## Session 1: Introduction

Welcome to European Union Law and Politics!

For our first meeting on Thursday, August 23, please read the following extracts from:

Robert Schuman, "The Schuman Declaration" (1950)
Margaret Thatcher, "A Family of Nations" (1988)
Jürgen Habermas, "Why Europe Needs a Constitution" (2001)
Anu Bradford, "The Brussels Effect" (forthcoming 2012/13)
Jean-Pierre Filatriau, USA Today, "How the European financial crisis affects you" (June 2012)

Craig Timberg, The Washington Post, "Google Works to Appease Aggressive EU Regulators" (July 2012)

Also, if you have obtained the casebook, please read Bermann et al., Preface, p. v

## Schuman Declaration of 9 May 1950

This is the full text of the proposal, which was presented by the French foreign minister Robert Schuman and which led to the creation of what is now the European Union.

World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it.

The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations. In taking upon herself for more than 20 years the role of champion of a united Europe, France has always had as her essential aim the service of peace. A united Europe was not achieved and we had war.

Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries. With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point.

It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe.

The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.

The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification.

This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements.

In this way, there will be realized simply and speedily that fusion of interest which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions.

Margaret Thatcher Speech to the College of Europe ("The Bruges Speech")

Below are extracts from a speech by British Conservative politician and Prime Minister Margaret Thatcher, delivered to the College of Europe on September 20, 1988

#### **BRITAIN AND EUROPE**

Mr. Chairman, you have invited me to speak on the subject of Britain and Europe. Perhaps I should congratulate you on your courage. If you believe some of the things said and written about my views on Europe, it must seem rather like inviting Genghis Khan to speak on the virtues of peaceful coexistence!

I want to start by disposing of some myths about my country, Britain, and its relationship with Europe and to do that, I must say something about the identity of Europe itself.

Europe is not the creation of the Treaty of Rome.

Nor is the European idea the property of any group or institution.

We British are as much heirs to the legacy of European culture as any other nation. Our links to the rest of Europe, the continent of Europe, have been the dominant factor in our history. The European Community is one manifestation of that European identity, but it is not the only one.

We must never forget that east of the Iron Curtain, people who once enjoyed a full share of European culture, freedom and identity have been cut off from their roots. We shall always look on Warsaw, Prague and Budapest as great European cities. Nor should we forget that European values have helped to make the United States of America into the valiant defender of freedom which she has become.

#### WILLING COOPERATION BETWEEN SOVEREIGN STATES

My first guiding principle is this: willing and active cooperation between independent sovereign states is the best way to build a successful European Community.

To try to suppress nationhood and concentrate power at the centre of a European conglomerate would be highly damaging and would jeopardise the objectives we seek to achieve.

Europe will be stronger precisely because it has France as France, Spain as Spain, Britain as Britain, each with its own customs, traditions and identity. It would be folly to try to fit them into some sort of identikit European personality.

Some of the founding fathers of the Community thought that the United States of America might be its model.

But the whole history of America is quite different from Europe.

People went there to get away from the intolerance and constraints of life in Europe.

They sought liberty and opportunity; and their strong sense of purpose has, over two centuries, helped to create a new unity and pride in being American, just as our pride lies in being British or Belgian or Dutch or German.

I am the first to say that on many great issues the countries of Europe should try to speak with a single voice.

I want to see us work more closely on the things we can do better together than alone.

Europe is stronger when we do so, whether it be in trade, in defence or in our relations with the rest of the world.

But working more closely together does not require power to be centralised in Brussels or decisions to be taken by an appointed bureaucracy.

Indeed, it is ironic that just when those countries such as the Soviet Union, which have tried to run everything from the centre, are learning that success depends on dispersing power and decisions away from the centre, there are some in the Community who seem to want to move in the opposite direction.

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.

#### **ENCOURAGING CHANGE**

My second guiding principle is this: Community policies must tackle present problems in a practical way, however difficult that may be.

For example, the task of reforming the Common Agricultural Policy is far from complete. Certainly, Europe needs a stable and efficient farming industry.

But the CAP has become unwieldy, inefficient and grossly expensive. Production of unwanted surpluses safeguards neither the income nor the future of farmers themselves.

### EUROPE OPEN TO ENTERPRISE

My third guiding principle is the need for Community policies which encourage enterprise.

If Europe is to flourish and create the jobs of the future, enterprise is the key.

The basic framework is there: the Treaty of Rome itself was intended as a Charter for Economic Liberty.

But that it is not how it has always been read, still less applied.

The lesson of the economic history of Europe in the 70's and 80's is that central planning and detailed control do not work and that personal endeavour and initiative do.

That a State-controlled economy is a recipe for low growth and that free enterprise within a framework of law brings better results.

The aim of a Europe open to enterprise is the moving force behind the creation of the Single European Market in 1992. By getting rid of barriers, by making it possible for companies to operate on a European scale, we can best compete with the United States, Japan and other new economic powers emerging in Asia and elsewhere.

And that means action to free markets, action to widen choice, action to reduce government intervention.

Our aim should not be more and more detailed regulation from the centre: it should be to deregulate and to remove the constraints on trade.

And before I leave the subject of a single market, may I say that we certainly do not need new regulations which raise the cost of employment and make Europe's labour market less flexible and less competitive with overseas suppliers.

If we are to have a European Company Statute, it should contain the minimum regulations.

And certainly we in Britain would fight attempts to introduce collectivism and corporatism at the European level—although what people wish to do in their own countries is a matter for them.

#### EUROPE OPEN TO THE WORLD

My fourth guiding principle is that Europe should not be protectionist.

The expansion of the world economy requires us to continue the process of removing barriers to trade, and to do so in the multilateral negotiations in the GATT.

It would be a betrayal if, while breaking down constraints on trade within Europe, the Community were to erect greater external protection.

We must ensure that our approach to world trade is consistent with the liberalisation we preach at home.

We have a responsibility to give a lead on this, a responsibility which is particularly directed towards the less developed countries.

They need not only aid; more than anything, they need improved trading opportunities if they are to gain the dignity of growing economic strength and independence.

## **EUROPE AND DEFENCE**

My last guiding principle concerns the most fundamental issue—the European countries' role in defence.

Europe must continue to maintain a sure defence through NATO.

There can be no question of relaxing our efforts, even though it means taking difficult decisions and meeting heavy costs.

It is to NATO that we owe the peace that has been maintained over 40 years.

We must strive to maintain the United States' commitment to Europe's defence.

## Jürgen Habermas

# WHY EUROPE NEEDS A CONSTITUTION (extracts)

Below are extracts from an article by German sociologist and philosopher Jürgen Habermas, published in the New Left Review in September of 2001

There is a remarkable contrast between the expectations and demands of those who pushed for European unification immediately after World War II, and those who contemplate the continuation of this project today—at the very least, a striking difference in rhetoric and ostensible aim. While the first generation advocates of European integration did not hesitate to speak of the project they had in mind as a 'United States of Europe', evoking the example of the USA, current discussion has moved away from the model of a federal state, avoiding even the term 'federation'. Does this shift in climate reflect a sound realism, born of a learning-process of over four decades, or is it rather the sign of a mood of hesitancy, if not outright defeatism?

More than two hundred years later, we are not merely heirs to a long established practice of constitution-making; in a sense, the constitutional question does not provide the key to the main problem we have to solve. For the challenge before us is not to invent anything but to conserve the great democratic achievements of the European nation-state, beyond its own limits. These achievements include not only formal guarantees of civil rights, but levels of social welfare, education and leisure that are the precondition of both an effective private autonomy and of democratic citizenship. The contemporary substantification' of law means that constitutional debates over the future of Europe are now increasingly the province of highly specialized discourses among economists, sociologists and political scientists, rather than the domain of constitutional lawyers and political philosophers.

On the other hand, we should not underestimate the symbolic weight of the sheer fact that a constitutional debate is now publicly under way. As a political collectivity, Europe cannot take hold in the consciousness of its citizens simply in the shape of a common currency. The intergovernmental arrangement at Maastricht lacks that power of symbolic crystallization which only a political act of foundation can give.

#### An ever-closer union?

Let us then start from the question: why should we pursue the project of an 'ever-closer Union' any further at all? Recent calls from Rau, Schroeder and Fischer—the German President, Chancellor and Foreign Minister—to move ahead with a European Constitution have met sceptical reactions in Great Britain, France and most of the other member-states. But even if we were to accept this as an urgent and desirable project, a second and more troubling question arises. Would the European Union in its present state meet the most fundamental preconditions for acquiring the constitutional shape of any

kind of federation—that is, a community of nation-states that itself assumes some qualities of a state? Why should we pursue the project of a constitution for Europe? Let me address this question from two angles: (i) immediate political goals, and (ii) dilemmas stemming from virtually irreversible decisions of the past.

If we consider the first, it is clear that while the original political aims of European integration have lost much of their relevance, they have since been replaced by an even more ambitious political agenda. The first generation of dedicated Eurofederalists set the process in train after World War II with two immediate purposes in mind: to put an end to the bloody history of warfare between European nations, and to contain the potentially threatening power of a recovering post-fascist Germany.

Of course, there was always a third strand in European integration—the straightforward economic argument that a unifi ed Europe was the surest path to growth and welfare. Since the Coal and Steel Community of 1951, and the subsequent formation of Euratom and the European Economic Community of 1958, more and more countries have become gradually integrated through the free exchange of people, goods, service and capital between them—a process now completed by the single market and single currency. The European Union frames an ever denser network of traderelations, 'foreign' direct investment, financial transactions and so forth. Alongside the US and Japan, Europe has gained a rather strong position within the so-called Triad. Thus the rational expectation of mutual benefits within Europe and of differential competitive advantages on world markets could, to date, provide a legitimation 'through outcomes' for an ever-closer Union.

But even making allowances for the consciousness-raising impact of the Euro, which will soon become a unifying symbol in everyday life across the continent, it seems clear that henceforward economic achievements can at best stabilize the status quo. Economic expectations alone can hardly mobilize political support for the much riskier and more far-reaching project of a political union—one that deserved the name.

#### Beyond a 'mere market'

This further goal requires the legitimation of shared values. There is always a trade-off between the efficiency and legitimacy of an administration. But great political innovations, such as an unprecedented design for a state of nation-states, demand political mobilization for normative goals. Constitution-making has hitherto been a response to situations of crisis. Where is such a challenge, we might ask, in today's rather wealthy and peaceful societies of Western Europe? In Central and Eastern Europe, by contrast, transitional societies striving for inclusion and recognition within the Union do face a peculiar crisis of rapid modernization—but their response to it has been a pronounced return to the nation-state, without much enthusiasm for a transfer of parts of their recently regained national sovereignty to Brussels. The current lack of motivation for political union, in either zone, makes the insufficiency of bare economic calculations all the more obvious. Economic justifications must at the very least be combined with ideas of a different kind—let us say, an interest in and affective

attachment to a particular ethos: in other words, the attraction of a specific way of life.

The last wave of economic globalization did not stem from any inherent evolution of the system: it was the product in large measure of successive GATT rounds—that is, of conscious political action. Democratic governments should therefore also have the chance, at least in principle, to counter the undesired social consequences of globalization by complementary social and infrastructural policies.

Such policies have to cope with the needs of two different groups. Their purpose must be to bridge the time-gap for short-run losers by investments in human capital and temporal transfers, and to offer permanent compensation to long-run losers in—for example—the form of a basic income scheme or negative income tax. Since neither group is any longer in a strong veto position, the implementation of such designs is a difficult task. For the decision on whether or not to maintain an appropriate level of general social welfare largely depends on the degree of support for notions of distributive justice. But normative orientations move majorities of voters only to the extent that they can make a straightforward appeal to 'strong' traditions inscribed in established political cultures.

In Western Europe, or at any rate its continental nations, this assumption is not quite unfounded. Here the political tradition of the workers' movement, the salience of Christian social doctrines and even a certain normative core of social liberalism still provide a formative background for social solidarity. In their public self-representations, Social and Christian Democratic parties in particular support inclusive systems of social security and a substantive conception of citizenship, which stresses what John Rawls calls 'the fair value' of equally distributed rights. In terms of a comparative cultural analysis, we might speak of the unique European combination of public collectivisms and private individualism. As Göran Therborn remarks: 'the European road to and through modernity has also left a certain legacy of social norms, refl ecting European experiences of class and gender . . . Collective bargaining, trade unions, public social services, the rights of women and children are all held more legitimate in Europe than in the rest of the contemporary world. They are expressed in social documents of the EU and of the Council of Europe'.

But if we grant this assumption, there remains the question of why national governments should not be in a better position to pursue countervailing policies more effectively than a heavy-handed EU bureaucracy. At issue here is the extent to which intensified global competition affects the scope of action of national governments.

National governments, whatever their internal profiles, are increasingly entangled in transnational networks, and thereby become ever more dependent on asymmetrically negotiated outcomes. Whatever social policies they choose, they must adapt to constraints imposed by deregulated markets—in particular global financial markets. That means lower taxes and fiscal limits which compel them to accept increasing inequalities in the distribution of the gross national product. The question

therefore is: can any of our small or medium, entangled and accommodating nation states preserve a separate capacity to escape enforced assimilation to the social model now imposed by the predominant global economic regime?

It is common to hear Europe described today as the power of the past. Europe is perceived to be weak militarily. Its relative economic power is declining as Asia's is rising. Its common currency may be on the verge of disintegrating. On the world stage, the European Union is thought to be waning into irrelevance due to its inability to speak with one voice. Given its seemingly declining power status and inability to get its way alone, the EU must retreat to weak multilateralism and international institutions.

Contrary to this prevalent perception, this paper highlights a deeply underestimated aspect of European power that the discussion on globalization and power politics overlooks: Europe's unilateral power to regulate global markets. The European Union sets the rules for global markets across a range of areas, such as food, chemicals, competition, and the protection of privacy. EU regulations have a tangible impact on the everyday lives of citizens around the world. Few Americans are aware that EU regulations dictate the make-up they apply in the morning (EU Cosmetics Directive), the cereal they eat for breakfast (EU rules on Genetically Modified Organisms, "GMOs"), the software they use on their computer (EU Antitrust Laws), and the privacy settings they adjust on their Facebook page (EU Privacy Directive). And that's just before 8:30 a.m. The EU also sets the rules governing the interoffice phone directory they use to call a co-worker (EU Privacy Laws, again). EU regulations dictate what kind of air conditioners Americans use to cool their homes (EU electronic waste management and recycling rules) and are even the reason why their children no longer find soft-plastic toys in their McDonalds happy meals (EU Chemicals Directive).

Editorial: How the European financial crisis affects you

6/10/2012 By Jean-Pierre Filatriau

The United States has deep cultural ties to Europe. But on economic matters, Americans have long harbored a standoffish, even smug, attitude toward a continent that is less entrepreneurial and more regulated than their own.

Like it or not, however, Europe's inability to resolve its financial problems has become the single biggest factor influencing U.S. employment and stock markets. President Obama acknowledged this Friday in calling on a reluctant Congress to enact a jobs bill. A Europe-led downturn could cost him his own job in November.

Europe accounts for 21% of all U.S. exports and roughly 7.1 million jobs, making a serious slowdown there keenly felt here, particularly in sectors such as tourism, technology, food and apparel. More ominously, Europe's precarious financial state — with several nations struggling to avoid default and a banking system unprepared for that event — is giving U.S. employers and investors a serious case of the jitters.

"The crisis in Europe has affected the U.S. economy by acting as a drag on our exports, weighing on business and consumer confidence, and pressuring U.S. financial markets and institutions," Fed Chairman Ben Bernanke told Congress last week.

Perhaps the most tangible way that Europe's woes can be measured is in U.S. stocks. On any given day, chances are good that Europe is behind up and downs for your 401(k). On down days, investors are pessimistic that Europe's problems will be resolved in a way that avoids a calamitous financial meltdown. On up days, they see hope.

Behind these gyrations is a realization that debt defaults could trigger a 2008-like calamity, bringing down major European banks with contagion here because the world financial system is interlinked. Just this weekend, European authorities — at U.S. urging — put up \$125 billion to rescue Spanish banks in danger of failing because of a real estate price collapse.

Sound familiar?

That rescue was just the latest stopgap measure. Europe, decentralized and unable to move quickly, never forced its banks to retain adequate capital for emergencies as the U.S. did. So it leaps from crisis to crisis — Ireland, Portugal, Greece, Spain and, probably next, Italy — putting fingers in dikes.

Meanwhile, austerity measures have pushed the continent into recession, and in some cases depression. Spanish unemployment is at 25%, and Greeks appear likely to see the value of their savings cut in half. It's a vision of what might have happened here had the 2008 crisis not been addressed so aggressively.

The U.S. has many advantages over Europe, particularly southern Europe, where heavy regulation, excessive labor protections and ineffective government have produced anemic economies. America has deposit insurance to deter bank runs, like those starting in Greece and Spain. Moreover, the USA is fortunate not to have the nightmare faced by 17 nations that share a common currency without a common government, and needing unanimous consent to make even modest policy changes.

But even taking these things into consideration, the crisis in Europe suggests that the U.S. response to 2008 — fiscal and monetary stimulus, short-term focus on growth over reducing deficits, and a push to stabilize banks — is the better one. Or to be more precise, the less bad one. Though U.S. economic growth of 1.9% and unemployment of 8.2% is dispiriting, it is, sadly, what passes for success among developed economies these days.

No simple answer to Europe's crisis exists. The best case is that it serves as a drag on the economy for some time to come. The worst case is that a messy breakup of the eurozone spawns a new financial meltdown. Either way, Europe's choices will continue to serve as a useful measure of our own.

The Washington Post, July 23, 2012

# Google works to appease aggressive E.U. regulators

Craig Timberg, Pg. A01

BRUSSELS - Europe may be a financial disaster and a faded military force, but in at least one arena it has emerged as a champ: Regulators here are challenging the power of America's technology titans. And they are winning.

Google is most squarely in the crosshairs as its officials negotiate furiously in hopes of avoiding a \$4 billion fine and a formal ruling that it has abused its dominance in the search market to hurt rivals across a variety of industries. A deal could be days away.

Facebook, Apple and Microsoft also have faced serious scrutiny from European regulators in the past year. And even if Google succeeds in settling the sprawling antitrust case here, it is facing investigations into its new privacy policy and its Android operating system for phones and tablets.

Many of these issues, including the antitrust case against Google, also have been investigated by American regulators. But the laws here are stricter, the fines bigger and the courts more supportive of aggressive government action - to the point that many experts say the legal landscape of the technology industry is being shaped more profoundly here than in the United States.

"The pipeline is packed with these cases," said Nicolas Petit, a professor at Belgium's University of Liege Law School who watches the technology industry closely.

Whether Google gets labeled a monopolist is largely in the hands of Joaquin Almunia, a former Spanish labor leader and onetime Socialist candidate for prime minister who is the European Union's top antitrust enforcer.

Almunia has pushed hard for a negotiated settlement in hopes of avoiding a years-long battle of the type that European regulators once waged with Microsoft over its Windows operating system. People closely watching the Google case predict that this week - the last before a long summer break hobbles operations here - will produce a deal or a formal "statement of objections," essentially an indictment on allegations of monopolistic behavior.

Almunia said that a negotiated deal would be a better outcome and that the company's proposals - there have been at least two rounds of them this month - are seeking to address the issues he has raised rather than disputing them.

"What was Google's motto at the beginning? 'Don't be evil?'" Almunia said in an interview at his office here, the headquarters of the E.U. "I hope it continues to be important."

The case is being tracked by regulators worldwide, including at the U.S. Federal Trade Commission, which has hired a prominent lawyer to lead its antitrust investigation of Google.

Google has issued a statement saying, "We continue to work cooperatively with the **European Commission**."

## Risk to Google

Almunia already has determined that the Google antitrust claims merit serious treatment, given that the company has more than 90 percent of the search market in some European countries. But having a monopoly is not a violation of law here; a company must abuse its dominance of a market to run afoul of regulators.

Almunia's office has outlined four potential abuses of dominance in preliminary filings. In the interview, he expressed particular concern that Google may be altering its results in a way that keeps users from having access to the best possible services, especially ones that compete with Google's offerings.

"The potential providers suffer in their profits, and the customers will receive . . . worse service," he said.

The risk to Google, analysts say, goes beyond the potential for fines because their business long has depended on users believing that search results are crafted primarily to serve their needs - not those of advertisers. A finding of abusive monopolistic behavior threatens to undermine its carefully cultivated public image.

Its reputation suffered a dent last year, when French regulators fined Google \$142,000 because its Street View program had gathered sensitive personal information from private wireless Internet signals as the company's cars crisscrossed the world capturing images.

Google had acknowledged the secret data collection and apologized, blaming a single engineer for creating the data-collection feature without approval of senior management. It also said there was nothing personally identifiable in the data.

The French Data Protection Authority, however, discovered users' passwords and lists of pornographic Web sites they were visiting when a Street View car drove by. In one instance, a Google car collected an e-mail exchange between a man and a woman - each married but not to each other - attempting to arrange a liaison. Global Positioning System data along with e-mail addresses made them clearly identifiable, the regulators concluded.

American regulators at the Federal Communications Commission investigated the same issue but found no violation of law. It fined Google \$25,000 in April for obstructing the investigation.

The differences are not merely legal. Personal privacy is a deeply held cultural value in most of Europe. French regulators often ask newspapers and bloggers to delete or alter information when citizens express fear that unflattering references or photographs online might undermine job prospects or personal relationships.

Isabel Falque-Pierrotin, head of the French Data Protection Authority, said such requests shot up 42 percent last year. She favors a bill before the European Parliament to expand this "right to be forgotten" to include links on search engines - a move Google has resisted.

"Ultimately, responsibility for deleting content published online should lie with the person or entity who published it," Peter Fleischer, Google's global privacy counsel, wrote in a blog post in February.

The French authority also has scrutinized the way iPhones report the geographic movements of the Apple devices' users and how Web sites track users as they surf the Internet.

"It's a bit frightening because all your data is shared by a huge ecosystem and you don't know," Falque-Pierrotin said. "I think people are more and more conscious of that. So they rely on the regulator to unveil the black box."

She called the approach not so much of a "French sensibility" as a "consumer sensibility."

# 'Judge, jury, executioner'

Some here worry that European regulators have become too powerful. The same officials investigate, engage in negotiations with companies, make rulings and levy fines - a process with far fewer checks than in the United States. Courts can overrule European regulators but rarely do.

Attorneys representing companies complain that a single bureaucracy can be "judge, jury and executioner" in cases. They also express concern that companies complain to regulators about rivals mainly to drain them of resources.

"The threshold to be taken seriously and generate a lot of aggravation is very low," said Brussels-based lawyer Miguel Rato, who has often represented technology companies. "One thing the commission doesn't do nearly well enough is deal swiftly with complaints that have no merit."

The high-tech regulatory fights in Europe are unlikely to quiet soon. French regulators are investigating Google's recent move to track signed-in users across its dozens of individual products. Irish regulators are reviewing Facebook's compliance with a detailed audit of how the company handles personal data. The European Commission is probing Apple's agreement with publishers over e-books, though a deal on that may be near as well. The U.S. Justice Department also is pursuing the e-books case, but a resolution may be more than a year away.

Even as the antitrust investigation of Google shows signs of reaching resolution, Almunia said his office is in the beginning phases of a separate probe into the Android operating system that Google uses to power mobile phones and tablet computers. He did not offer details.

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