in Europe*, 17 WEST EUROPEAN POLITICS 77-101 (1994). Today Majone sees the EU as a pure confederation; see his DILEMMAS OF EUROPEAN INTEGRATION: THE AMBIGUITIES AND PITFALLS OF INTEGRATION BY STEALTH (2005).

<sup>29</sup> For a general overview of legal perspectives see: Stefan Oeter, *Federalism and Democracy*, in: PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast, eds., 2009, 2nd ed., in print); Armin von Bogdandy, *Founding Principles*, in: FEDERALISM AND DEMOCRACY, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast, eds., 2009, 2nd ed., in print); CLAUDIO FRANZIUS, GEWÄHRLEISTUNG IM RECHT: GRUNDLAGEN EINER EUROPÄISCHEN REGULIERUNGSMODELLS ÖFFENTLICHER DIENSTLEISTUNGEN (2009), at 157-169; Rainer Wahl, *Erklären staatsrechtliche Leitbegriffe die Europäische Union?*, in: RECHTS- UND STAATSTHEORETISCHE SCHLÜSSELBEGRIFFE: LEGITIMITÄT – REPRÄSENTATION – FREIHEIT. SYMPOSIUM FÜR HASSO HOFMANN ZUM 70. GEBURSTAG (Horst Dreier, ed., 2005); Id., *Der Einzelne in der Welt jenseits des Staates*, 40 DER STAAT 45-72 (2001); ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW (2009; in press). For the political science perspectives see: SIMON HIX, THE POLITICAL SYSTEM OF THE EUROPEAN UNION (2005); STEPHAN LEIBFRIED AND PAUL PIERSON, EUROPEAN SOCIAL POLICY: BETWEEN FRAGMENTATION AND INTEGRATION 5, 432-465 (1995), at 5-19, 432-465; Alec Stone Sweet and Wayne Sandholtz, *European Integration and Supranational Governance*, 4 JOURNAL OF EUROPEAN PUBLIC POLICY 297-317 (1997); EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE (Wayne Sandholtz & Alec

cal legal issues of forming a union and resonate throughout Europe's national legal and political cultures. All four interpretations are involved in the current attempt to topple the German Parliament's October 2008 approval of the Treaty of Lisbon, a case which the German Constitutional Court is expected to decide on in May of 2009. If the plaintiffs are successful, European integration will be frozen for some time to come, no matter what the consequences of the Czech government's recent collapse or what the Irish decide in their next referendum.

If we view the ship from the bottom up, then we must focus on its body and hull, implied or constructed, as it were, of the word "EUROPE" and decorated with a simple winged figurehead. This is what holds the ship together and provides stability, buoyancy and maneuverability. This first view shows us a ship of state in every sense of the ancient Greek metaphor, and as we gaze upwards at the fifteen flags (which would now be twenty-seven), we cannot describe it without uttering the word that Margaret Thatcher turned into a curse word in her Bruges speech of September, 1988<sup>30</sup>: it is a full-blown federal state.<sup>31</sup> Those who view the European end state in this manner, focus on the hierarchical relationship between the member states and the central, or federal, administration, broadly interpreting the treaties and imputing the implied powers accordingly.<sup>32</sup> The European Court of Justice has done just this in most of its decisions. This hull-centric view of the European ship is commonly known as supranationalism.

If we view the European ship from above, then it is the flags of the different nation states that capture our attention, the many sails with their different sizes, ropes, adjustments and purposes. We see a commonwealth of nations, a confederation of states that lacks a hierarchical center. In this second version of the European end state, member-state control of the union is maximized, and the sovereignty of the nation states is closely guarded. Those who take this view, such as the plaintiffs in the case against the German parliament's ratification of the Lisbon Treaty,<sup>33</sup> maintain that the *Herren der Verträge*, the so-called

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Stone Sweet, eds., 1998); EUROPEAN INTEGRATION THEORY (Antje Wiener & Thomas Diez, eds., 2004, 1st edn.). For a *historical* look at the concept of "federation" (*Bund*): Reinhart Koselleck, *Bund*, in: GESCHICHTLICHE GRUNDBEGRIFFE, VOL. 1, 582-671 (Otto Brunner, Werner Conze & Reinhart Koselleck, eds., 1972).

<sup>30</sup> "We have not successfully rolled back the frontiers of the state in Britain, only to see them re-imposed at a European level with a European super-state exercising a new dominance from Brussels." Speech available at <http://www.margaretthatcher.org/speeches/displaydocument.asp?docid=107332>

<sup>31</sup> The ship of state, long used as a metaphor for the *unitary* state, was first adopted as metaphor for a *federal* state during the development of the U.S. federation; see CHARLES A. MILLER, SHIP OF STATE. THE NAUTICAL METAPHORS OF THOMAS JEFFERSON: WITH NUMEROUS EXAMPLES FROM OTHER WRITERS, FROM CLASSICAL ANTIQUITY TO THE PRESENT (2003). The metaphor was not used as an explicit expression of federalism that might call to question the structure of the union, as in Dirksen's image, but rather as a general call to unity during the revolution and founding of the federation and in the face of civil war. The ship of state was later used to symbolize unity versus division *between* the branches of the central government level itself.

One wonders if the Dutch ever used the ship of state as rallying cry in their long trajectory from the confederation of The Republic of the Seven United Netherlands (1581-1795) to the unitary Batavian Republic and Napoleon's contraptions (1795-1815), and finally the United Kingdom of the Netherlands (1815 ff.). We have, to date, found no examples.

<sup>32</sup> American scholars with the federal vision in mind have been taking a fresh look at the European Union. THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypso Nicolaidis & Robert Howse, eds., 2002). R. DANIEL KELEMANN, THE RULES OF FEDERALISM: INSTITUTIONS AND REGULATORY POLITICS IN THE EU AND BEYOND (2004). For an earlier synthesis, Alberta M. Sbragia, *The European Community: A Balancing Act*, 23 PUBLIUS 23-28 (1993). *Thinking about the European Future: The Uses of Comparison*, in: EURO-POLITICS. INSTITUTIONS AND POLICYMAKING IN THE "NEW" EUROPEAN COMMUNITY 257-291 (Alberta M. Sbragia, ed., 1991).

<sup>33</sup> Karl-Albrecht Schachtschneider, *Verfassungsrechtliche Argumente gegen den Vertrag von Lissabon*, 36 LEVIATHAN 317-343 (2008). The legal brief is available at <http://www.KASchachtschneider.de>. See also Dietrich Murswieck, *Der Vertrag von Lissabon und das Grundgesetz*. Rechtsgutachten, Freiburg, May 2008 at <http://www.peter-gauweiler.de/pdf/Vertr%20Lissabon%20Gutachten.pdf>

Treaty Masters,<sup>34</sup> must be protected from any outside interference. The treaties must pass the test of national constitutional law, and they should be interpreted literally and strictly; implied powers are not to be imputed and European encroachment should be avoided. In this sail-centric view, more commonly known as intergovernmentalism, the EU is just another international organisation. In *The Choice for Europe*, Andrew Moravcsik gives us a political scientist's variation on the theme, something he calls "liberal intergovernmentalism."

In a concession to the special nature of the European confederation, the Constitutional Court judge Paul Kirchhof invented another, rather tempered and opaque, version of the intergovernmental view and called the EU a *Staatenverbund*, a composite or network of states.<sup>35</sup> The *Staatenverbund* turns the traditional public law dichotomy of federal versus confederal into a continuum, with the EU lying slightly nearer the federal than the confederal end. In its 1993 Maastricht decision, the German Constitutional Court adopted the concept, which is so vague that most questions of constitutionality are left open and each new EU treaty invites a new onslaught of lawsuits. Furthermore, the Court has long taken a relatively defensive position with respect to the EU, and if the *Staatenverbund* definition should give too much authority to the European court, a number of emergency exits are already in place. In two rulings known as the *Solange* decisions,<sup>36</sup> for example, the court ruled that as long as there is no comprehensive European bill of rights or other charter for individual constitutional rights in the EU treaties, national constitutional law will take precedence over European law.

In our third view of Dirksen's ship, we see both body and sails in equal measure, but their influence shifts with the wind and with our own position relative to the ship. If we watch from leeward as the ship heels onto its side in a gale, only the sails are visible and we focus our attention, as Andrew Moravcsik does, on the high politics of treaty-making. For the moment, the EU will seem to function as a confederacy, with all the Treaty Masters at the table. But if the winds suddenly reverse and the ship heels away from us, then we find ourselves face to hull, and our attention shifts to the low politics of administration and adjudication: we focus on the activities of the administration in Brussels, the workings of its committees, and the decisions of the European Court of Justice in Strasbourg. Now the EU appears to function like a federal state. As the winds subside and the ship rights itself, we see that it is, indeed, a hybrid of forms, wherein low and high politics mingle. Now we must consider a whole shifting, multi-tiered system. Here national prerogatives cannot be entirely defensive or obstructive, like the German *Solange* decisions, but must be constructive, geared toward building and participating in a close-knit, mutually beneficial union.

Is this a conceivable end state for the EU, a sort of hybrid construction that combines the best of both worlds, confederate and federate? Or is it really just a transitory stage, a "federal state in the making" as

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<sup>34</sup> For a mild "Masters' " approach, see Peter M. Huber, *Europäisches und nationales Verfassungsrecht*, in VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 194-245 (2001).

<sup>35</sup> Paul Kirchhof, *Der deutsche Staat im Prozess der europäischen Integration*, in: HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, vol. 7: NORMATIVITÄT UND SCHUTZ DER VERFASSUNG – INTERNATIONALE BEZIEHUNGEN 855-887 (Josef Isensee & Paul Kirchhof, eds., 1992); Id., *The balance of powers between national and European institutions*, 5 EUROPEAN LAW JOURNAL 225-242 (1999). Kirchhof (born 1943), then a justice on the constitutional court and the rapporteur for the Maastricht case, is generally considered responsible for the Maastricht decision of October 12, 1993 (BVerfGE 89, 155), but he most likely made a number of concessions to achieve it. Udo di Fabio (born 1954), the rapporteur for the current Lisbon case, is also well published on issues of European integration: see his *The European Constitutional Treaty: An Analysis*, 5 GERMAN LAW JOURNAL 1121-1132 (2004); *The allocation of competences between the European Union and its member states*, in: THE TREATY OF NICE AND BEYOND: ENLARGEMENT AND CONSTITUTIONAL REFORM 107-119 (Mads Andenas & John A. Usher, eds., 2003).

<sup>36</sup> May 29, 1974 (BVerfGE 37, 271) and October 22, 1986 (BVerfGE 73, 339).



the first Commission President, Walter Hallstein, called it?<sup>37</sup> After all, both the United States and Germany wavered and floundered in similar fashion before settling into their modern federal forms.<sup>38</sup> But it may be that we need to set aside our conceptions of confederate and federate in our interpretation of the modern EU—it may be that the end state in this dynamic whole-ship view is not a hybrid of the two, not *between* federal and confederal, but *outside* of them. The federal versus confederal dichotomy took form during the latter half of the nineteenth and early twentieth century and was intimately tied to the evolution of the nation state. But Europe's problem, in the past sixty years, has been to deal with political trajectories that extend *beyond* the nation state.<sup>39</sup> It may well be that what we need for the EU is a *sui generis* construction.

There has been some talk in recent years of a European institutional and constitutional *Sonderweg*<sup>40</sup> and of Europe as a "polycentric polity."<sup>41</sup> But most *sui generis* approaches to date have concerned themselves with dismissing the old categories, while failing to really look beyond them, to discover and describe new genera.<sup>42</sup> One of the few attempts to actually define the new form looks beyond nation state and EU institutions to the peoples of Europe: unity exists to the extent that a European identity coexists with national identity.<sup>43</sup> In Germany, Ingo Pernice is the main champion of this post-national version of the EU, referring to it as a *Verfassungsverbund* in German—literally, a constitutional union or network of constitutions—and as "multilevel constitutionalism" in English.<sup>44</sup> Unlike the *Staatenverbund*, the *Verfassungsverbund* does not *preclude* a federal end state—but neither does it focus on achieving a federal state institutional apparatus. Some scholars, nevertheless, doubt that this concept is truly *sui generis* and see it as the leftovers of a failed federal state vision imbued with post-modern individualism.

Another arguably *sui generis* version of the EU defines its end state as the current state. "What you see is what you get," might be the motto here. Sovereignty does not reside at the center, or with the nations, or at some difficult-to-determine and ever-shifting point in between, as for the *Staatenverbund*. Sovereignty is, rather, in a permanently suspended state, a *Schwebezustand* that is neither here nor there.<sup>45</sup>

<sup>37</sup> WALTER HALLSTEIN, DER UNVOLLLENDETE BUNDESSTAAT (1969), 228 ("*Bundesstaat im Werden*") = UNITED EUROPE. CHALLENGE AND OPPORTUNITY (1962). Hallstein (1901-1982) was Commission President from 1958 to 1967.

<sup>38</sup> See Oeter 2009 (*supra*, note 29) and Schönberger 2004 (*infra*, note 47). See also STEFAN OETER, INTEGRATION UND SUBSIDIARITÄT IM DEUTSCHEN BUNDESSTAATSRECHT: UNTERSUCHUNGEN ZU BUNDESSTAATSTHEORIE UNTER DEM GRUNDGESETZ (1998).

<sup>39</sup> MICHAEL ZÜRN, REGIEREN JENSEITS DES NATIONALSTAATS. GLOBALISIERUNG UND DENATIONALISIERUNG ALS CHANCE (1998).

<sup>40</sup> See Joseph H. H. Weiler, *In defence of the status quo: Europe's constitutional Sonderweg*, in: EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7-26 (Joseph H. H. Weiler & Marlene Wind, eds., 2003).

<sup>41</sup> Marlene Wind, *The European Union as a polycentric polity: returning to a neo-medieval Europe?*, in: Weiler & Wind eds. 2003 (*supra*, note 40), 103-134.

<sup>42</sup> Schönberger 2005 (*infra*, note 47), at 81-88.

<sup>43</sup> For an empirical treatment of the Europeanization of the public sphere see: Hartmut Weßler, ed., PUBLIC DELIBERATION AND PUBLIC CULTURE. THE WRITINGS OF BERNHARD PETERS, 1993 - 2006 (2008); HARTMUT WEßLER, BERNHARD PETERS, MICHAEL BRÜGGEMANN, KATHARINA KLEINEN VON KÖNIGSLÖW AND STEFANIE SIFFT, THE TRANSNATIONALIZATION OF PUBLIC SPHERES (2008).

<sup>44</sup> Ingo Pernice is born in 1950; see his *Europäisches und nationales Verfassungsrecht*, in: VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 149-193 (2001); Pernice, *Comments on Art. 23 Grundgesetz*, in: GRUNDGESETZ: KOMMENTAR (Horst Dreier, ed.; loose leaf, since 1996, 1998); see also his *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, 36 COMMON MARKET LAW REVIEW 703-750 (1999) (<http://www.whi-berlin.de/pernice-cmlrev.htm>); *Multilevel Constitutionalism in the European Union*, 2 EUROPEAN LAW REVIEW 511-529 (2002); and *European v. national Constitutions*, EUROPEAN CONSTITUTIONAL LAW REVIEW 99-103 (2005).

<sup>45</sup> CARL SCHMITT, VERFASSUNGSLEHRE (1993, 8th ed.; reprint of the 1928 1st ed.), at 371 = CONSTITUTIONAL THEORY (2008), at 388-9. What Schmitt has to say about *Schwebezustand* is enlightening: "The collective exis-

This *sui generis* version does not take contemporaneous federal states and their evolution as its frame of reference, but creates its paradigm directly from the historic forms: its own, at various stages of development since the 1950s; the pre-Civil War United States; Switzerland in 1815 and, again, in 1848;<sup>46</sup> and the various nineteenth century German formulations (*Deutscher Bund* (1815-1866), *Norddeutscher Bund* (1866/67-1871), and *Deutsches Kaiserreich* (1871-1918)). This interpretation of the EU is known as the *Bund*<sup>47</sup> approach, what we will refer to here as the "Union," based on the historic names.<sup>48</sup>

If we are to adopt a *sui generis* view of the EU that looks beyond the nation state, we may, finally, need to relinquish our ship metaphor. French artist Fabien Vienne's contribution to the Marshall Contest, for example, may come close to imagining such a Europe. Like Dirksen's ship, it looked beyond the post-war deprivation and American aid, but now salvation lies not in a common state, but in cooperation *and* human solidarity: here we see a sturdy construct of human hands with the national flags suspended in the air between them.



Image 6: Marshall Plan Contest, Fall 1950<sup>49</sup>

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tence of the federation must not subsume the individual existence of the member states, nor can the existence of the member states subsume that of the federation. The member states are not simply subordinated, subjects of the federation, nor is the federation subordinated and subject to them. The federation exists only in this existential connection and in this balance. From both directions, various levels of association are possible, the most extreme case of which always leads to the fact that either the federation dissolves itself and only individual states still exist or the individual states cease to exist, and there remains only a single state. The essence of the federation resides in a dualism of political existence, in a connection between federalist togetherness and political unity, on the one hand, and the persistence of a majority, a pluralism of political unities, on the other. Such an *intermediary condition* [*Schwebezustand*] necessarily leads to many conflicts, which must be decided." (Our emphasis)

<sup>46</sup> On a current Swiss perspective see ANTON R. GREBER, *DIE VORPOSITIVEN GRUNDLAGEN DES BUNDESSTAATES* (2000); ALFRED KÖLZ, *DER WEG DER SCHWEIZ ZUM MODERNEN BUNDESSTAAT: 1789-1798-1848-1998. HISTORISCHE ABHANDLUNGEN* (1998).

<sup>47</sup> Christoph Schönberger, *Die Europäische Union als Bund: Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas*, 129 *ARCHIV DES ÖFFENTLICHEN RECHTS* 81-120 (2004); Ulrich K. Preuß 2005 (*supra*, note 23); OLIVIER BEAUD, *THEORIE DE LA FÉDÉRATION* (2007; Series *Léviathan*). Schönberger also cites a number of similar interpretations from scholars in other EU member states.

<sup>48</sup> *Bund* is often translated as "federation" which creates some ambiguity, as federation is often used interchangeably with federal state. Here we will use the term "union" for this newly defined form of EU governance. See also footnote 20.

<sup>49</sup> By Fabien Vienne (born 1925; see [http://www.fabienvienne.com/en\\_biography.html](http://www.fabienvienne.com/en_biography.html)); GCMF Catalog ID 1005.

Our fourth view of the European ship is not so optimistic. Here we again get a glimpse of the whole ship, but now it appears as a frightful chimera, construed of incompatible body parts, a monstrous creation built of incompatible body parts and doomed to self-destruct. The nation state flags have been forced to mast above a supranational hull, except there are no masts, nor, for that matter, a helmsman or crew, and the hull is comprised of a weak assembly of alphabetic characters, a mere word. It is a ship that is constitutionally unfit to sail, forced into existence by post-World-War II emergencies and a looming cold war. This chimeric contraption's only recognized talent was its ability to scare the Soviet Block, and with the fall of the Berlin wall in 1989 and the transformation of Eastern Europe that followed, it lost its only conceivable *raison d'être*. Its transition state was anti-communism and its end state is self-destruction and annihilation. In political parlance it is a form of nationalism, a view most often professed by the political right.

These four views have not emerged ready-made from the legal discourse. They have, rather, evolved over the course of EU history, produced by different legal traditions to meet the needs of the moment. Nor, of course, are they mutually exclusive in that different aspects of the EU may be best addressed by one or the other view.<sup>50</sup>

## D. A LONG AND WINDING ROAD ... TO WHERE?

A federal vision for Europe accompanied the birth of the European communities and provided the moral economy for founding and building Europe's institutions. This was the maxim of hope that informed Reyn Dirksen's illustration in 1950, transcending the ruins of the Second World War and propelling Europe away from the nationalism that had descended on it after the first one, toward a new, yet-to-be-defined supranationalism. Even the United States, which had retreated into its splendid isolation after World War I, now supported the European efforts to rebuild and unify.<sup>51</sup> In the 1950s and 1960s, the pan-European Christian-Democratic movement formed the vanguard of these efforts—Robert Schuman, of course, along with Alcide de Gasperi (1881-1954) in Italy, Konrad Adenauer (1876-1967) in Germany, Paul-Henri Spaak (1899-1972) in Belgium and their counterparts around Europe.<sup>52</sup>

When European integration intensified in the 1980s, a new generation of general public law scholars challenged the federalist creed of the now-entrenched European law specialists, and our second, confederal or Treaty Master vision of the European ship took shape. The *Staatenverbund* variation on the theme was a conservative attempt to compromise the federal and confederal visions in the 1990s, and attempts to bypass the impasse altogether gave rise to the third vision, the hybrid and *sui generis* interpretations.

Throughout the 1980s and 1990s, while the continental—and particularly the German—lawyers were squabbling about the locus of sovereignty and whether the last word would lie with the national or Euro-

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<sup>50</sup> The European integration process is so huge and incomprehensible that Donald Puchala used the old story of the blind men and the elephant to describe the arguments about its nature—and that was back in 1972, before it really grew out of hand and the arguments heated up. Donald Puchala, *Of Blind Men, Elephants, and International Integration*, 10 JOURNAL OF COMMON MARKET STUDIES 267-285 (1972).

<sup>51</sup> For a discussion of U.S. support for European integration based on American government records see: BEATE NEUSS, GEBURTSHELFER EUROPAS? DIE ROLLE DER VEREINIGTEN STAATEN IM EUROPÄISCHEN INTEGRATIONSPROZESS 1945-1958 (2000); GEIR LUNDESTAD, THE UNITED STATES AND WESTERN EUROPE SINCE 1945. FROM 'EMPIRE BY INVITATION' TO 'TRANSATLANTIC DRIFT' (2003).

<sup>52</sup> For a socio-political history see: Wolfram Kaiser, Brigitte Leucht and Mortens Rasmussen, eds., THE HISTORY OF THE EUROPEAN UNION: ORIGINS OF A SUPRANATIONAL POLITY 1950-72 (2009); WOLFRAM KAISER, CHRISTIAN DEMOCRACY AND THE ORIGINS OF THE EUROPEAN UNION (2007). For a short version, see Wolfram Kaiser, *Transnational Europe since 1945: Integration as Political Formation*, in: TRANSNATIONAL EUROPEAN UNION: TOWARD A POLITICAL SPACE 17-35 (Wolfram Kaiser and Peter Starie, eds., 2005). For a more state-oriented history see: ALAN S. MILWARD, THE EUROPEAN RESCUE OF THE NATION STATE (1992; 2000 2nd ed.).

pean courts, political scientists argued that the lawyers were missing the point.<sup>53</sup> Integration was not a zero-sum proposition. It was about power-sharing, a potentially win-win proposition, if one thought in terms of multi-level governance and retired the outmoded nation-state vocabulary of federal versus confederal from use. Whereas the lawyers attempted to shape European integration via the national Constitutional and European courts, political scientists' interpretations were mostly observational, based on empirical analyses of political processes and institutions and less hampered by preconceived normative legal categories.

But like the lawyers, the political scientists differed in their methodologies and perceptions, and their interpretations varied accordingly.<sup>54</sup> Some concentrated on how things had changed over time, a sort of movie approach known as historical institutionalism; others looked at results, a sort of snapshot approach known as intergovernmentalism. And still others, like Andrew Moravcsik with his liberal intergovernmentalism, did something in between, neither movie nor snapshot, but a sort of slideshow.<sup>55</sup> Like the lawyers, these approaches emerged from different sub-disciplines—historical institutionalism from comparative politics and from European scholars of EU integration, and intergovernmentalism from the arguably higher art of international relations.<sup>56</sup> In the 1990s, the intergovernmentalists saw that member states were in full control and were only using the EU as a forum for inter-state bargaining, with international actors serving as facilitators for the nations' diplomatic maneuvers. The historical institutionalists, on the other hand, observed incremental, often unintended, losses of nation-state control and, often by

<sup>53</sup> At the Bremen TranState Research Center we call this the "hazard of dichotomies"; see Sonderforschungsbereich (Collaborative Research Centre) 597, *Staatlichkeit im Wandel. Transformations of the State* (Bremen: University of Bremen 2002), vol. 1, 13, 16-18 *et seq.*, also published as MICHAEL ZÜRN, STEPHAN LEIBFRIED, BERNHARD ZANGL, AND BERNHARD PETERS, TRANSFORMATIONS OF THE STATE? (BREMEN: UNIVERSITY OF BREMEN, WORKING PAPER NO. 1/2004), 3 *et seq.* (see <http://www.sfb597.uni-bremen.de/pages/pubAp.php?SPRACHE=de>).

<sup>54</sup> See: Robert O. Keohane and Stanley Hoffmann, *Institutional Change in Europe in the 1980s*, in: THE NEW EUROPEAN COMMUNITY: DECISIONMAKING AND INSTITUTIONAL CHANGE 1-39 (Robert O. Keohane & Stanley Hoffmann, eds., 1991). Liesbet Hooghe and Gary Marks, *European Union?*, 31 WEST EUROPEAN POLITICS 108-129 (2008), on the starting pages; Simon Hix, *The EU as a New Political System*, in: COMPARATIVE POLITICS 573-601 (Daniele Caramani, ed., 2008); Beate Kohler-Koch and Rainer Eising, eds., THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION (1999); Markus Jachtenfuchs and Beate Kohler-Koch, *Governance and Institutional Development*, in: Diez and Wiener 2004 eds. (*supra*, note 29), 97-115; FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC (2001). For an early classic see: Fritz W. Scharpf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, 66 PUBLIC ADMINISTRATION 239-278 (1988; the original article had appeared in German in POLITISCHE VIERTELJAHRESSCHRIFT in 1985).

<sup>55</sup> Moravcsik began his state-focused analysis in THE CHOICE FOR EUROPE with the Messina negotiations for the EEC Treaty in 1956. By ignoring its antecedent, the ECSC, which formed in 1951, he fails to fully take into account the EC's path dependence. Despite the fact that the president of the ECSC, Jean Monnet, was against the founding of the EEC (FRANÇOIS DUCHÊNE, JEAN MONNET: THE FIRST STATESMAN OF INTERDEPENDENCE (1994)), the transatlantic networks that had formed during and after WWII, with activists like Piere Uri and Hans von der Groeben, were crucial to EEC institution building and responsible, among other things, for the 1956 Spaak Report.

<sup>56</sup> Paul Pierson, *The Path to European Integration: A Historical Institutional Analysis*, 29 COMPARATIVE POLITICAL STUDIES 123-163 (1996), at 124-5; for the preceding period see Andrew Moravcsik, *The European Constitutional Compromise and the neofunctionalist legacy*, 12 JOURNAL OF EUROPEAN PUBLIC POLICY 349-386 (2005), at 354. One might expect such a conclusion from European scholars of integration. It comes as some surprise, however, that scholars of comparative politics have come to similar conclusions, as thinking in comparative politics has traditionally taken the nation state as the central unit of comparison and neglected the growing interdependence between states. In the past, comparativists have even been accused of "methodological nationalism." Andrew Moravcsik, however, says that such divisions are arbitrary: "No one of my generation believes in a firm distinction between Comparative Politics and International Relations. There are just theories of politics, e.g. delegation, institutions, endogenous preferences, with varied assumptions. So, I don't like the dichotomizing." (personal communication)

default, accordant increases in power for supranational actors.<sup>57</sup> They see a dynamic, path-dependent redistribution of control within a system of multi-level governance that leads to "pooled sovereignties,"<sup>58</sup> or what Paul Pierson calls "a fragmented but discernable multi-tiered European polity."<sup>59</sup>

In the 1990s, the EU lost its hopeful course. George Ross recognized this as early as 1992 when he wrote that: "The heroic period of the European Community renaissance that began in 1985 is over."<sup>60</sup> The EU was threatening to devolve from a political union to a free trade zone, like the European Free Trade Association<sup>61</sup> that the U.K. created as an alternative to integration in 1960. Not just stalled in the doldrums or temporarily lost in the fog, it seemed, for the first time, to lack a charted course. There is talk of *L'Europe à plusieurs vitesses*, where the nations make no attempt to go forward in solidarity but move at their own speeds, and worse, of a multi-speed and multi-track Europe, where they all chart separate courses. It is here that the pessimistic fourth vision raises its ugly head and we get a glimpse of the chimeric ship tearing itself apart, en route to self-destruction. Though no one, as yet, has seriously threatened to withdraw, the endless enlargements are now tempered by the possibility of member state withdrawal—an option that was hitherto unthinkable and perhaps even illegal under the old treaties<sup>62</sup>—and member state posturing and blackmail seem to be turning into the standard *modus operandi*.

Karl-Heinz Ladeur might argue that the meta-narrative of a European *Gestalt* is simply a myth that has no place in post-modern realism. Frightening chimeras are as much the stuff of superstition and nostalgia as a European federal state is, as, indeed, the mid-twentieth century nation state is. The post-modern Europe that Ladeur describes is flat: its nations are part of a transnational network of governance and the EU can, at best, hope to serve the role of "mediator," in the free-for-all of private and public actors.<sup>63</sup>

To those of us who cling to the ancient wisdom of our myths, however, the financial and economic crises currently eating their way through our globalized system are calling out for a strong EU and reminding us of the need for transatlantic cooperation. Neither is easy to come by. The past decade has seen the EU floundering and transatlantic cooperation withering, though a couple of small support enterprises have held their own: The German Marshall Fund of the United States (GMF), founded with German funding in the 1970s as a memorial to post-war Marshall Plan aid, and Harvard's Center for European Studies (CES) which has been a meeting place for scholars of comparative European politics and integration from both sides of the Atlantic since 1968. The whole series of Marshall Plan posters hangs on the walls of the George C Marshall Foundation in Lexington, Virginia, and many decorate the GMF headquarters in Washington, D.C. And at the CES office in Cambridge, Dirksen's ship hangs to the left of the elevator in

<sup>57</sup> Two essays characterize the debate well: Pierson 1996 (*supra*, note 56) and Moravcsik 2005 (*supra*, note 56). The authors have been friends since childhood and came of professional age with European integration themes in the 1990s, when the EU was heading into troubled waters.

<sup>58</sup> Pierson 1996, *supra*, note 56, at 123.

<sup>59</sup> Moravcsik later places his 1998 analysis within the framework of multilevel governance, though the historical institutionalists claim that terrain as their own; see Moravcsik 2005 (*supra*, note 56), at 384, note 69. In Moravcsik's view, the "dichotomy between Liberal Intergovernmentalism and Historical Institutionalism is based on a complete misunderstanding." The real dichotomy, he maintains, is between Pierson's approach and one that is dominant in the sub-discipline of American Politics, in particular that of Ken Shepsle (*Studying institutions: Lessons from the rational choice approach*, 1 JOURNAL OF THEORETICAL POLITICS 131-147 (1989)). (personal communication)

<sup>60</sup> George W. Ross, *After Maastricht: Hard Choices for Europe*, 9 WORLD POLICY JOURNAL 487-513 (1992), at 501, as quoted by Joseph M. Grieco, *The Maastricht Treaty, Economic and Monetary Union and the Neo-Realist Research Programme*, 21 REVIEW OF INTERNATIONAL STUDIES 21-40 (1995), at 22, note 3.

<sup>61</sup> On the EFTA see: Helen Wallace, ed., *THE WIDER WESTERN EUROPE: RESHAPING THE EC/EFTA RELATIONSHIP* (1991); THOMAS PEDERSEN, *EUROPEAN UNION AND THE EFTA COUNTRIES: ENLARGEMENT AND INTEGRATION* (1994).

<sup>62</sup> Historically, Charles de Gaulle's 1965-66 empty-chair politics comes to mind as the strongest action of that sort.

<sup>63</sup> Karl-Heinz Ladeur 2008 and 2004 (*supra*, note 3).

the reception area. It is impossible not to see it—though how one sees it depends, as Moravcsik's book shows so dramatically, on one's perspective. In January 2006, when Chancellor Angela Merkel visited the GMF headquarters,<sup>64</sup> Guido Goldman—who is director of the Program for the Study of Germany and Europe at CES as well as co-chairman of the GMF board<sup>65</sup>—presented her with a copy of the poster. Whether the gift was meant as a historic memento, a cautionary tale, or as a reminder of the many possible forms that European integration might take is unclear. But at this particular juncture in history it might behoove Chancellor Merkel to see it in the latter sense and hang it prominently above her desk in the *Bundeskanzleramt*.<sup>66</sup>

It remains to be seen whether the champions of the world's largest single market will be able to respond effectively to the double-headed global crisis. Henry Kissinger's (born 1923) description of Germany as "a political dwarf but an economic giant" in the 1970s is an equally apt description of the turn of the 21<sup>st</sup> century EU, as the former Belgian foreign minister, Mark Eyskens (born 1933), noted at the outbreak of the First Gulf War in 1990.<sup>67</sup> Its response to the crisis to date is limited to suspension of a few rules in its competition law and other Common Market standards, the loose coordination of national financial and economic therapies, and a 5 billion Euro economic stimulation program—measures which, in many cases, only seem to cancel each other out. Nor will the early warning system for financial markets, the "European Systemic Risk Council," that the European Central Bank is currently considering as a way to guard against future crises, do anything to alleviate the current one. The European peninsula is no more dependent on outside trade than the United States is, and much depends on the reinvigoration of the Europe's internal market—on defining and shaping Europe as a common political space for some variant of Keynesianism. The G8, even in its full manifestation as the G-20, cannot take the place of a well-functioning EU 27. Jeffrey Checkel and Peter Katzenstein have described the moment eloquently:

*"The ship of European identity has entered uncharted waters. Its sails are flapping in a still breeze. Beyond the harbor, whitecaps are signaling stormy weather ahead. The crew is fully assembled, but some members are grumbling—loudly. While food and drink are plentiful, maps and binoculars are missing. Officers are vying for rank and position as no captain is in sight. Sensing a lack of direction and brooding bad weather, some passengers are resting in the fading sun on easy chairs thinking of past accomplishments; others are huddling in an openly defiant mood close to the lifeboats, anticipating bad times ahead. With the journey's destination unknown, the trip ahead seems excruciatingly difficult to some, positively dangerous to others."*<sup>68</sup>

If Europe is to head off the current global crisis, the EU needs room to maneuver. It needs to be able to call on stronger European regulation *and* experiment with a "European New Deal." And that is something that cannot be handled by the likes of the Open Method of Coordination, which has characterized European decision-making to date.

U.S. history offers a case in point. Roosevelt's response to the economic crisis of the 1930s focused as much on building the central government's *capacity to act* as it did on creation of the American welfare

<sup>64</sup> Angela Merkel (born 1954) was attending the dedication of the GMF's newly renovated headquarters in Washington. See [http://www.gmfus.org/event/detail.cfm?id=210&parent\\_type=E](http://www.gmfus.org/event/detail.cfm?id=210&parent_type=E). For the official German report see: [http://www.bundeskanzlerin.de/nn\\_5292/Content/DE/Artikel/2001-2006/2006/01/2006-01-12-europa-und-amerika-sind-unverzichtbare-partner.html](http://www.bundeskanzlerin.de/nn_5292/Content/DE/Artikel/2001-2006/2006/01/2006-01-12-europa-und-amerika-sind-unverzichtbare-partner.html).

<sup>65</sup> For a short portrait of Guido Goldman (born 1937) see: <http://www.ces.fas.harvard.edu/people/p15.html>

<sup>66</sup> The poster also hangs in a window at the German Historical Museum in Berlin as part of a display promoting the museum's permanent collection.

<sup>67</sup> "L'Europe est un géant économique, un nain politique et, pire encore, un ver de terre lorsqu'il s'agit d'élaborer une capacité de défense." (Europe is an economic giant, a political dwarf, and, even worse, a worm until it concerns itself with elaborating a defence capability.) See: <http://www.wsws.org/articles/1999/sep1999/belg-s13.shtml>

<sup>68</sup> Jeffrey J. Checkel & Peter J. Katzenstein, *The politicization of European identities*, in: EUROPEAN IDENTITY 1-25 (Jeffrey J. Checkel and Peter J. Katzenstein, eds., 2009), at 1.

state.<sup>69</sup> When the markets collapsed in 1929, American federalism was still too weak and undeveloped to cope. The New Deal first had to make room for maneuvering, and then it had to create the federal agencies and their instruments, something that it did in an explicitly trial and error fashion.<sup>70</sup> Whatever the obtaining theory of integration, Europe at this moment is similarly lacking: "the policy-making capabilities of the Union have not been strengthened nearly as much as capabilities at the level of member states have declined."<sup>71</sup> In terms of competencies, the EU may, in many respects, be more developed than the U.S. federal government was after the Civil War—but it lacks the political and institutional wherewithal to make use of its competencies. Its method of decision-making precludes risk-taking experimental approaches like the ones that President Obama is even now pushing through the American congress. Both George C. Marshall and Jean Monnet had the lessons of the Americans' New Deal in mind when they worked to set Europe on course to integration in the 1950s.<sup>72</sup> Though Europe was, is, and will always be a ship of another form altogether, it may be, as we try to set its course in the 2000s, that we can yet learn from the successes and failures of those American experiments.<sup>73</sup> Again, we return to the meta-narrative—and hope—of Dirksen's 1950 image, the presumption of a European *Gestalt*, a single ship that, no matter how mismatched its parts, might serve us long and well if refitted, or perhaps retrofitted, and made seaworthy.

<sup>69</sup> Europe's *welfare state dimension* taken per se is explored in: Herbert Obinger and Stephan Leibfried, *Nationale Sozialstaaten in der Europäischen Version: Zukünfte eines 'sozialen Europas'*, in: DIE POLITISCHE ÖKONOMIE DER EUROPÄISCHEN INTEGRATION 335-365 (Martin Höpner & Achim Schäfer, eds., 2008); an earlier English version appeared as: Herbert Obinger, Stephan Leibfried, and Frank Castles, *Bypasses to a social Europe? Lessons from federal experience*, 12 JOURNAL OF EUROPEAN PUBLIC POLICY 545-571 (2005).

<sup>70</sup> For an overview see: ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR (1996). "Worrying about the problems of production and the structure of the economy" (at 271) has now returned with a vengeance, and we read Brinkley's epilogue, "The Reconstruction of New Deal Liberalism," (at 265-271) in a radically different light than we did when it was published in the nineties.

<sup>71</sup> Fritz W. Scharpf, *Community and Autonomy: Multi-level Policy-Making in the European Union*, 1 JOURNAL OF EUROPEAN PUBLIC POLICY 219-242 (1994), at 219.

<sup>72</sup> One must keep in mind that the New Deal didn't just create a vast alphabet soup of regulatory agencies. In May 1933 it created the Tennessee Valley Authority (TVA), a multi-faceted water and power distribution project that was the first special purpose administrative association or "quango." The TVA was the world's first organisational model for region-wide socio-economic development, and it's quite likely that the EC founders had it in view. See: David Ekbladh, *'Mr. TVA': Grass-Roots Development, David Lilienthal, and the Rise and Fall of the Tennessee Valley Authority as a Symbol for U.S. Overseas Development, 1933-1973*, 26 DIPLOMATIC HISTORY 335-374 (2002). The TVA, like the EU, was a top-down bureaucracy that had problems with democratic deficit: see PHILIPP SELZNICK, TVA AND THE GRASS ROOTS: A STUDY OF POLITICS AND ORGANIZATION (1949; 1984 1<sup>st</sup> pb. reprint). In recognition of this pioneering project, the national memorial to Franklin Delano Roosevelt (located along the Cherry Tree Walk in Washington's Constitution Gardens) is built around many pools and cascades of water—Ekbladh dubbed it the "hydraulic monument."

<sup>73</sup> Joseph H. H. Weiler (born 1951), who pioneered the comparison between American federalism and the EEC/EU in the mid-1980s (see *supra*, note 25), has turned away from such a comparison in recent years, but a number of American scholars have picked up the comparison in the meantime (see *supra*, note 32). Weiler has now suggested an alternative vision of an EU structure that is comprised of opened container states and geared toward the EU citizens and individual rights, something akin to a *Verfassungsverbund*. See his: THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION (2000); Joseph H. H. Weiler, Iain Begg and John Peterson, eds., INTEGRATION IN AN EXPANDING EUROPEAN UNION: REASSESSING THE FUNDAMENTALS (2003).

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