# CONVERGENCE & DIVERGENCE: AN AMERICAN PERSPECTIVE ON THE PROPOSED EUROPEAN CONSTITUTION

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When the initial draft of this paper was presented at the University of Lisbon in May 2004, the news focus on both sides of the Atlantic was on the expansion of Europe. With the accession of ten new members, Europe had become the world's largest trading bloc. Upon the adoption of the proposed European Constitution[1], it would assume political jurisdiction over the lives of over 450 million European citizens. From an American point of view, this was a perfect opportunity to discuss what might be termed the "practical politics" of constitutional law.

My focus in that initial draft was on the ways in which the very different structural and philosophical assumptions that guided the framers of each constitution were reflected in the documents they produced. Even more important, from an American point of view, would be a discussion of the very practical ways in which difference in philosophy and outlook concerning the distribution of political power and accountability would play out in the politics of European constitutional law. In keeping with this view, the presentation draft focused on three issues relating to political and civil rights: 1) citizenship in the European Union; 2) taxation and the common market; and 3) religion and culture.

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[1] Treaty establishing a Constitution for Europe, 47 Official Journal of the European Union, 2004/C 310/01 (December 16, 2004) [hereafter "European Constitution."]

been grappling over the course of its history. As the French say, "*plus ça change, c'est la même chose.*" The second observation is that "all politics are local."[6] This statement, attributed to the late Thomas P. ("Tip") O'Neill of Boston, who served as Speaker of the United States House of Representatives from 1977 to 1985, captures best one of the most important truths of the democratic process: Politicians should not be surprised when voters prefer the interests of their own communities. Students of human nature would expect them to do just that.

Though it is far too early to have a complete understanding of the political forces that lead French, Dutch, and British voters to question the wisdom of the current draft of the proposed constitution, initial indicators point to voter anger over the "local" impact of policies that lie at the core of the integration process: free trade, freedom of movement within the Union, political accountability, and cultural assimilation. Commentators have observed that the French vote was influenced by the failure of President Jacques Chirac's administration to address the myriad economic and social issues raised by cheap, immigrant labor. In the Netherlands, economics economic issues were also important, but so too were the Dutch government's policies relating to immigration, cultural assimilation, and the question of Turkish accession to the EU[7].

## I) A Preliminary Note on the relationship of Structure and Political Accountability

The structure of the American federal union is one of its most important features, but my experience in Europe shows rather clearly that the practical and political implications of that federal structure are not very

[6] Congressman, Thomas P. ("Tip") O'Neill, of Boston, Massachusetts served as Speaker of the United States House of Representatives from 1977 to 1985.

[7] Graham Bowley, "Europe Lurches Toward a Period of Crisis," International Herald Tribune Online (2005) at http://www.iht.com/bin/print_ipub.php?file=/articles/2005/05/30/news/union.php; Anthony Browne, "Dreams of a Bigger EU Dashed by Voters' Fears for Lost Jobs," Times Online, (2005) at http://www.timesonline.co.uk/printFriendly/0,,1-13090-1636030-13090,00.html; Phillipe Naughton, "Dutch Set to Reject EU Constitution," Times Online (2005) at http://www.timesonline.co.uk/printFriendly/0,,1-13090-1636482-13090,00.html; Johan Huizinga, "Resounding French Rejection of the EU Constitution," Radio Nederland Wereldomroep (2005) at http://www2.rnw.nl/rnw/en/specialseries/EU_Constitution/fra050530?view=Standard.

The final draft preserves that focus, and relates each of these issues to the current debates in Europe and the United States on matters of common interest. As this paper goes to press in June 2005, the big news is that voters in France and the Netherlands have rejected the proposed European Constitution by decisive margins. In the face of public opinion polls showing nearly sixty-four percent (64%) opposition,[2] Mr. Blair's government has postponed the United Kingdom's referendum on the constitution, but the Polish government will hold that country's referendum as scheduled[3]. By many accounts, the draft European Constitution is in trouble, and so too are some of the politicians who supported it[4].

With the benefit of hindsight, it would be easy to say that all of this was predictable, but to do so would be both unfair and counterproductive. Creating a political community of the size and diversity of either the European Union or the United States is a daunting political task that requires both a long-term vision of the common good and an even longer-term commitment by political leaders who are willing, if necessary, to sacrifice their own political careers to achieve the common goal[5]. Europe is creating a new political community. Political controversies are both inevitable, and an important part of the integration process. If Americans have learned anything in our nearly 220 years of political experience under the Constitution of the United States, it is the truth of two observations about the nature of political reality. One is French, the other is quintessentially American.

The first observation is that many of the "integration" issues facing Europe today are identical to those with which the United States has

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[2] See Ed Johnson, "Britain Puts EU Constitution Vote on Hold The Move, just days after Defeats in France and Holland, was seen by Many as a Fatal Blow," *The Philadelphia Inquirer*, Tuesday, June 7, 2005 at A3, 2005 WLNR 8978508.

[3] Associated Press, "EU Treaty Shaky as U.K. 'Shuts off Respirator'", *Kitchener-Waterloo Record*, Tuesday, June 7, 2005, Section: Front, 2005 WLNR 8999561.

[4] *See, e.g.*, John Vinocour, "A Battle Map is Offered, but will Europe March? Politicus," *International Herald Tribune*, Tuesday, June 7, 2005, News, p. 3, 2005 WLNR 9009591; Mika Brzezinski and Sheila MacVicar, "Setbacks Put Brakes on European Unification," *FDCH CBS Newswire*, Monday, June 6, 2005; Gerard Baker, "EU Constitution Got What It Deserved," *Los Angeles Times*, Monday, June 6, 2005, Section: Business, 2005 WLNR 9000993.

[5] One of the famous statements reflecting the political reality of such an endeavor is attributed to Benjamin Franklin, who was asked by an observer after the Constitutional Convention of 1787: ""Well, Doctor, what have we got—a Republic or a Monarchy?", to which Franklin replied: "A Republic, if you can keep it."

well understood in Europe. *The Federalist*, No. 51, places the "structural" component at the center of our government's commitment to the protection of human and civil rights.

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.
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> Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.[8]

Few topics have been more controversial in the history of America's compound republic than the nature and extent of the federal government's power to make laws that have the purpose and effect of preempting state institutions or policies. The first such controversy occurred at the Constitutional Convention itself, where the Antifederalists sought explicit guarantees that federal power would not be utilized to preempt important state laws, institutions, and values. The Preamble to the Bill of Rights reflects those concerns. It states:

> THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institutions.
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> RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States.... [9]

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[8] Alexander Hamilton, James Madison & John Jay, THE FEDERALIST No. 51, at 164 (Alexander Hamilton or James Madison).

[9] U.S. CONST. pmbl., bill of rights. The Preamble to the Bill of Rights was agreed to by the Senate on Tuesday, September 8, 1789. *Journal of the Senate* (Tuesday, Sept. 8, 1789) at 78. The image can be obtained online through the Library of Congress at: http://www.loc.gov/exhibits/treasures/images/uc004829.jpg (last visited July 25, 2003). The Preamble itself is reproduced online *at* http://www.archives.gov/exhibit_hall/char-

The text and structure of the Constitution, Bill of Rights, and Fourteenth Amendment underscore the point. The United States Reports are filled with disputes in which the ultimate question is the balance to be struck between federal and state jurisdiction to prescribe.

Controversies over the power of judicial review center on precisely the same issue. In *Marbury v. Madison,* the Court asserted the unexceptionable proposition that Congressional jurisdiction to prescribe is limited by the Constitution that creates it, and that laws exceeding those limits are a nullity.[10] Executive acts[11] federal and state judicial decrees,[12] and state laws[13] are subject to the same jurisdictional restraints. So too are the decisions of the United States Supreme Court.[14]

Thus, one of the first and most important differences between the Constitution of the United States and the proposed European constitution

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ters_of_freedom/bill_of_rights/preamble.html (National Archives' Charter of Freedom Exhibit) (last visited June 5, 2005). In full, the Preamble provides as follows:

> **Congress of the United States** begun and held at the City of New-York, on Wednesday the fourth of March, one thousand seven hundred and eighty nine.
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> **THE** Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.
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> **RESOLVED** by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.
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> **ARTICLES** in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.
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> *Id.*

[10] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[11] *E.g.*, Clinton v. Jones, 520 U.S. 681 (1997); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[12] Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[13] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[14] *See Erie*, 304 U.S. 64 (1938), *rev'g* Swift v. Tyson, 41 U.S. (16. Pet.) 1 (1842). *See generally* Robert A. Destro, *The Structure of the Religious Liberty Guarantee,* 11 J. LAW & RELIGION 355 (1994-95).

is the way in which each conceptualizes the relationship of political power to the protection of civil and human rights. In the American view, "fundamental rights" exist independently of their recognition by government. They are protected best when government authority is divided among competing authorities and explicitly constrained by constitutional limitations. The *practical* result is that Americans are free to challenge actions they perceive to be abuses of authority through the simple expedient of petitioning a *different* branch of government for a redress of their grievances. This is why the late Justice Robert Jackson of the United States Supreme Court, who also served as Attorney General of the United States under President Franklin Roosevelt, described constitutional litigation as "the stuff of power politics in America."[15]

The difference in approach is apparent when one examines the operative provisions of Article 7 of the European Constitution. It is phrased in the affirmative, and views "rights" as a creature of law.

> 1. The Union *shall recognize* the rights, freedoms, and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution.
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> 2. The Union *shall seek accession* to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.
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> 3. Fundamental rights, *as guaranteed by* the European Convention for the Protection of Human Rights and Fundamental Freedoms, *and as they result from* the constitutional traditions common to the Member States, *shall constitute* general principles of the Union's law. (emphasis added)

The "rights" provisions of the United States Constitution, by contrast, are framed in the negative. The distribution of power within the system leads to an initial assumption that the powers granted by the constitution are plenary to the extent necessary to carry out the assigned task, but that they are limited by the rights retained by the People and by the duties assigned to other branches of government. From this perspective, it would be completely inappropriate to observe that the accession to a human rights treaty "shall not affect the Union's competences as defined in the Constitution." In the American understanding of civil

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15 Robert H. Jackson, The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics 287 (1941).

and human rights, violations are, by definition, actions taken *outside the scope of the authority granted.*

The first amendment to the Constitution of the United States provides a good example of this approach. It provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[16]

Written at a time when the States had established churches and restrains on freedom of the press were common, the amendment presumes that, if construed broadly, the powers (competencies) of Congress could be utilized to *authorize* the passage of laws that would violate the "inalienable rights" endowed by our Creator an which are part and parcel of human nature. This is why those who *opposed* the Constitution demanded the inclusion of a Bill of Rights. They wanted explicit guarantees that Congress could "make no law" that would violate the rights of speech, press, religion, assembly, and petition, and an explicit direction *to courts* that the broad powers granted to Congress "shall not be construed" to permit them to use their authority in a manner that would be inconsistent with the powers retained by the States and the People[17]. The ever-present "structural component" is implicit in its first word[18]. The amendment limits the powers of Congress *alone*. The *states* are free, as sovereign political communities, to formulate their own policies on these questions.[19].

The result is that one cannot read the "rights" provisions of the United States Constitution without reference to the competencies they limit.

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[16] U.S. Const. amend. I(1791).

[17] U.S. Const. amends. IX, X (1791). The antifederalists appear to have feared, correctly as it turns out, that the powers granted to the federal government would arguably permit the creation of a "church of the United States." *See* McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819) (reading the general powers of granted to Congress as authorizing the creation of the Bank of the United States).

[18] Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156 (1986)

[19] In a series of cases beginning in the early 1940s, the United States Supreme Court has applied the first amendment to the states through the Due Process Clause of the fourteenth amendment. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). *See generally* Michael S. Ariens & Robert A. Destro, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY (Carolina Academic Press, 2d ed. 2002), Chapter 5.

Because powers (or competencies) are given to the government as a means for the attainment of community interests, the precise nature and scope of any specific power is to be ascertained on a case-by-case basis though a careful examination of the rights and powers retained by the states and the people[20]. In cases of doubt, the presumption is *against* the exercise of federal authority, and in favor of the power of the states to provide *more* rights protections than those available under federal law.[21]

The proposed European Constitution, by contrast, assumes the primacy of Union law on rights matters. It does not speak in terms of *power*, but rather, in terms of "respect" and "recognition." Article 5 §1, for example, requires that

> The Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security.

Read together, Article 7 and Article 5 §1 raise a number of important constitutional questions, all of which center on the nature of the jurisdictional boundary that separates the powers of the Union from those of its member states. There is an enormous difference between the *respect* (or "comity")[22] that one sovereign owes to another in a case where both have political competence[23], and the jurisdictional bar that exists when a

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[20] *See generally* U.S. Const., arts. I, II, III, and amends. IX, X, and XIV.

[21] Amendments IX and X provide:

*Amendment IX:* The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

*Amendment X:* The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[22] In his classic treatment of the subject of comity in COMMENTARIES ON THE CONFLICT OF LAWS §§ 29-38 (1865), the great American jurist, Joseph Story, discussed Ulrich Huber's (Huberus, 1635-1694) three axioms that apply in situations when there is a conflict of laws: "1) The laws of each state have force within the limits of that government and bind all subjects to it but not beyond; 2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof; and 3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects." Id. §29, n. 3.

[23] U.S. Const., art. IV §1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may

governmental body acts *outside* its competence[24], but Articles 7 and 5 §1 appear to blur that distinction.

From an American perspective, this puts enormous power into the hands of the Union. The political and governmental structures of the member states are to be "respected" only if they are perceived by officials of the Union – including the Court of Justice – as "fundamental" or as necessary for the preservation of "essential state functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security."[25] Read together with the provisions of Article 5 §2, which requires that the "Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution," it should come as no surprise that political accountability is, and will continue to be, an important theme in the debates over the adoption and revisions of the proposed constitution.

## II) Citizenship, Freedom of Movement, and Political Accountability

### A. *Comparing the Constitutions: The "Constitutional" Politics of the Immigration Issue*

Much of the recent discussion of the rejection of the European Constitution by French and Dutch voters centers on issues that fall under the general rubric of "globalization." Like many Europeans, Americans have significant concerns about the economic, social, and political effects that occur during massive, cross-boundary labor and capital flows, but the

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by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.") *See, e.g.,* State of Nevada v. Hall, 440 U.S. 410 (1979) (State of Nevada could not claim immunity from private lawsuits in California state courts for damages alleged to have been inflicted by Nevada state employees conducting state business in California); Allstate Insurance Co. v. Hague, 450 U.S. 971 (1981) (states are free to apply their own law to cases pending in their own courts whenever they have minimum contacts with the persons, events, or transactions involved in the case).

[24] *Compare* Printz v. United States, 521 U.S. 898 (1997) (Congress does not have the power to require state and local law enforcement authorities to conduct background checks on prospective handgun purchasers) *with* New York v. United States, 505 U.S. 144 (1992) (Congress has the power to regulate the disposal of nuclear waste materials, but may not compel the states to enact laws on the same subject).

[25] European Constitution, Art. 5 §1.

debate over these issues in the United States has a somewhat different focus than that which has been reported in France, Germany, or the Netherlands.

Some of the difference is attributable to history. Many Americans are either economic migrants themselves, or are, like this writer, descended from immigrants who came to the United States in search of a better life for themselves and their families. Mass migrations *within* America's vast, internal market have become the stuff of legend, folklore, and film. From the wagon trains and ships that brought migrants from the Eastern seaboard to the Plains and Far West in the Nineteenth Century to the development of the "Sun Belt" of the South and Southwest in the years following World War II, the economic, social, political, and cultural impact of internal migration has been stunning. The regions receiving the immigration flows have experienced sustained growth in their populations, economies, and political power, while those losing population have had to grapple with unemployment, a shrinking tax base, and the loss of political power and influence in Washington.

Notwithstanding the difficulties that arise from the free movement of people and capital within the internal market, Americans would react with horror at the suggestion that either the federal government or the States should take any action designed to stem the flow of goods or labor in that market[26]. Freedom of movement within the internal common market is so firmly entrenched in the national consciousness that regional disparities in economic performance and job creation are seen primarily as economic and social development problems to be solved by through state and local

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[26] The Interstate Privileges and Immunities Clause, U.S. Const., art. IV §2, cl 1, provides that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," and guarantees not only the right to freedom of movement within the United States, but alo the right to be free from discrimination on the basis of state citizenship. *See, e.g.,* Austin v. New Hampshire, 420 U.S. 656, 660-63 (1975) (finding New Hampshire Commuters Income Tax imposed on Maine residents employed in New Hampshire violated the Privileges and Immunities Clause); Hicklin v. Orbeck, 437 U.S. 518, 523-24 (1978) (holding that an Alaska law that required that all oil and gas leases, easements or rights-of-way permits, and other large projects contain requirement that qualified Alaska residents be hired in preference to nonresidents was unconstitutional as under the Privileges and Immunities Clause of Article IV of the Constitution of the United States); Matter of Jadd, 391 Mass. 227, 461 N.E.2d 760 (1984) (holding that a Supreme Judicial Court Rule that an attorney seeking admission to the Massachusetts bar must be a resident of the Commonwealth violates the Privileges and Immunities Clause of the United States Constitution).

tax and policy initiatives[27]. In this view, the states bear primary responsibility for the economic and social welfare of their citizens. The federal government's role is limited to ensuring legal and political accountability across the entire system[28].

Like Europeans, American voters are uneasy the way in which politicians have been responding to the both legal and illegal immigration. Both Congress and the states appear to notice that frustration and are responding to the pressure in interesting ways. On May 11, 2005 President Bushed signed a series of laws regulating both border and internal se-

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[27] *See* U.S. Const., art. §I §§8-9 (1787). Given the distribution of taxing authority in the American union, there is a substantial question concerning the nature and extent to which "harmonisation" of internal tax policies of the type contemplated by Title III §6, art. III-59-62 of the European Constitution is even possible. There is an extensive literature on "jurisdiction to tax" and its relationship to Congressional power to regulate interstate and international commerce under U.S. Const., art. I §8, but the discussion is complex and far beyond the scope of this paper. For present purposes it is enough to quote from the Justice Sandra Day O'Connor's opinion for the United States Supreme Court in *New York v. United States*, 505 U.S. 144, 180 (1991):

While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did not intend that Congress should exercise that power through the mechanism of mandating state regulation. The Constitution established Congress as "a superintending authority over the reciprocal trade" among the States, *The Federalist* No. 42, p. 268 (C. Rossiter ed. 1961), by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to state governments. As Madison and Hamilton explained, "a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity." Id., No. 20, at 138.

[28] *Compare* County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004) (holding that the Michigan Constitution does not permit the state to take private property for public use and transfer it to another private entity unless: (1) there is a public necessity of the extreme sort that requires collective action; (2) the property remains subject to public oversight after transfer to a private entity; and (3) the property is selected because of facts of independent public significance, rather than the interests of the private entity to which the property is eventually transferred.), *with* Kelo v. City of New London, 268 Conn. 1, 843 A.2d 500 (2004) (permitting the state to use the power of eminent domain to take private property for commercial development), *certiorari granted* Kelo v. City of New London, Conn., — U.S. —, 125 S.Ct. 27 (2004) (No. 04-108) (same case now pending in the United States Supreme Court, arguing that Connecticut's laws permitting the use of eminent domain in such circumstances violates the fifth amendment to the Constitution of the United States).

curity.[29] These new laws make it difficult, if not impossible, for undocumented persons to obtain state-issued driver licenses, which serve as the most commonly-used form of official identification in the United States. There has also been an extensive, and largely negative, discussion of the "guest worker" proposals discussed in meetings between the President Bush and Mexican President Vincente Fox[30].

There has been considerable immigration-related political activity at the state level as well – a fact that illustrates another way in which the European Constitution differs from that of the United States. Under the European Constitution, the specifics of immigration policy are left to the member states[31], but the Union is competent to establish a common immigration policy.[32] Under the United States Constitution, Congress has exclusive power to set immigration and naturalization policy[33], but the states have considerable power to define the rights and obligations of their own citizens and others who live within their borders[34].

Much to the dismay of the federal government, as well as to a number of American political and cultural elites, some states have taken official actions that express their displeasure with federal and immigration and border security policies. In their view, federal policies do not provide sufficient protection for states and local governments from the social, fiscal, and other pressures caused by the influx of large numbers illegal and unskilled of immigrants.

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[29] See "Real ID Act of 2005," enacted as Titles I & II, §§101-207 of H.R. 1268, "The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005," and signed by President Bush on May 11, 2005: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h1268enr.txt.pdf.

[30] *See, e.g.*, Jerry Seper, "Congressmen urge Bush to Drop Guest-Worker Plan," *The Washington Times,* http://washingtontimes.com/national/20041116-110709-8081r.htm; American Public Media, "President Bush, Immigration Reform, and the Guest Worker Debate, *Marketplace*, Tuesday, March 22, 2005, http://marketplace.publicradio.org/shows/2005/03/22/PM200503223.html (discussing the rights and working conditions of border patrol agents).

[31] European Const. art. III-267, ¶ 2(b), 4.

[32] European Const. art. III-267, ¶ 1-2.

[33] U.S. Const., art. §I §8, cl. 3: "The Congress shall have the power ... To establish an uniform Rule of Naturalization...."

[34] U.S. Const. amend. XIV §1 (1868). An extensive discussion of the differences between state and national citizenship in the United States is beyond the scope of this paper.

The most recent of these was a November 2004 Arizona ballot initiative entitled "Protect Arizona Now."[35] Aimed squarely at both undocumented aliens and a federal government that appears either unable, unwilling, or both to enforce the immigration laws, the ballot language provided that:

> This state finds that illegal immigration is causing economic hardship to this state and that illegal immigration is encouraged by public agencies within this state that provide public benefits without verifying immigration status. This state further finds that illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship. Therefore, the people of this state declare that the public interest of this state requires all public agencies within this state to cooperate with federal immigration authorities to discourage illegal immigration.

Over strenuous opposition by politicians, the media, human rights, and church-related organizations, Arizona's voters adopted the measure, and amended the state's laws to require that authorities confirm the citizenship of all those who show up at the polls to vote. The measure also requires that state welfare authorities the immigration and citizenship status of all applicants for state-provided public benefits[36].

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[35] For details on the Initiative, *see* http://www.pan2004.com.

[36] Section 46-140.01 of the Arizona Revised Statutes now provides:

A. An agency of this state and all of its political subdivisions, including local governments, that are responsible for the administration of state and local public benefits that are not federally mandated shall do all of the following:

1. Verify the identity of each applicant for those benefits and verify that the applicant is eligible for benefits as prescribed by this section.

2. Provide any other employee of this state or any of its political subdivisions with information to verify the immigration status of any applicant for those benefits and assist the employee in obtaining that information from federal immigration authorities.

3. Refuse to accept any identification card issued by the state or any political subdivision of this state, including a driver license, to establish identity or determine eligibility for those benefits unless the issuing authority has verified the immigration status of the applicant.

4. Require all employees of the state and its political subdivisions to make a written report to federal immigration authorities for any violation of federal immigration law by any applicant for benefits and that is discovered by the employee.

### B. *Common Themes: Political Accountability, Subsidiarity, and Local Control*

To the extent that there is a common theme in the debates on both sides of the Atlantic, it appears to be a growing awareness on the part of the developed world that globalization has significant costs in the local market. The European Union and the United States have been aggressive advocates for globalization – as long as that concept is understood as free trade and access to global markets for European and American capital, goods, services, and ideas. There is less support for the concept at the national level, where the competitive pressures unleashed by globalization are felt most keenly. In these communities, "integration" (or "globalization") can easily be seen as having adverse effects on local economies, on important concepts like national citizenship and sovereignty[37], on the legal fabric that protects the rights of workers and families[38], and on a nation's concept of its own cultural identity[39].

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B. Failure to report discovered violations of federal immigration law by an employee is a class 2 misdemeanor. If that employee's supervisor knew of the failure to report and failed to direct the employee to make the report, the supervisor is guilty of a class 2 misdemeanor.

C. This section shall be enforced without regard to race, religion, gender, ethnicity or national origin. Any person who is a resident of this state shall have standing in any court of record to bring suit against any agent or agency of this state or its political subdivisions to remedy any violation of any provision of this section, including an action for mandamus. Courts shall give preference to actions brought under this section over other civil actions or proceeding pending in the court.

[37] *See generally* Commission of the European Communities, *Fourth Report on Citizenship of the Union* (1 May 2001 – 30 April 2004), COM (2004) 695 final COM (2004) 695 final (26/10/2004), http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0695en01.pdf, and annexed staff report: http://europa.eu.int/comm/justice_home/doc_centre/citizenship/doc/sec2004_1280_en.pdf.

[38] See Eilene Zimmerman, "Border Agents Feel Betrayed by Bush Guest-worker Plan," *The Christian Science Monitor*, February 24, 2004, http://www.csmonitor.com/2004/0224/p03s01-uspo.html

[39] *See generally* Commission of the European Communities, Green Paper "On an EU Approach to Managing Economic Migration," COM(2004) 811 final (11.1.2005); Simon Jenkins, "The Peasants' Revolt," *Sunday Times* (UK), Sunday, June 5, 2005, Section: Features, p. 1; Frida Ghitis, Editorial, "Immigration Dims Dutch View of EU," *Atlanta Journal-Constitution*, Monday, June 6, 2005 at A13, 2005 WLNR 8931041; Trudy Rubin, Commentary, "EU Vote Shows Search for Identity," *Duluth Tribune*, Wednesday, June 8, 2005, 2005 WLNR 9081081; Richard Bernstein, "Europe Is Still Europe," *New York Times*, Tuesday, June 7, 2006 at A10, 2005 WLNR 8996807. *See also* Thomas P.M.

Much has been said and written about political movements like those of Jean-Marie LePen in France, Pym Fortuyn in the Netherlands, and the Vlaams Bloc in Belgium. Whatever one thinks of their politics, these "grass roots" organizations complain that their respective governments' policies do not strike an appropriate balance between the demands of human dignity and the need to preserve national, regional, and local social and cultural institutions. With the recent defeat of the European Constitution in a country as politically progressive as the Netherlands, it is now a bit easier for political "moderates" to speak openly on the issue of immigration reform and political assimilation. A good example of this trend is a recent commentary by *Washington Post* columnist Robert J. Samuelson, who observed that:

> There are now an estimated 34 million immigrants in the United States, about a third of them illegal. About 35 percent of all immigrants lack health insurance and 26 percent receive some sort of federal benefit reports Steven Camarota of the Center for Immigration Studies. To make immigration succeed, we need (paradoxically) to control immigration.
>
> Although this is common sense, it's common sense that fits uneasily inside our adversarial political culture. You're supposed to be either pro-immigrant or anti-immigrant – it's hard to be pro-immigrant and pro-tougher immigration restrictions. But that's the sensible position, as any examination of immigration trends suggests.
>
> ... We could do a better job of stopping illegal immigration on our southern border and of policing employers who hire illegal immigrants. ... We could also make more sensible decisions about legal immigrants – favoring the skilled over the unskilled. But the necessary steps are much tougher than most politicians have so far embraced and their timidity reflects a lack of candor about the seriousness of the problem. The stakes are simple: Will immigration continue to foster national pride and strength or will it cause more and more weakness and anger?[40]

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Barnett, THE PENTAGON'S NEW MAP (Penguin Group, 2004) ISBN: 0399151753. In Barnett's view, the World's new map is divided into two parts: "the functioning core" and the "nonintegrating gap." The core consists of economically advanced or growing countries that are linked to the global economy and bound to the rule-sets of international trade. The rest of the world is in the nonintegrating gap. These countries operate outside the global economy, are not bound to the rule-sets of international trade, and, unfortunately, have been the loci of all post-Cold War military conflicts.

[40] *See* Robert J. Samuelson, "Candor on Immigration," *Washington Post*, Wednesday, June 8, 2005 at A21.

If, as Samuelson suggests, the "timidity" of both American and European leaders on the immigration issue leads *voters* to draw the same conclusion: *i.e.* that their lack of leadership "reflects a lack of candor about the seriousness of the problem," the vote on the European Constitution may tell us more about the views of the electorate regarding their leaders than it does about their views on the principle of European integration. As one Irish observer put it: "The people of France and the Netherlands have acted in accordance with the dictum that, in a referendum, a question is asked and voters answer another."[41]

From an American perspective, a reading of the election results that emphasizes the *message* being sent by the voters rather than the answer they gave to the specific question their leaders asked illustrates another important difference between the Constitution of the United States and the proposed European Constitution: the *operational* aspects of the principle of "subsidiarity."

Article 9 of the European Constitution provides that

> 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
>
> 2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.
>
> 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
>
> The Union Institutions shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Constitution. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in the Protocol.
>
> 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.

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41 Letters, "Crisis Over the EU Constitution", *Irish Times*, June 6, 2005 at 15.

> The Institutions shall apply the principle of proportionality as laid down in the Protocol referred to in paragraph 3.[42]

In the United States, the principle of subsidiarity is not an aspiration. It is built into the concept of divided sovereignty and is an integral component of the structure of federalism. Much of American constitutional law is, in this view, simply the written record of a case-by-case struggle to define the jurisdictional boundaries between the federal government and the states[43]. As noted by United States Supreme Court Associate Justice Sandra Day O'Connor just a few days before this essay went to press:

> [The United States Supreme Court] enforce[s] the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government.[44]

In an opinion even more sweeping in its breadth, Associate Justice Clarence Thomas made a point that should also give some pause to Europeans who may have concerns about the ways in which the EU will implement and respect the principle of subsidiarity:

> The majority's rewriting of the Commerce Clause seems to be rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively. [citations omitted]. The interconnectedness of economic activity is not a modern phenomenon unfamiliar to the Framers. (citation omitted); Letter from J. Madison to S. Roane (Sept. 2, 1819), in 3 THE FOUNDERS' CONSTITUTION 259-260 (P. Kurland & R. Lerner eds.1987). Moreover, the Framers understood what the majority does not appear to fully appreciate: There is a danger to concentrating too much, as well as too little, power in the Federal Government. This Court has carefully avoided stripping Congress of its ability to regulate *inter*state commerce, but it has

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[42] *See also*, Protocol on the Application of the Principles of Subsidiarity and Proportionality, http://europa.eu.int/eur-lex/en/treaties/selected/livre345.html.

[43] *See, e.g.*, Gonzales v. Raich, S.Ct., 2005 WL 1321358 (June 6, 2005) (discussing the power of the federal government to ban the use of marijuana for any purpose *vis á vis* the power of the states to permit individuals to grow or obtain small amounts of marijuana (*Cannabis sativa*) for medicinal use).

[44] Id., S.Ct., 2005 WL 1321358 (O'Connor, J., Rehnquist, C.J., and Thomas, J., dissenting).

> casually allowed the Federal Government to strip States of their ability to regulate *intra*state commerce—not to mention a host of local activities, like mere drug possession, that are not commercial.
>
> One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States. Yet this Court knows that "'[t]he Constitution created a Federal Government of limited powers.' " *New York v. United States*, 505 U.S. 144, 155, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991)). That is why today's decision will add no measure of stability to our Commerce Clause jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter. If stability is possible, it is only by discarding the stand-alone substantial effects test and revisiting our definition of "Commerce among the several States." Congress may regulate interstate commerce—not things that affect it, even when summed together, unless truly "necessary and proper" to regulating interstate commerce.[45]

Political movements like "Protect Arizona Now" and those that urged a "no" vote on the European Constitution are significant actors on the political scene. Because they play an important role in the preservation of political accountability, ensuring that they have sufficient opportunities to express their political concerns, and to seek redress for their grievances, is a key component of any political system committed to democratic self-governance[46]. This is why American observers of the European Constitution are so interested in its political accountability mechanisms, and in the *operational* aspects of the principle of subsidiarity. In large and diverse political systems like the EU and the United States, local control plays an important *political* role, and serves as an "early warning" to politicians at the union level that they may be dangerously out of touch with the People themselves. It makes no difference whether that role arises out of a profound respect for the principle of subsidiarity, or from the jurisdictional limitations built into the separation of powers doctrine. The key factor is whether the People have real, and regularly recurring, opportunities to make their voices heard.

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[45] Id., S.Ct., 2005 WL 1321358 (O'Connor, J., Rehnquist, C.J., and Thomas, J., dissenting).

[46] *See* U.S. Const. art. IV §3 (Guaranty Clause); amend. I (petition for redress of grievances).

> Federalism is one safeguard [against unwise policies], for political accountability is easier to enforce within the States than nationwide. The other principal mechanism, of course, is control of the political branches by an informed and responsible electorate. Whether or not federalism and control by the electorate are adequate for the problem at hand, they are two of the structures the Framers designed for the problem the statute strives to confront. The Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge. The fact that these mechanisms, plus the proper functioning of the separation of powers itself, are not employed, or that they prove insufficient, cannot validate an otherwise unconstitutional device.[47]

## III) Religion, Culture and the Concept of "Citizenship"

### A. *Determining Who Is a Member of the Community and Who is an "Outsider"*

The task of building a community begins with persons. As social beings, human persons have a need to belong to a community not only for physical support, but as an essential component of the task of self-identification. That process begins with a family and often occurs within a faith community, for both institutions – church and family – serve as essential transmitters of culture. American constitutional law recognizes this point:

> Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390 ..., we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny

[47] Clinton v. City of New York, 524 U.S. 417, 452-453 (1998) (Kennedy, J., concurring). *See also* New York v. United States, 505 U.S. 144, 181-182 (1992) (discussing the reasons why federalism and separation of powers foster individual rights and political accountability).

have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[48]

Once a child leaves home and seeks to enter the political, educational, and business communities and their relevant subcultures, the identity shaping devices and structures that define those groups is a fertile ground for inter-ethnic and religious tension. Under this rubric arise the issues of

- Assimilation (overt and informal)
- Cultural Expropriation
- The Need of Sub-Cultures to Maintain their Identity in a Plural Culture
- The Need of the Larger Society to Create and Maintain a Cohesive, yet Plural Culture

Given its heritage as a nation of immigrants, Native Americans and slaves brought here involuntarily, the American experience provides a unique, and uniquely useful, example of some of the "religious" questions that can arise when a political community sets out to define itself in "secular" or "neutral" terms.

### 1. *Membership in the Political Community: Citizenship*

"Citizenship" was the legal issue over which the United States fought the Civil War, and the substantive content that status remains a source of controversy in the American body politic even today. In purely legal terms, the issue in the mid-1850s was a simple one: should persons of Black-African descent be permitted to attain the status of "citizen", and, if so, whose law (federal, the State of origin, or the state of residence and labor) would determine the issue? In *Dred Scott v. Sandford*[49], the United

[48] Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1973). This position also finds support in international human rights principles. *See, e.g.*, The International Covenant on Civil and Political Rights, Article 18 (1966); The Helsinki Final Act (1975) (Baskets VI & VIII); United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981). Concluding Document of the Vienna Meeting in 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, held on the Basis of the Provisions of the Final Act Relating to the Helsinki Conference (1989).

[49] 60 U.S. (19 How.) 393 (1856).

States Supreme Court held that the answer was a question of federal law, and that the only relevant cultural *and religious* perspective on the issue was that of pro-slavery, persons of white, European descent.[50]

The important legal point to draw from this episode in American history is that is Americans acquire citizenship *status* under the Constitution itself[51], but, like citizenship in the European Union[52], the *rights* enjoyed by American citizens are defined by both federal and the law of the state in which they reside. It would be inconsistent with both European and the American understandings of human dignity to have one's relationship to the political community defined by an immutable characteristic, such as "race" or "gender", by reference to a tribal or communal culture, or to a "state of mind." The question, for Americans, is which of the relevant political communities has the "final word."[53]

### B. *Religion, Political Culture, and Citizenship in the European Union and the United States*

Because religion is such an important component of a nation's culture and identity, it is almost inevitable that the status of religion in society will become a topic for discussion when a draft constitution is submitted for consideration. In the United States, where the "separation of church and state" is "functional" in character, the only mention of religion in the Constitution of 1787 is the Religious Test Clause of Article VI[54]: "no religious test shall ever be required as a Qualification to any Office or public Trust under the United States."

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[50] This was the holding explicitly overturned by the Citizenship Clause of the Fourteenth Amendment. U.S. Const. Amend. XIV § 1 (1868). ("All persons born or naturalized in the United States are citizens of the United States and of the State in which they reside.").

[51] U.S. Const. amend. XIV §1 (1868) provides that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

[52] European Constitution, Title II, art. 8.

[53] See Robert A. Destro, *Federalism, Human Rights, and the Realpolitik of Footnote Four*, 12 WIDENER LAW REVIEW 373-457 (2003).

[54] Article VI, clause 3 requires an oath or affirmation in support of the Constitution from all officials and legislators, both State and federal, but only the federal government was prohibited from utilizing the religious tests to determine fitness for public office.

Like the drafters of the European Constitution, the Framers of the American Constitution wanted to keep the federal government out of religious controversies, and thought they could so by keeping the powers of the union focused on purely temporal issues while leaving questions of regarding religion and religious groups to the states. In this view, it was possible for the Framers of the United States Constitution to draw "nonestablishment sum from the lack of federal jurisdiction over religion plus the test ban." In the debates over the ratification of the Constitution they argued that "since the oath requirement was the only plausible power one sect might use to gain the upper hand"[55]; Article VI was "enough [of a religious liberty guarantee] for a federal government of specific enumerated powers"[56].

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[55] *See* Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 708--709 (1987) quoting IV ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION at 196 (speech of James Iredell). This is a significant point, especially in light of the current Court's understanding of the Fist Amendment's guarantees of freedom of speech, press, religion, peaceable assembly and petition for redress of grievances. It seems to have been forgotten in contemporary church-state jurisprudence that an "establishment of religion" was a many faceted enterprise which included, in addition to the *preferential* treatment of and support for identifiable religious groups, there were also legal mechanisms designed to enforce the political and civil *subordination* of the disfavored religions and their adherents. Among these were test oaths, requirements of church membership and worship, and other civil disabilities. *See generally* William A. Blakely, ed. & The Religious Liberty Ass'n, AMERICAN STATE PAPERS AND RELATED DOCUMENTS ON FREEDOM IN RELIGION (Review and Herald: Washington, D.C., 1949) 17-92.

[56] *Id.*, Bradley, *supra* note 55 at 709. Professor Bradley notes that just "as in the voter qualifications actually left to state law by article I, the Framers *could* have cut into the comparatively 'illiberal' state orders [supporting state-established religions ] had they wanted to. Put differently and largely as a matter of legal analysis and not political wisdom, an incision at this point could certainly have been justified as a necessary, limited protection of the federal regime, and not as a wholesale invasion of state autonomy. This reticence and the overall sparseness of the record at least plausibly confirm Pinckney's proposal as a matter of observation, both about the completed legal framework and the Framers' intentions: Congress should not regulate the 'subject of religion.'" Bradley, *supra* note 55 at 693.

The States, by contrast, commonly applied such tests to those seeking State offices, and at least one –Tennessee – continued to do so as late as 1977! *See* McDaniel v. Paty, 435 U.S. 618 (1978), *rev'g*, Paty v. McDaniel, 547 S.W.2d 897 (Tenn., 1977). For an historical perspective on this issue, *see* William G. Torpey, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA (Chapel Hill: U.N.C. Press, 1948) at 16, quoting Sanford H. Cobb, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (New York: MacMillan, 1902) at 510 (compiling statistics "relative to religious qualifications for officeholders in the first thirteen state constitutions.)

Former Commission President, Romano Prodi, made essentially the same point in answer to a question posed to him on the subject of religion in the European Union:

> ***Question***: *What is the attitude of the European institutions in general, and of the European Commission in particular, towards the Churches, religious associations and religious communities in the continent?*
>
> ***Answer***: The position of the institutions of the European Union towards the churches, the religions and the religious communities is absolutely impartial, it respects the rights of everyone and it acknowledges the importance of the role of the religions in our society of today. [57]

A position of "absolute impartiality," however, is rarely enough to satisfy the concerns of those who view the union's constitution as a statement concerning the religious heritage of the community. In the United States, the anti-Federalists viewed the Test and Supremacy Clauses as threats to religious liberty.[58] So did the States. Both pressed, successfully, for the ratification of the First Amendment because the Constitution of 1787 did not state explicitly that the federal government had no enumerated power either to vex religious liberty directly or to set national policy on the subject.[59]

The discussion in Europe has a similar character, and proceeds from many of the same concerns. Mr. Prodi's response to the question of the treatment of churches in the European Constitution is informative:

> ***Question***: *There is a lot of discussion about the Christian roots of Europe in the future European Constitution. What is your opinion about this? In your opinion, what space should the religious denominations have in the European Constitution?*
>
> ***Answer***: The Convention on the future of Europe has partly answered this question in the Preamble that opens the project of the Constitutional Treaty and, in a more specific way, in article 51 of the text. I have already referred to article 51, but I would like to draw attention to its qualifying part by citing the third paragraph: "The Union maintains an open, transparent

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[57] European Consortium on Church & State Research, *Newsletter*, April 2004, pp 1-2.

[58] Id. at 694-711.

[59] Federalist, No. 52, 57 (Madison). *See generally* id., No. 10, 51. Professor Bradley writes that "[t]he no-test clause was sold as a constitutionalized Golden Rule with a Machiavellian spin to it: 'Constrain yourself as you would constrain others.'" Madison's views on the role factions should play in the protection of all forms of liberty are thus clearly in evidence here. Bradley, *supra* note 55 at 702-707.

> and regular dialogue with such churches and organizations, recognizing their identity and their specific contribution." I would like today to confirm my position on this point. I am convinced that religion is one of the fundamental values of Europe and the history of Europe and the history of Christianity are indissolubly linked. [60]

Just as in Europe, religion is an important component of American domestic culture, but Americans appear to be far more overt in their discussion about the role of religion in society *and in politics* than our European counterparts. Many Americans question both the wisdom, and the constitutionality, of the French education law that provides that "the wearing of tokens or clothing by which students [in public schools] openly manifest a religious affiliation is forbidden,"[61] and some have pointed to the rejection of the appointment of Mr. Rocco Buttiglione as Justice Minister for the European Commission as an example of anti-religious bigotry.[62] The history of the First Amendment to the Constitution of the United States is largely a chronicle of the myriad ways in which such charges are made, and resolved, in the United States through politics, litigation, migration, and cultural assimilation.

In short, we have much to learn from each other.

## IV) **Conclusion**

In the paper presented above, I have sought to relate questions discussed at the Lisbon conference in 2004 to the politics of the present day. I hope that it will serve to foster additional discussion. At the first Luso-

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[60] European Consortium on Church & State Research, *Newsletter*, April 2004, p. 2. *See also* European Consortium on Church & State Research, *God in the European Constitution?* Opinions of the European Constitution Members. Available online at: http://www.church-state-europe.org/newsletter/April2004rechts.HTML.

[61] Section 141-5-1 of the Education Code provides: "Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit. Le règlement intérieur rappelle que la mise en oeuvre d'une procédure disciplinaire est précédée d'un dialogue avec l'élève." http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L, last visted October 30, 2004.

[62] *See, e.g.*, George Weigel, *The New Europe: No Catholics Need Apply, The Catholic Difference* (November 17, 2004), available online at: http://www.catholiceducation.org/articles/persecution/pch0071.html.

-American conference, held at The Catholic University of America in 2001, all of the speakers pointed out that there is much to be gained in a trans-Atlantic dialogue between the United States, Portugal, and other the Portuguese speaking counties. The conference held in Lisbon in 2004 proves not only the truth of those observations, but also the need to continue the dialogue on matters of common interest.

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