

Timeo Danais Dona Ferre and the Constitution that Europeans May One Day Have Given Themselves

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A. Introduction

Neil Walker published a paper in 2004 in which he analysed the Convention on the Future of Europe in terms of the concept of a constitutional moment made salient by Bruce Ackerman during the late 1980s and 1990s.¹ The first lines of the paper refer to the rhetorical discourse of the Convention as “replete with references to the United States’ founding constitutional event over 200 years earlier” and the documenting footnote mentions the leading role that Valery Giscard D’Estaing, chairman of the Convention, played in the rise of this rhetoric.² One finds thus, in these opening lines of Walker’s 2004 article, an evident and compelling linkage between two temporal notions, the notion of a constitutional event, on the one hand, and the

¹ Neil Walker, “The Legacy of Europe’s Constitutional Moment,” *Constellations* 11, no. 3 (2004): 368–92. See also Bruce Ackermann, “Constitutional Politics/Constitutional Law,” *Yale Law Journal* 99, no. 3 (1989): 453–547; Bruce Ackermann, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991); Bruce Ackermann, *We the People: Transformations* (Cambridge, MA: Harvard University Press, 1998).

² See Walker, “The Legacy of Europe’s Constitutional Moment,” 388, fn. 2.

notion of a constitutional moment, on the other. What is at stake in the invocation of a constitutional *moment* as a constitutional *event*?

One of the key features of a constitutional *moment* concerns the way it launches a discourse that exceeds the discursive framework of an existing constitutional and legal order. It signals a distinctly temporal inception of a new constitutional and legal framework during the time of which the following situation prevails:

- 1) The settled constitutionality and legality of an old constitutional and legal order is rendered obsolete.
- 2) The new order that is in the process of being introduced cannot, as yet, claim the established legality and constitutionality that the now obsolete order used to command.
- 3) For purposes of articulating and establishing the new constitutional order, linguistic and epistemological materials that described and determined the obsolete order inevitably remain, at least partially, in use.

At issue under 3) are not necessarily, and surely not only, the amendment rules of the old order that Andrew Arato invokes to stress the constitutional and legal continuity between old and new constitutional orders.³ More fundamentally at issue is the fundamental

³ For references to and a discussion of Arato's insistence on legal continuity against the background of the constitutional transition in South Africa, see Johan van der Walt, "Constitution-Making as a Learning Process: Andrew Arato's Model of Post-Sovereign Constitution Making –

hermeneutic exigency that compels any articulation of new knowledge and new discourses to rely substantially on existing or old knowledge and discourses.⁴ A certain degree of hermeneutic, semantic, and normative continuity thus appears inevitable as far as constitutional moments or events, and the eventual stabilisation of new constitutional orders, are concerned.⁵ Yet, any adamant concern with the event or moment as that which constitutes a severing temporal incision that renders existing hermeneutics definitely obsolete and new hermeneutics significantly novel (Walker emphasizes the terms “*discontinuity* and *transformation*”⁶), would require concession of at

Editor's Introduction,” *South African Journal on Human Rights* 26, no. 1 (2010): 15.

⁴ One of the pioneering and most authoritative analyses of which is still Hans-Georg Gadamer's engagement with the indispensable pre-understanding (*Vor-verständnis*), embodied in pre-judgements (*Vorurteile*) in Hans-Georg Gadamer, *Wahrheit Und Methode* (Tübingen: J.C.B. Mohr Paul Siebeck, 1972), 250–290.

⁵ Hannah Arendt also engaged extensively with this insight in Hannah Arendt, *On Revolution* (New York: Penguin Books, 1990), 205, 210–211, emphasizing on the indispensable chiasm or *hiatus* between pre- and post-revolutionary orders, but also an assumed continuity in terms of which the new constitution and foundation could be interpreted as a restoration of trans-temporal normative principles. For a discussion of the complexity of Arendt's views in this regard, See Johan van der Walt, “Law and the Space of Appearance in Arendt's Thought,” in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the Law* (Oxford; Portland, OR: Hart Publishing, 2013), 63–88.

⁶ Walker, “The Legacy of Europe's Constitutional Moment,” 368. The transformation is, one might add in view of the hermeneutic exigency pointed out above, always partial. But, the significance or incisiveness of the transformation will depend on the extent to which the transformation

least two elements that qualify the classic hermeneutic demands for pre-understanding or prior knowledge incisively:

- 3.1) If the event indeed renders existing or old hermeneutics obsolete, the continued reliance on such hermeneutics can, at best, be said to *accompany* the event and the traversal of the event. It does not address, reflect, or name the event in any significant way.
- 3.2) Whatever newness can be attributed to the emergence and eventual stabilisation of a new constitutional order does not, and cannot, pertain to the hermeneutics borrowed from the old order; it can only pertain to the event itself, which such hermeneutics exactly does not and cannot address, reflect, or name, but only accompany.

The significant newness of a new constitutional order can thus, to a significant extent, only be invoked with reference to an event or moment (or something) that can definitely neither be named within that order, nor be named with reference to anything that can be named in that order. These observations also clarify what was really at stake in the classic stand off between Carl Schmitt and Hans Kelsen regarding the origin of constitutions. Schmitt was the typical hermeneutic thinker who insisted on the continuing and uninterrupted capacity of the

can, despite its necessary reliance on old semantics, indeed be said to turn on a discontinuity that it cannot name fully, also not from within a new semantics.

pouvoir constituant to name and rename itself.⁷ Kelsen was the typical constructivist (surreptitiously deconstructivist) thinker who insisted that new constitutional beginnings cannot be named. They can only be assumed or presupposed in view of events that cannot be named within the legal order.⁸ We return to Schmitt and Kelsen below. Suffice it to leave matters here, for now, to return to the introductory question regarding the nature of the event and the constitutional event, in particular.

⁷ See Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 2003), 79–80: “Auf der verfassunggebenden Gewalt beruhen alle verfassungsmässig konstituierten Befugnisse und Zuständigkeiten. Sie selbst aber kann sich niemals verfassungsgesetzlich konstituieren. Das Volk, die Nation, bleibt der Urgrund alles politischen Geschehens, die Quelle aller Kraft, die sich in immer neuen Formen äussert, immer neue Formen und Organisationen aus sich herausstellt, selber jedoch niemals ihre politische Existenz einer endgültigen Formierung unterordnet....In manche Äusserungen von Sieyès erscheint der ‘pouvoir constituant’ in seinem Verhältnis zu allen ‘pouvoirs constitués’ in einer metaphysischen Analogie zu der ‘natura naturans’ und ihrem Verhältnis zur ‘natura naturata’ nach der Lehre *Spinozas*: ein unerschöpflicher Urgrund aller Formen, selber in keiner Form zu Fassen, ewig neue Formen aus sich herausstellend, formlos alle Formen bildend.” However formless, the people (*Volk*) remains the nameable underlying substance that guarantees constitutional and hermeneutic continuity.

⁸ According to Kelsen, the *Grundnorm* never exists as positive or posited (*gesetzte*) presence. Its existence is always presupposed (*vorausgesetzt*). See Hans Kelsen, *Reine Rechtslehre* (Aalen: Scientia Verlag, 1994), 66–67. In keeping with this, a demos or people also does not exist as a positive or posited presence. Its existence is attributed to it by a presupposed *Grundnorm*. See Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Aalen: Scientia Verlag, 1981), 31–32.

What is the event? This question constituted one of the major concerns in 20th century European philosophy.⁹ A key suggestion regarding the nature or status of the event that can be distilled from a number of significant texts is this: The event concerns an emergence or disclosure of an unprecedented reconfiguration of the relation between platitudinous knowledge and abyssal ignorance in the course of which a new epistemology or a new era or epoch of knowledge and understanding begins to assert and establish itself. The event typically concerns a temporal or epochal emergence of a critical demand for new knowledge and new understanding that is accompanied by reliance on available knowledge and understanding that no longer meets the demand for knowledge that the event exacts. As already suggested above, the event is *merely accompanied* by reliance on knowledge that *does not respond* to it. The event is thus accompanied by knowledge that does not meet the demand for knowledge, hence the definition of the event in terms of an emergence of a new configuration of knowledge and ignorance. A constitutional event or the event of founding a new legal dispensation or system is similarly the manifestation of an event in which a new configuration of the relation between law and legal knowledge, on the one hand, and non-law and

⁹ Consider in this regard Martin Heidegger, *Zur Sache des Denkens* (Tübingen: Max Miemeyer Verlag, 1976); Jean-Luc Nancy, *Une Pensée Finie* (Paris: Galilée, 1990); Jean-Luc Nancy, *Le Sens du Monde* (Paris: Galilée, 1993); Jean-Luc Nancy, *Être Singulier Pluriel* (Paris: Galilée, 1996); Jacques Derrida, *Donner le Temps 1. La Fausse Monnaie* (Paris: Galilée, 1991); Jacques Derrida, *Spectres de Marx* (Paris: Galilée, 1993); Hannah Arendt, *The Human Condition* (Chicago: University Of Chicago Press, 1989); Arendt, *On Revolution*, *supra*. The description of the event that follows is informed and influenced by all these texts, but not necessarily exegetically faithful to any one of them.

lack of legal knowledge, on the other, emerges. In the course/wake of this emergence a new framework of law and legal knowledge begins to assert and establish itself, thus again severing law's interim engagement with an abyssal lack of law and a precipitous absence of legal knowledge.

To the extent that some significant *response* to the event is possible, that response would not consist in a direct reflection of the event (such a reflection would be categorically impossible for lack of hermeneutic resources). It would consist in a *practice* that responds to the incongruence between knowledge and the event and thus facilitates the reconfiguration of knowledge and ignorance that emerges with/in the wake of the event. That practice would clearly exceed the bounds of knowledge and understanding. It would consist in a *doing* that would not understand fully what is being done. At issue here, in other words, is a practice that constitutes, epistemologically speaking, an *excessive response to the event*. The core hypothesis of this paper concerns the status of this exceeding practice. This core hypothesis can be stated as follows: The response to the event that exceeds knowledge (again, as it must if it is to be a *response to the event* and not just a non-responsive hermeneutic accompaniment that blindly traverses the time and space and *epoche* of the event) takes the form of either gift or sacrifice or a mixture of gift and sacrifice. The core question that this paper will pursue on the basis of its core hypothesis concerns the possibility of a distinction between gift and sacrifice and the possibility of a response to constitutional events that pivots on the gift and not on sacrifice, or at least pivots significantly on the gift and not completely on sacrifice. And, this core question will be asked in the context of Europe's twofold inability that emerged during the years of the recent, if not still current, economic crisis: the inability to respond creatively and productively to the current financial crisis and the inability to move toward more significant constitutional unity.

Talk is now that the crisis is over and that we have been saved from it, in the end, by Angela Merkel and/or Mario Dragghi.¹⁰ The solution with which Dragghi came up and with which Merkel went along in the end, notwithstanding the discontent of her own (German) bankers, can hardly be said to have been a creative response to the event and it surely did not move Europe significantly closer to incisive constitutional unity. At issue in Dragghi's solution, with which Merkel went along, was a technocratic move that did not alter the political face or climate of Europe in the least. What Dragghi's move managed to do was to drastically discourage sovereign debt speculation. This was surely not insignificant and the determined and decisive way in which he did so surely calls for much respect. It should nevertheless be considered ironic that Europe's chief banker and not Europe's most powerful politician will be remembered as the one who acted like a statesman when the occasion called for it. And this irony surely stresses the reality that Europe's politics and politicians still lack the essential resource they require for facing the challenges of the twenty-first century, namely, the ability to resort to knowledge-exceeding practices that used to be associated with political sovereignty. It is with these practices that the rest of this essay will be concerned. And the concern is crucial, for the first two decades of the twenty-first century have evidently come to confront Europeans with exigencies to which they cannot hope to respond with knowledge that is as relevant as it is secure or as secure as it is relevant. In the event of the event, in the very event of its offing, the relation between security and relevance of knowledge is not parallel, but inversely parallel.

¹⁰ See Pieter Spiegel, "How the Euro was Saved," *Financial Times*, 11 May 2014.

B. Timeo Danais Dona Ferre

Vergil's line was of course a different one: *Timeo Danaos, et dona ferentes*. I fear the Greeks, also (or especially) when they bring gifts. What happens to the line when one turns the accusative *Danaos* into the dative *Danais*, and the present participle construction *dona ferentes* into an infinitive construction *dona ferre*, as has been ventured in the title above? For all its clumsiness, it may well pass as a reasonably apt construction of this sentence: I fear bringing gifts to the Greeks.

Does the fear of bringing gifts to the Greeks tell one anything significant about the question whether Europeans may one day have come to give themselves a constitution? May the fear of bringing gifts to the Greeks be the same fear that has hitherto prevented Europeans from having given themselves a constitution? I wish to explore this question with specific reference to the symbolics of *giving* that have conspicuously adorned the birth of significant European constitutions in the *Salle du jeu de paume*, Versailles 1789; in the *Paulskirche*, Frankfurt 1848; and in the *Theatergebäude*, Weimar 1919.

The verb *donner*, to give, does not appear in either the *Serment du Jeu de Paume* of 1789 or the *Declaration de l'homme et du citoyen* of 1791. However, a memorial plaque fixed above the door at the time of the restoration of the *Salle du Jeu de Paume* in 1883 reads as follows: "Dans ce jeu du paume, le xx juin, MDCCLXXXIX, les députés du peuple ... jurèrent de ne point se séparer qu'ils *ne eussent donné* une constitution à la France. Ils ont tenu parole." (Emphasis added)

The first line of the *Paulskirche* Constitution of 1849 already appears to mark some shift to the notion of *constitution-giving*. It invokes a *constitution-giving* national assembly – *eine Verfassunggebende Nationalversammlung*. The first lines of the Weimar Constitution of 1919 invoke the notion of constitution-giving more forcefully: "Das deutsche Volk ... von dem Willen beseelt sein Reich in Freiheit und Gerechtigkeit zu dienen und den gesellschaftlichen Fortschritt zu fördern, *hat sich diese Verfassung gegeben*." There is also a memorial

plaque on the *Theatergebäude* in Weimar that reads: *In diesem Haus gab sich das Deutsche Volk durch seine Nationalversammlung die Weimarer Verfassung von 11 August 1919.*

The first Luxembourg Constitution of 1841 was surely given (accorded) to Luxembourgers in no uncertain terms. The first lines of the preamble read: “Nous Guillaume II, par la grace de Dieu, Roi de Pays-Bas, Prince D’Orange-Nassau, Grand Duc de Luxembourg ... avons resolu de accorder à nos sujets du Luxembourg une Constitution...” This vertical line from the grace of God to the King to the subjects of the King will surely be put in question by the concept of non-sacrificial giving that will be at issue in this essay, but it can be commended for at least solving the juridical puzzle evident in the notion of a people giving itself a constitution.¹¹ Juridically speaking, one

¹¹ I single out the Luxembourg Constitution of 1841 here, because this Constitution is a remarkably late example of constitutions that invoke a vertical connection, through a sovereign, between a people and God. From 1791 onwards, but especially after 1815, European Constitutions would no longer invoke this vertical link but simply invoke in their preambles a popular sovereignty that ordains or decrees a constitution for itself. In 1849, the Prussian King Friedrich Wilhelm IV would still or again resist this horizontalisation of constitutional sovereignty by rejecting the invitation of the Paulskirche Assembly to become the King of a United Germany. He insisted that he obtains his sovereignty from the higher authority of the heavens. See Deutscher Bundestag, (ed.), *Fragen an die deutsche Geschichte* (Bonn: Cassell and Company Ltd, 1990), 147–148. It is this vertical or political theological resistance – and one might read here into the word ‘resistance’ all the psychoanalytical connotations of the word – that was overcome, if only briefly, in the Weimar Constitution of 1919. The

cannot give oneself a gift. The deputies of France cannot give France a constitution without assuming a position outside France. They cannot give France a constitution without bringing about a certain doubling of France that would allow for the transfer, or changing of hands, without which no giving of gifts can be imagined. No wonder that political theology or the theological foundation of politics would return so forthwith to France in the wake of the revolution, as Claude Lefort pointed out in his classic essay *Permanence du theologico-politique*?¹² An essential metaphysical doubling is exactly what political theology affords a polity.

The next section of this essay will highlight the extent to which sacrifice, as one possible source of constitutions, turns on or facilitates this political theological metaphysical doubling. Suffice it to note here, however, that the gift, should it come to be given, would also require a doubling of sorts. And the question that presses here is this: Can the prerequisite doubling that might come to facilitate the gift, giving and indeed constitution-giving as an instance of the giving of gifts, be contemplated *without a metaphysical* doubling of the people, that is, *without* invoking a sacred second order that is the real origin of the people and the actual donor or *donateur* of its constitution?

The status of the *Nationalversammlung* that gave Germany the Weimar Constitution in 1919 casts significant light on the question regarding a non-metaphysical doubling of the people. The Weimar Constitution indeed appears to confront one with a challenge to the political theological foundation of constitution-giving. In the case of Weimar, the claim is expressly that the German people gave themselves – *gab sich* – a constitution. Should one assume for now

United States Constitution would already break with this vertical constitution of nationhood in 1789.

¹² Claude Lefort, *Essais Sur Le Politique – XIXe-XXe Siècles* (Paris: Editions du Seuil, 1986), 275–329.

that the symbolism of the Weimar Constitution indeed constitutes an instance of resistance to political theology and the political theological conception of constitution-giving, one would have to clarify the status and possibility of the non-metaphysical doubling that would allow for a notion of constitution-giving that does not rely on a transcendent donor or *donateur* as the Luxembourg Constitution of 1841 does. One of the key aims of this article is indeed to scrutinise whether such a non-metaphysical doubling of the people is possible or at least conceivable. This key concern can now be stated comprehensively as follows: A doubling of the people seems to be a precondition for contemplating the change of hands, delivery, or transfer – the *traditio* – evident in the notion of constitution-making as an instance of giving. Must this doubling necessarily be a vertical doubling (as the Luxembourg Constitution of 1841 suggests) or is there a possibility of a horizontal doubling (as the Weimar Constitution of 1919 suggests)?

Again, the nature and possibility of this non-metaphysical doubling still requires clarification. However, the following may already be noted now: Should this horizontal or non-metaphysical doubling currently not appear possible in contemporary Europe, as would indeed seem to be the case, this impossibility can plausibly be assumed to relate to a fear of bringing gifts. Europe's procrastinating inability to deal decisively and politically with the failure of the Greek and other southern European economies in recent years (again, the only worthy act of statemanship would come from a banker – see above) appears to underline the plausibility of this assumption. Europe's constitutional development would appear to be arrested by a fear of bringing gifts to the Greeks – *timere Danaï dona ferre*. Should this fear continue to hold sway, Europe's constitutional event will, at best, turn into a non-event in the course of which no reconfiguration of its existing constitutional or legal knowledge-ignorance constellations will be risked. A mindless

incrementalism – *ein Kopfloser Inkrementalismus*, Jürgen Habermas calls it¹³ – will prevail over what could have been Europe's constitutional event.

We return to reflect more on this phrase of Habermas below. But, it can already be noted here that the phrase surely marks a concern with the opposite of, or at least something significantly different from, this mindless incrementalism. It surely marks Habermas' contemplation of a *mindful decisiveness*, a decisiveness that does not follow from a series of pusillanimous positions, but risks a more creative and courageous solicitation of and engagement with the unknown. At least here, at least with respect to this phrase, Derrida, the thinker who was renowned for contemplating a courageous hospitality to the event,¹⁴ appears to have left Habermas – the thinker who for such a long time wanted to secure transcendental linguistic conditions that would render all learning processes essentially uneventful and incremental¹⁵ – with more than a mere sense of friendship (assuming for a moment there is something like a *mere* sense of friendship, as if a *sense* of friendship is not always, at least partly, an excessive/exceeding engagement with the unknown).¹⁶

Be that as it may, the observation that Europe's mindless incrementalism may *at best* turn out to be a *non-event* requires further

¹³ Jürgen Habermas, *Zur Verfassung Europas: Ein Essay* (Berlin: Suhrkamp, 2011), 41.

¹⁴ Derrida, *Spectres de Marx*, 111–112 .

¹⁵ I am referring to the phase or aspect of his thought marked predominantly by *Theorie des kommunikativen Handelns*, (Frankfurt a. M: Suhrkamp, 1981).

¹⁶ Jürgen Habermas, *Ach Europa*, (Frankfurt a.M: Suhrkamp, 2008), 63–64.

reflection, for there may well be more to it than a non-event. Europe's "uneventful" incrementalism may well be the façade of obsolete knowledge that accompanies and even seeks to obscure an event that is evidently in the offing. And not only does this façade of obsolete knowledge blindly accompany and obscure this event in the offing, it also conditions this event significantly. The continued reliance on obsolete knowledge not only accompanies but also precipitates the event (in the way the persistent adherence to obsolete conceptions of justice may precipitate ineffable revolutionary demands for justice or the way the very monotony of dulled rhythms can spawn transgressive choreographic improvisations). The event at issue here, accompanied as it is by insistent adherence to the existent and the obsolete, is nevertheless not the event of the gift, for it gives nothing. It does not *offer* significant newness or innovation, however much such newness and innovation may come to overtake it. It is the event of sacrifice, namely, the un-giving and unforgiving sacrificial maintenance of an obsolete past that, despite its best efforts to resist the event, may nevertheless be overtaken by the event. The event of the *gift*, on the other hand, may ultimately not be entirely devoid of sacrifice. However, in order to be something else, something significantly different from sacrifice, it would have to contain elements of a gift economy that exceed the economics of sacrifice. But, we are rushing on ahead of ourselves. For these observations to become fully comprehensible, one first needs to scrutinise more closely the difference between the event of sacrifice and the event of the gift and the possibility of this very distinction.

C. Between Gift and Sacrifice

There is indeed a conspicuous switch of emphasis from the verbs *deciding*, *announcing*, *establishing* and *declaring* in the *Serment du Jeu du Paume* of 1789 or the *Declaration de l'homme et du citoyen* of

1791, and the Paulskirche Constitution of 1849, on the one hand, to the verb *giving* in the Weimar Constitution and on the memorial plaques fixed to the *Salle du Jeu du Paume* in Versailles, 1883, and later also to the *Theatergebäude* in Weimar. Might one infer from this switch an emergence in Europe of a stronger regard for *constitution-making* as a matter of *constitution-giving* toward the end of the nineteenth century? The historical research required for answering this question, either positively or negatively, cannot be offered in what follows. Let us nevertheless assume or presuppose for the moment that this question might be answered positively. What would this assumption or presupposition suggest as far as the semantics of European constitutional discourses are concerned? It would suggest, I wish to argue, that Constitutions may, at least partly, be considered as *gifts*. It would further suggest that *giving*, indeed the *giving of gifts*, might be an *alternative* origin of Constitutions. Alternative? What might the other origin then be? A remarkable passage from one of Ulrich Preuss' instructive engagements with constitutional beginnings provides one with an important clue. Preuss writes:

Constitutions come into being after a revolution or war . . . After a revolution . . . the triumphant forces lay out their principles of how society should be ordered. [They impose] their rule upon the defeated groups who are then usually denounced as 'counter-revolutionary,' 'reactionary,' or sometimes even as enemies of the people.

Constitution-making after a war is not very different. If the war was lost, then the demoralized masses place the blame for their defeat and sufferings on the . . . 'old regime.' They throw their rulers out of office and . . . demand . . . a new constitution [that] reflect their needs, hopes and aspirations. But even after a victorious war, a new distribution of power, i.e. a new constitution, is on the agenda of the nation. The people want recognition and remuneration for their

sacrifices and hence demand a new distribution of the benefits of the social compact.¹⁷

Preuss' use of the word "sacrifice" in this passage may or may not have been guided by the aim of invoking deep anthropological or hermeneutic dynamics of political creation and destruction. The use of the word sacrifice in this passage may only seek to invoke the common-sense demand that those who caused or failed to avoid suffering in the past must pay up and those who suffered in the past must be compensated. In other words, new sacrifices are demanded to compensate for old sacrifices, and so forth. As the passage stands, however, its reliance on the word "sacrifice" in a description of new political and constitutional beginnings can hardly fail to direct our attention to philosophical and anthropological engagements with the deeper dynamics of sacrificial practices in legal and political beginnings.

The Strasbourg philosopher Jean-Luc Nancy links Western conceptions of political sovereignty and political theology directly to the generic metaphysics of sacrifice that informs Western thought. Nancy writes:

On this count, the political must be destined to have history as its scope, sovereignty for its emblem and sacrifice for its access. We should retrace the impressive history of political sacrifice and sacrificial politics, or, actually, of the politics of truth, that is to say, of the theologico-political: We must trace it from the sacrifice that is expressly

¹⁷ Ulrich K. Preuss, "Perspectives on Post-Conflict Constitutionalism," *New York Law School Law Review* 51 (2006/7): 469–470, emphasis added, text slightly paraphrased.

religious right to the diverse acts of terror, and to all national, militant and partisan sacrifices. To all politics for which cause sacrifice is due. In this regard, all political theology, right up to its secularisation, can only be sacrificial.¹⁸

We cannot engage extensively here with Nancy's profound reflections on the deep links between sovereignty and the generic metaphysics of sacrifice. Suffice it to observe briefly the key thought that he articulates in this regard. The Western metaphysical mind-set refuses to accept that existence is just existence. Western *meta*-physics turns on the political theological insistence that there is physics beyond physics. *Meta*-physics pivots on a doubling of existence, a doubling of existence that links the empirical to a transcendent reality beyond itself. Metaphysics thus also ties the horizontality of the empirical plane of existence into a vertical relation with its transcendent double. And the essential knot that effects this tie, according to Nancy, is sacrifice. Sacrifice is the essential cognitive/non cognitive act, embodied in a myriad of ritual practices, that splits existence into the empirical and meta-empirical, the earthly and heavenly, the mortal and immortal, and the mundane and the sacred.

Nancy's thoughts in this regard are corroborated by findings of cultural anthropologists. As Henri Hubert and Marcel Mauss put it, sacrifice was the pivotal act through which the archaic mind first

¹⁸ Translated from Nancy, *Le Sens du Monde*, 141: "A ce compte, la politique *doit* être destin, avoir l'histoire pour carrière, la souveraineté pour emblème et le sacrifice pour accès. Il faudrait retracer l'histoire impressionnante du sacrifice politique, de la politique sacrificielle – ou de la politique *en vérité*, c'est-à-dire du 'théologico-politique' [ou] la Politique de la *Cause* à laquelle le sacrifice est dû. En cela, tout le théologico-politique, jusque dans sa 'sécularisation,' . . . ne peut être que sacrificiel."

created the different worlds of mortal humans and immortal gods.¹⁹ Nancy's analyses of the fundamental metaphysical doubling performed or enacted by sacrifice are guided by the endeavour to undo this doubling. Nancy seeks to communicate the message that existence is just existence. Existence cannot be sacrificed, it can only be destroyed or shared, he writes.²⁰ Subliminal endeavours to create a second order of existence through sacrificial incinerations do not produce anything. They do not produce the second order that they claim to produce. They just destroy. They produce nothing but ash. Its claim to effect a vertical link between the horizontal plane and its heavenly double is the myth of a communal existence that seeks to operationalize itself.²¹ It is the myth – the mobilising truth – staged by *an operative community*. Nancy contemplates, in response to this operative myth, the possibility of an *inoperative* and therefore *non-sacrificial* community, a community to which he refers as a horizontality of mortals – *une horizontalité de morts*.²² This horizontal community would not be united through a vertical line that ties it to its transcendental double.

¹⁹ Henri Hubert & Marcel Mauss, *Essai sur la Nature et la Fonction du Sacrifice* in Marcel Mauss, *Oeuvres 1. Les Fonctions Sociales du Sacré*, (Paris: Les Éditions de Minuit, 1968), 297–299 .

²⁰ Nancy, *Une Pensée Finie*, 105: “L'existence n'est pas à sacrifier, et on ne peut la sacrifier. On peut que la détruire, ou la partager.”

²¹ Jean-Luc Nancy, *La Communauté Désœuvrée*, (Paris: Christian Bourgois, 1999), 109–173.

²² Jean-Luc Nancy, *Corpus*, (Paris: Éditions Métailié, 2000), 49; Jacques Derrida, *Le Toucher, Jean-Luc Nancy*, (Paris: Éditions Galilée, 2000), 253–254 .

Nancy is undoubtedly one of the truly percipient thinkers of our time. Another is the Italian philosopher Giorgio Agamben. In one of Agamben's essays, we find the following observation: All human *facere* is *sacer facere*.²³ All human *doing* or all human *making* is sacrifice. We know that *facere* can be translated with both *making* and *doing*. Might some human activity be exempted from Agamben's comprehensive description of human conduct as a matter of sacrifice? If not, there would surely be little hope for Nancy's contemplation of a non-sacrificial existence. If not, there would be little point in exploring the possibility of *constitution-giving* as a kind of constitution-making that is *not* or *not exhaustively* a matter of *sacer facere* or sacrifice. One would have to accept that Ulrich Preuss' passage quoted above gives us the definitive and exhaustive assessment of the dynamics of constitution-making. However, if no human activity can be exempted from Agamben's comprehensive description of human conduct as a matter of sacrifice, one would also have to note in passing that Agamben himself would surely have considerable difficulty explaining the significance of his extensive engagement with *homo sacer*, the enigmatic figure in Roman criminal law that Pompeius Festus described as the one who may be killed *but not sacrificed*.²⁴

Is there the slightest possibility that giving, *dare*, might at least partly be exempted from *facere* as *sacer facere*, so that one might meaningfully explore the possibility of a constitution-giving that is not a matter of sacrifice? Might one find, in the margins of sacrifice, a precarious possibility that new political beginnings may emerge from a gift that is not entirely permeated by sacrifice? Alexander, the main protagonist in Andrei Tarkowski's sublime film *The Sacrifice* observes: "Every sacrifice contains a gift, and every gift a sacrifice." Yet, this very

²³ Giorgio Agamben, *Potentialities*, (Stanford: Stanford University Press, 1999), 135.

²⁴ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Stanford: Stanford University Press, 1998), 71–80 .

observation suggests that there is some significant distinction and differentiation between sacrifice and the gift that demands attention. Alexander – or Tarkovksi – does not simply suggest that the gift is nothing but a sacrifice, and vice versa. His suggestion is only that there is something of the one in the other. Is there a faint possibility that the sacrifice-gift compound may sometimes curdle, like milk curdles, so as to render visible two distinctly different elements, gift and sacrifice, in what may otherwise have passed as a simple substance characterised by the latter, that is, by sacrifice only? A careful reading of Marcel Mauss' famous *Essai sur le don* gives pause for considerable thought in this regard. It may well be high time for European legal, political, and social theorists to return to this text that Claude Levi-Strauss read in 1951 with a beating heart and an effervescent head – “*le cœur battant, la tête bouillonnante.*”²⁵

It is not possible to do justice, in what follows, to this text that inspired several of the legendary thinkers that launched the great wave of French philosophy of the second half of the twentieth century. Suffice it to trace one of its central themes with reference to a number of key passages, the first of which concerns Mauss' conviction that the morality and economy of the gift that his essay sets out to analyse, still constitute one of the pillars of contemporary society – “*un des rocs humains sur lesquels sont bâties nos sociétés . . .*”²⁶

²⁵ Claude Lévi-Strauss, “Introduction à l'œuvre de Marcel Mauss” in Marcel Mauss, *Sociologie et Anthropologie*, (Paris: PUF, 1950). See also Florence Weber's introduction to Marcel Mauss, *Essai sur le Don*, (Paris: PUF/Quadrige, 2007), 8.

²⁶ Mauss, *Essai sur le Don*, 67–68 .

One of the rocks of humanity on which human societies are built? What might the other or others be? Mauss never comes back to this point expressly, but another passage early in the essay may well be a key to this question. The ritual contractual exchanges of gifts between humans, on the one hand, and humans and gods, on the other, claims Mauss, clarifies one complete side of the theory of sacrifice – “*tout un coté de la théorie du Sacrifice*.”²⁷ What might the other side of the theory of sacrifice be? And, how might these two sides of sacrifice relate to the other rock or rocks of humanity on which our societies are built? Mauss is again far from systematically clear as far as this question is concerned, but one point seems abundantly clear thus far: The theory of the gift or the analysis of the gift is part of a broader theory of sacrifice. This much is corroborated by the distinction between the blood sacrifice and the sacrifice-gift, the *sacrifice-don* or *offrande* in the *Essai sur la Nature et la Fonction du Sacrifice*.²⁸

The gift economy evidently embodied two imperatives, the imperative to give and to receive gifts (to refuse a gift signalled a wilful severance of the social tie and basically amounted to a declaration of war) and the imperative not to appropriate for oneself any gift thus given and received. The second imperative, the proscription of any appropriation of the gift for oneself, relates to the social solidarity and the religious dimensions of the gift economy. Something of the self was given to the other but this something always had to be preserved and returned, and vice versa. Thus, a network of close social ties formed, the force of which literally tied individuals to one another so that no one could claim a completely independent existence, severed from the existence of others. The goal of the gift was primarily the solicitation of

²⁷ Ibid., 94.

²⁸ Hubert & Mauss, *Essai sur la Nature et la Fonction du Sacrifice*, 203–204.

friendly relations, not the transfer of economic value – “*l’objet en est de produire un sentiment amical entre les deux personnes.*”²⁹

But there was more to the giving of gifts than the feelings of friendship solicited between people. The giving of gifts between persons solicited and celebrated the very generosity of things and of nature itself – “*les échanges de cadeaux entre les hommes . . . incitent les esprits des morts, les dieux, les choses, les animaux, la nature, à être “généreux envers eux. L’échange de cadeaux produit l’abondance de richesses.*”³⁰

Exchanging gifts was thus also a way of evading bad spirits. “*On écart ainsi les mauvais esprits [et] les mauvaises influences.*”³¹ The circulation of gifts tied all individual members of a gift society to one another, to the gods and to their natural environment in very fundamental way. At issue was literally a mixing of the human spirit with the spirits of things – “*on mêle les âmes dans les choses, on mêle les choses dans les âmes.*”³²

In some communities, the circulation of gifts mutated into a destructive competition of giving. Thus developed the *potlatch*, an exceptional form of gift exchange in the course of which every donor sought to surpass the value of gifts received by giving ever more valuable gifts in return. Instead of merely confirming with every gift

²⁹ Mauss, *Essai sur le Don*, 102.

³⁰ Ibid., 92.

³¹ Ibid., 97.

³² Ibid., 103.

given in return that nothing had been covetously appropriated when the gift was received, instead of merely confirming the communality and community that resulted from participation in the circle of giving, the *potlatch* turned into an excessive gesture through which the donor showed that the material worth or value of the gift meant nothing to him; hence also the development of an extreme form of the *potlatch* in the course of which gifts were no longer received and returned, but ostentatiously incinerated, as if they were no longer received from and given to the gods *through* receiving them from and giving them to another person. In other words, the gifts given in the potlatch were given directly to the gods in a way that could hardly be distinguished from practices and rituals of sacrifice. In fact, according to Mauss, these extreme forms of *potlatch* constituted a complete conflation of gift and sacrifice and an erasure of all differences between them – “*nous avons ici, purement et simplement, la confusion des deux principes du sacrifice et du don.*”³³

We have now put enough of Mauss' text on the table to point out its underlying complexity and ambiguity. On the one hand, we encountered at the outset of our engagement with the text, Mauss' observation that the analysis of the contractual exchanges of gifts between humans constituted one whole side of the theory of sacrifice – “*tout un côté de la théorie du Sacrifice.*” This observation suggests clearly that the study of the gift is an integral part of the study of sacrifice. On the other hand, we have now also noticed his invocation of the “simple conflation” of gift and sacrifice that occurs in the irregular practice of the *potlatch*. The invocation of *irregular* or *specific* “conflations” of gift and sacrifice clearly suggests the *generality* or *regularity* of the distinction between gift and sacrifice, and the reality of this distinction. An irregular conflation is clearly only possible on the back of a regular distinction. And, this oblique, but evident, invocation of a regular distinction between gift and sacrifice clearly renders Mauss' initial subsumption of the study of the gift *under* the study of

³³ Ibid., 146.

sacrifice highly unstable. On the one hand, Mauss simply subsumes the gift under sacrifice. On the other hand, he draws a clear distinction between them.

The aim of this scrutiny of Mauss' famous text is, however, not to point out a logical deficiency or banal contradiction in it. The aim, to the contrary, is to affirm this text as an accurate and perceptive engagement with an irreducibly complex and ambiguous phenomenon that manifests itself in terms of unstable distinctions between, and confluences of, gift and sacrifice. The upshot of our engagement with Mauss' text is this: Archaic sacrificial rituals and archaic exchanges of gifts can and should neither be simply conflated with one another, nor completely distinguished from one another. Mauss seems to offer an ambiguous answer to the question that we articulated in response to Agamben's observation that all *facere* is *sacer facere*. The *Essai sur le don* seems to suggest that giving, *dare*, can and cannot be distinguished from *facere* as *sacer facere*. However, should this reading of Mauss' enigmatic text be cogent, it would seem to offer us at least a narrow margin for contemplating the thought that *constitution-making* could be, at least partially, a matter of *constitution-giving*. How might one pursue this thought further?

How might one sustain by argument the possibility of a precarious distinction between gift and sacrifice as far as the birth of constitutions is concerned? The next section will endeavour to address this question with reference to the political and constitutional theories of Carl Schmitt, Hans Kelsen, and John Rawls.

D. Schmitt, Kelsen, and Rawls

An attempt to conceptualise constitution-making in terms of constitution-giving and indeed in terms of the giving of gifts should

surely be tempted to turn to Carl Schmitt, the constitutional theorist who is renowned for making the concept of the *Verfassunggebende Gewalt* – literally, “constitution-giving authority – the centre piece of his constitutional theory. Schmitt’s *Verfassunggebende Gewalt*, conceived as it is on Sieyès’ *pouvoir constituant*, nevertheless leads one straight into a dead end as regards the contemplation of constitution-giving that can at least partially be exempted from sacrificial constitution-making. Not only is Schmitt’s political-theological conception of law and politics sacrificial through and through. His thinking almost constitutes a caricature of the link between political-theological sovereignty and sacrifice that Nancy articulates in the passage quoted above.³⁴ Two further features of Schmitt’s constitutional thinking render the contemplation of constitution-giving as the giving of a gift implausible. The first concerns the temporal structure of the *pouvoir constituant*; the second concerns the irreducible unity of the people on which Schmitt insists.

The temporal structure of the *pouvoir constituant* from which Schmitt’s notion of *Verfassunggebung* issues, simply does not allow for acts of giving or exchanges of gifts. As already shown above,³⁵ Schmitt describes the *pouvoir constituant* with reference to Sieyès and to Spinoza’s concept of the *natura naturans* as an eternal creative energy that endlessly expresses itself in new forms. The essential presence of this *natura naturans*, however, never gets interrupted by any of the new forms it takes. Schmitt’s constitutional theory is a metaphysics of

³⁴ For a further elaboration of this point, Johan van der Walt, “Vertical Sovereignty, Horizontal Constitutionalism, Subterranean Capitalism: A Case of Competing Retroactivities,” *South African Journal on Human Rights* 26, no.1 (2010): 118–119.

³⁵ See fn. 7, *supra*.

presence par excellence, as Hans Lindahl has pointed out well.³⁶ And here lies the essentially un-giving status of the *pouvoir constituant*, for no gift is conceivable on the basis of uninterrupted presence. Gifts cannot be mere continuations of already present states of existence. They cannot be continuations of that which already is fully present. They must come from elsewhere; they must always contain an element of surprising discontinuity. We know this when, as parents of small children, we hide gifts before we furtively put them under Christmas trees or next to the bed of a sleeping child, treading ever so softly. It is the mystery of the gift, and not the value of the gift, that makes the gift a gift. No gift without interruption or rupture, as Emilios Christodoulidis might want to put it.³⁷ But, there is no real rupture conceivable in Schmitt's *pouvoir constituant*.

Nor is there the essential doubling of the people that is required to make the giving of a constitution by a people to a people possible. For Schmitt the political group is essentially one. Its constitution – its absolute constitution – consists in its existential unity and sameness.³⁸

³⁶ See Hans Lindahl, "Collective Self-Legislation as an *Actus Impurus*: A response to Heidegger's Critique of European Nihilism," *Continental Philosophy Review* 41 (2008): 323–343.

³⁷ Emilios Christodoulidis, "Strategies of Rupture," *Law and Critique* 20, 3 (2009): 3–26.

³⁸ Schmitt, *Verfassungslehre*, 3: "Das Wort 'Verfassung' muß auf die Verfassung des Staates, d.h. der politische Einheit eines Volkes beschränkt werden."; Carl Schmitt, *Der Begriff des Politischen* (Berlin: Dunker & Humblot, 1996), 39: "[Die politische Gruppierung] ist deshalb immer die *maßgebende* menschliche Gruppierung, die politische Einheit infolge dessen immer, wenn sie überhaupt vorhanden ist, die maßgebende

It is Kelsen, Schmitt's classic antagonist, who posited such a doubling as an essential condition of constitutionalism. Kelsen's constitutional theory pivots on a majority-minority distinction and division. No constitutional democracy worthy of the name "majority democracy" is possible without this distinction and division, he claims. There is no such thing as a majority principle without a minority principle. The two principles condition one another logically, argued Kelsen with impeccable rigour. Without regard to minority guarantees, dominant social groupings may well assert their dominance, but they cannot claim to be democratic *majorities*.³⁹ The significance of this point of departure in Kelsen's theory of democracy for the thought pursued in this paper should be abundantly clear. Against the background of Kelsen's thought, the enigmatic idea of a people giving themselves a constitution, as suggested by the symbolics of the Weimar constitution, becomes quite plausible. Against this background, the idea of a constitution passing from the hands of a majority to the hands of a minority, and vice versa, indeed becomes possible, at least in principle. Is it also feasible? A close look at John Rawls' articulation of the liberal political ethos that underpins his concept of public reason offers remarkable insights in this regard.

Rawls describes the emergence of a liberal political ethos in terms of the gradual transformation of an initial *modus vivendi* into a veritable overlapping consensus. A *modus vivendi* has no firm foundation,

Einheit und 'souverän' in dem Sinne, daß die Entscheidung über den maßgebenden Fall, auch wenn das der Ausnahmefall ist, begriffsnotwendig immer bei ihr stehen muß. Das Wort 'Souveränität' hat hier einen guten Sinn, ebenso wie das Wort 'Einheit.'"

³⁹ Kelsen *Vom Wesem und Wert der Demokratie*, 53, 57, 58. Kelsen articulates here, in a nutshell, the co-originality of democracy and rights to which Habermas has paid extensive attention in *Faktizität und Geltung*, (Frankfurt a.M: Suhrkamp, 1992), 112–135; 167–187.

claims Rawls. It commences with a precarious compromise. The more the partakers in this initial and initiating compromise abide by the terms of the compromise, the more they gain trust that the terms of the compromise will also be respected in future. In the course of this process, what usually begins with nothing more than a precarious liberal democratic compromise between individuals with profoundly different burdens of judgment (and conflicting comprehensive world views), turns into a stable overlapping consensus.⁴⁰ Where might gift and sacrifice figure in this process? I have argued elsewhere that Rawls' concept of public reason cannot be rid of all sacrificial elements.⁴¹ However, the transformation of a *modus vivendi* into an overlapping consensus, which his political theory describes, also allows for the contemplation of public reason as a gift.

The role of the gift in Rawls' conception of the emergence and consolidation of public reason becomes evident when one pays attention to the simple fact that someone always has to take the first initiative, without knowing whether the initiative will be reciprocated. Someone simply has to take a chance and run a risk. Rawls pays some attention to this critical moment that conditions the emergence of a possible *modus vivendi*, but one can enrich his endeavours in this regard significantly with recourse to an insight of the French

⁴⁰ John Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1973), 490–496; John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1996), 142, 154–164; John Rawls, *The Law of Peoples*, (Cambridge, MA: Harvard University Press, 1999), 15–16, 19, 44–48.

⁴¹ See Johan van der Walt, "Rawls and Derrida on the historicity of constitutional democracy and international justice," *Constellations* 16, no.1 (2009): 23–41.

philosopher, Jacques Derrida: Someone has to offer hospitality to the event, that is, to the uncertain and unpredictable occurrence of a new beginning.⁴² Someone simply has to *give* others the chance to respond to the initiative of founding a new constitution. And at the early stages of founding a constitution by simply giving it a chance, reciprocation, too, remains a matter of taking chances and running risks. Nothing warrants an assumption that the first initiative is not a Trojan horse. Nothing warrants an assumption that a first gesture of giving will be corroborated by a second. Only when reciprocation has been forthcoming for a considerable length of time do the chance and risk elements of early initiatives and reciprocations dissipate to make way for significant levels of mutual trust and stable expectation. Only then can one begin to confidently assume the existence of an overlapping consensus that ultimately warrants something like constitutional rights guarantees.

The transformation of a *modus vivendi* into an overlapping consensus is never complete though, and the gift of constitutions ultimately retains a residue of irreducible risk-taking. As we have seen from Mauss' analysis of the gift economies of archaic societies, stable expectations in long standing arrangements of giving and counter-giving eventually attain a contractual quality that renders the distinction between the reciprocal giving of gifts and mere compliance with regular contractual duties unstable and questionable. It is for this reason that Derrida also argued cogently that there is no such thing as a pure gift *within* any economic circle of exchange.⁴³ But the inverse of Derrida's

⁴² Derrida, *Spectres de Marx*, 55–57.

⁴³ Derrida, *Donner le Temps 1. La Fausse Monnaie*, 18–19: “S’il y a don, le *donné* du don . . . ne doit pas revenir au donant . . . Il ne doit pas circuler, il ne doit pas s’échanger.” The mere recognition of the gift as gift within a system of representation or hermeneutic comprehension, without any actual or material counter-gift or even any gratitude at issue yet, already effects the initiation of a circle of exchange that destroys the gift. “Il suffit

insight also applies. If there is no such thing as a pure gift, there is also no such thing as a purely reciprocal transaction. The possibility and likelihood of coercive enforcement does not eradicate the significant extent to which contractual transactions turn on taking a chance with the ultimate willingness and ability of the other party to comply with the agreed terms. It is not for no reason that risk management is a central concern of contemporary capitalism. Following up on Derrida's acute perception regarding the impossibility of the pure gift, one can and must therefore add: There is also no such thing as a purely contractual transaction. It may not be accompanied by the spirit or intention of giving, but there is an irreducible element of giving at the very heart of every contractual exchange, provided of course, that none of the parties command the power to eliminate the element of risk completely.

Mauss himself points out that the early Romans still discerned the root *dare* (to give), in *vendere* (to sell). It was only later that a dis-embedded contract of *emptio-venditio* seemed to have extracted itself decisively from the consciousness that conditioned the economy of the gift. We learn in first year Roman law about the essential formula of the Roman contract: *do ut des* – I give so that you will give. We can infer from all of this that stable commercial contractual terms still turn fundamentally on elements of giving. This is not less so, but probably more so in the case of the emergence of social contracts that Rawls describes in terms of the transformation of a *modus vivendi* into an overlapping consensus. As long as a social contract lasts or prevails, the element of giving, which conditioned its emergence as a *modus vivendi* and sustained its transformation into an overlapping

donc que l'autre *perceive le don . . .* pour que cette simple *reconnaissance* du don *comme* don, *comme tel*, avant même de devenir *reconnaissance comme gratitude*, annule le don comme don.”

consensus, never ceases to play a crucial role when the latter attains some consolidation. The risks to which the emergence of a *modus vivendi* and its transformation into an overlapping consensus respond remain real and irreducible. Here too, and even more so, the giving of the gift never culminates in the transfer of coined or coinable value that can be secured and extracted from social exchanges fraught with significant risk. This also applies to the liberal or constitutional democracy that Rawls has in mind. Its fundamental agreements and guarantees remain precarious.

The liberal democratic social contract that Rawls describes thus never exists or culminates in the form of secured value that can be consolidated and cashed. What is it then that is given when we talk of the gift that brings about this contract? The irreducible element of giving in the gift economy that sustains the social contract ultimately turns on the degree of risk that is taken each and every time that the gift economy is renewed with a counter gift. What is given by taking a risk? What is given by taking a risk, moreover, with no hope of finally or ever extracting any secure gain from this risk? Here too, Rawls' thinking may be enriched with another of Derrida's acute observations regarding the gift: The moment of pure giving might be located in the *chance* and *the time* that is given to the other to reciprocate. Giving is not a matter of giving value. If giving were at all possible, it would be a matter of giving time – “ [c]e qu'il y a à donner, uniquement, s'appellerait le temps.”⁴⁴

It is instructive to relate this essential element of the gift, the giving of time, to another element of the gift economy that Mauss' analysis brings to the fore: The giving of gifts involves more than an exchange between people. The giving of gifts solicits the abundance of things. It solicits benevolent spirits, the generosity of the gods and of nature itself. If the gift is ultimately not about the giving of value, but the giving of time, giving itself is nothing less than a solicitation of time. Giving

⁴⁴ Derrida, *Donner le Temps*, 45.

concerns a prayer, a prayer that time will give itself to us again so that we may live on. Gifts between humans constitute the way time gives itself to them. If time might still be gracious to them, if time might still allow humanity more time, it will turn on the extent to which humans might maintain economies of the gift. And the specific question that we are pursuing in this essay is whether Europeans may one day arrive at humanity of the gift.

The thinking of this thought requires no mysticism or mythology. It turns on pure and sober phenomenology – *sachliche Phenomenologie* – one might say with allusion to Husserl's understanding of phenomenology as a return to the thing itself, *zurück zur Sache selbst*. At issue in this sober phenomenology is the engagement with the initial opening of time to which Heidegger referred as the *Ereignis*.⁴⁵ Merleau-Ponty invoked in this regard the notion of the *chiasme* from which emerges the very distinction between the visible and invisible.⁴⁶ Hannah Arendt, in the rare moments that she stripped her own thinking of the new political myth that she pasted to the back of sound phenomenological intuitions, made mention of the *hiatus* that succeeds and precedes time and demands the forgiveness and promise that might inaugurate new beginnings.⁴⁷ Stripped of all the modern romanticisms and ancient paganisms to which Heidegger's thinking often succumbed, the essence of his penetrating contemplation of *Dasein* can be understood as the question concerning the way human existence might solicit time so that time would give itself to human

⁴⁵ Heidegger, *Zur Sache des Denkens*, 14–25.

⁴⁶ Maurice Merleau-Ponty, *Le visible et l'Invisible*, (Paris: Gallimard, 1964).

⁴⁷ Arendt, *On Revolution*, 205.

existence. This is the essential hermeneutic circle that the contemplation of *Dasein* extracted from Husserl's transcendental phenomenology.⁴⁸ Again, stripped of the romantic and pagan excesses that Heidegger pasted on the back of his profound analyses of the hermeneutic cycle between time and the solicitation of time, phenomenology would return to its early sobriety and eventually

⁴⁸ Martin Heidegger, *Sein und Zeit*, (Tübingen: Max Niemeyer Verlag, 1979), 372–437, especially the closing paragraphs on 436–437. It is important to distinguish this hermeneutic circle from the one that is current or currency in the tradition of semantic hermeneutics, say in the texts of Schleiermacher and Gadamer. The latter always, be it Schleiermacher's concern with the circular relationship between the comprehension of part of the text and understanding the text as a whole, be it Gadamer's concern with the circular relationship between pre-understanding (embodied in presuppositions) and understanding, concern circles of understanding *within* time. See again note 4 above. The insistence that the hermeneutic situation is universal (that is, it cannot be incircumvented) and irreducibly textual renders hermeneutics *innerzeitlich, in time*, and therefore in a significant aspect non-temporal and timelessly present (as long as it lasts). It is only when this textual or non-temporal hermeneutic circle is displaced, ruptured or interrupted by a different circular relation, namely the circulation between time and the solicitation of time, that hermeneutics become truly temporal. One should probably not even talk about a circle any more in the case of the latter, but only about that which, irreducibly related to the circle, always exceeds the circle. Derrida is again very precise and instructive in this regard. The hermeneutics that might engage with (the irreducibly non-economic) gift of time would not be strange to the circle or non-circular, but attentive to something strange to the circle. See Derrida, *Donner le Temps* 19: "Si la figure du cercle est essentielle à l'économique, le don doit rester *anéconomique*. Non qu'il demeure étranger au cercle, mais il doit *garder* au cercle un rapport d'étrangeté, un rapport sans rapport de familière étrangeté."

become *deconstruction*: the solicitation of a primordial *arché-différence* or *différance* that might afford human existence significant alternatives (differences) and postponements (deferrals), none of which can be cashed in, but all of which may, or may not, afford more time.⁴⁹ This, then, is the crucial question that phenomenology, the tradition of thinking that Europe has given the world, must ask at the time when Europe appears hell bent on sanitizing economies and cashing in current gains and current values by sacrificial externalisations of costs, as will become clear in a moment. At issue, in this cashing in, cashing up, or sanitisation, is an attempt to buy something out of time. Husserl's *Krisis der Europäischen Wissenschaften* has morphed yet again into a *Krisis der Europäischen Wirtschaften*, a crisis of the European economies.⁵⁰ Both crises – perhaps it is ultimately just one and the same old crisis – pivot on oblivion regarding the way time constantly requires careful solicitation.

When one looks beyond or beneath its anthropological curiosities, Mauss' *Essai sur le don* may well be understood as a study in how archaic communities carefully cultivated and sustained a transcendental consciousness of time and a consciousness of time itself as a transcendental condition. In other words, the *Essai sur le don* may be understood as a study of the cultivation of a hermeneutic or phenomenological circle in the cycles of which a transcendental

⁴⁹ Jacques Derrida, *Marges de la Philosophie* (Paris: Les Éditions de Minuit, 1972), 8–19.

⁵⁰ Edmund Husserl, *Die Krisis der Europäischen Wissenschaften und die transzendente Phänomenologie* in *Gesammelte Schriften* 8, (Hamburg: Felix Meiner Verlag, 1992); *Zur Phänomenologie des inneren Zeitbewusstseins*, (The Hague: Martinus Nijhoff, 1966).

consciousness of time conditioned time as a transcendental condition of existence. At issue in this hermeneutic circle is a simple doubling of the genitive *of* in the expression *consciousness of time*. Read as a subjective and objective genitive, consciousness of time is also time's consciousness. The *Essai sur le don* can be understood as an inquiry into the way archaic communities comprehended that existence *in* time but *oblivious to* time – existence absorbed by the presence of things and by its own presence – *lose time* in a very fundamental sense. They do not just lose a certain length of time. They do not just run out of the time calculated for purposes of doing this or that. They lose time itself and thus become lost in present pockets of time that have no temporal bearing or horizon, present pockets of time that are surely destined to run out of time.⁵¹

Within these dark pockets of time, the only consciousness that remains possible is a mindless incrementalism, invariably accompanied by claims of authoritative expertise, that scurry from one exasperating moment to the next. *Ein kopfloser Inkrementalismus*, Jürgen Habermas calls it in a passage to which we shall turn soon. And if the inner darkness of pockets does not appear to be an apt adjective for the glistening brilliance in which postmodern corporate capitalism is clad, one might even better invoke here a crystalline bubble of time that has come to envelope the best knowledge available in confounding halls of mirrors.

The economic crisis of our time is evidently a crisis of knowledge and of science that is lost in a timeless bubble of blinding presence. It

⁵¹ Heidegger called this situation of being lost in time or in pockets of time as an *Innerzeitigkeit* that obscures temporality. See Heidegger, *Sein und Zeit*, 404–428. That this existence *lost in time* is always also marked by a loss of time is clearly reflected in his observation that *das man*, the human individual who is lost in time, always experiences a lack of time. See *ibid*, 410.

is in response to a similar scientific blindness that Husserl expressly re-articulated transcendental phenomenology, in 1937, in terms of an inquiry into time consciousness that ultimately exposed the notion of an isolated present moment and thus of present knowledge or knowledge of presence as a misguided scientism that is highly unlikely, on its own, to produce any significant knowledge. Derrida's later critiques of Husserl turned, in many respects, on insights that Husserl had already articulated. The undeniable elements of forceful critique evident in Derrida's engagement with Husserl were aimed at the way Husserl regularly resisted his own insights into temporality.⁵² And the ingenuity evident in this critique consisted in restating Husserl's insights forcefully in a world that showed all the signs, after an interim of disastrous implosion, of again settling into confounding seamless presences, of again settling into a world or worlds that lost *track* or *trace* of the way it always derives from and remains conditioned by precarious transcendental openings of time, openings of time that Derrida constructively called *arché-writing* or *différance* for lack of language that could name these pre-ceding and succeeding *openings of time* without reducing them to *moments in time*, that is, to moments of presence, be they past, present, or future moments of presence.⁵³

The importance of revisiting here these crucial developments in 20th century European philosophy, and the need to rethink them much more incisively, precisely, and extensively than can ultimately be done here, concern the way the mindless technocratic incrementalism in the grips of which Europe bumbles on from one exasperating moment to the next

⁵² Jacques Derrida, *La Voix et le Phénomène*, (Paris: PUF/Quadrige, 1998); Jacques Derrida, *Introduction à "l'Origine de la Géométrie" de Husserl*, (Paris: PUF, 1962).

⁵³ See Derrida, *Marges de la Philosophie*, 21–22.

feeds from a stagnant hermeneutic bubble, the limits of which are no longer available for scrutiny and no longer co-conditioned by *timely* political interventions (or *untimely* political interventions, should one be comprehending these interventions from within time⁵⁴). Recognition of the importance of re-engaging with these phenomenological insights regarding the temporality and historicity of human existence may also benefit well from a re-appraisal of Machiavelli's *Discourses on Livy*, for already here, we shall see below, does one find a significant treatise on politics as a virtuous solicitation of *time* that exceeds technocratic reactions to technical crises. Technocratic reactions always commence *from within time* (*innerzeitlich*) and proceed, incrementally, from one moment *in time* to the next. If at all worthy of being considered as a *response to time*, technocracy is a very late response, and invariably a response that comes too late. Technocracy is a response to a *time* that has already become fully manifest and it does not see beyond this manifest time.

How might the generosity of humans solicit the gift of time itself? How might humanity suspend its consciousness of things that have become manifest within the parameters of an already disclosed period of time, so as to respond to time itself and the very disclosure of a time or an epoch? This is how Husserl's question regarding the transcendental reduction or *epoche*, the suspension of every day consciousness so as to focus on the primary way in which things first become apparent to consciousness, might be recast today.⁵⁵ And this

⁵⁴ When time is comprehended as a sequence of moments, the event that gives time (a time, another time, a significantly different time or *epoch*) will always come across as unexpected and untimely. But, it is in the untimely event that time discloses itself as truly timely, truly temporal, truly *epochal*.

⁵⁵ For Husserl's expositions of the transcendental and eidetic reductions, See Edmund Husserl, *Ideen zu einer reinen Phänomenologie und phänomenologischen Philosophie* in *Gesammelte Schriften 5* (Hamburg: Felix Meiner, 1992), 6, 16; Edmund Husserl, *Cartesianische Meditationen*

is the underlying question that Mauss' *Essai sur le don* can be seen to ask when one looks underneath its anthropological curiosities. It is the question of how human generosity might come to beget the generosity of time. How can generosity be begotten if generosity is required for this begetting? This is the ancient question of the impossibility of beginnings and the old question of the impossibility of constitutional beginnings, all over again. This question is asked here, urgently, against the background of Europe's epochal inability to invoke, either Luxembourg 1841 style, a vertical doubling and external source of grace and generosity, or Weimar 1919 style, a horizontal doubling and lateral source of mutual generosity that goes by the name of self-reflecting solidarity. Phenomenology teaches us that the latter, horizontal generosity, exceeds the immediacy of a second order

in *Gesammelte Schriften 8* (Hamburg: Felix Meiner, 1992), §§ 34–35; Edmund Husserl, *Phänomenologische Psychologie* (The Hague: Nijhoff, 1962), 281–285; Edmund Husserl, *Erfahrung und Urteil: Untersuchungen zur Genealogie der Logik* (Hamburg: Felix Meiner, 1972), 94 ff. See also the discussions of the phenomenological reductions in Frederick Elliston and Peter McCormick (eds), *Husserl: Expositions and Appraisals* (Notre Dame, Ind: University of Notre Dame Press, 1978); Marvin Farber, *The Foundation of Phenomenology* (Albany: State University of New York Press, 1943); Paul Ricoeur, *Husserl: An Analysis of his Phenomenology* (Evanston: Northwestern University Press, 1967); Karl Schuhmann, *Die Fundamentalbetrachtung der Phänomenologie* (The Hague: Martinus Nijhoff, 1971); Robert Sokolowski, *Husserlian Meditations* (Evanston: Northwestern University Press, 1974). Again, the recasting of Husserl's transcendental reduction or *epoche* above is based on a reading of Husserl's texts and of these discussions of his work, but evidently does not intend to toe a strict exegetic line.

instrumental and technocratic manipulation of present realities and present crises. It exceeds this immediateness by maintaining a first order regard for the way solidarity itself requires careful solicitation and sustenance. It turns on a doubling of registers in which a temporal register of meticulous caring for time itself precedes and supersedes the a-temporal register of instrumental knowledge and technocratic manipulation of present realities. The vertical grace invoked in political theologies and political-theological constitutional foundations may well have fallen into irreparable obsolescence precisely because of the way this grace came to be assumed as an eternal presence and an eternal guarantee for technological mastery that requires no foundational solicitation, care, and sustenance. It is with regard to this metaphysical assumption that Kelsen and Rawls evidently part company with Schmitt. Rawls tells us that fundamental hermeneutic arrangements and normative frameworks commence with precarious *modus vivendae*. Kelsen teaches us that they never attain securely posited or positive present realities. They can at best be presupposed, and must be presupposed again and again. Thus do Kelsen and Rawls tend to the task of caring for the temporal horizons of basic hermeneutic and normative frameworks.

E. Europe Between Gift and Sacrifice

Stable constitutional principles emerge from the process in which an initial *modus vivendi* transforms into a reliable overlapping consensus, Rawls tells us. But who will take the initiative towards the compromise from which might ensue the first frail features of a common compromise? Who will be hospitable to the deeply fraught event or advent of a possible *modus vivendi*? The initiative will always be taken against the background of deep division and conflict. The one who takes the initiative takes an immense risk on many fronts. A political leader who ventures the first reconciliatory gesture towards enemies or political opponents not only risks rejection or abuse of this gesture by the enemy or opponent; she also risks losing her constituency. The first gesture is the first gesture exactly because everyone else is still

resisting it. Someone must take the crucial first step in the hope and faith that it may precipitate broader benevolence that is, as yet, non-existent. Someone must solicit friendly or generous spirits, one might say with allusion to Mauss' *Essai sur le don*. The remarkable and exceptional for-giving (prior-giving) initiative that first just Nelson Mandela, still in prison, and later a broader African National Congress leadership played in the South African constitution-giving process will remain, as long as time remains, the gift that South Africa will have bestowed to the world's understanding of the primordial origins of new constitutions.⁵⁶

Timeo Danais dona ferre. Might the fear of bringing gifts to Greeks be the malevolent spirit in which the dream of the European Community currently appears to go up in smoke? Was this dream all along a sacrificial spirit that was bound to go up in smoke and fall to ash again, as has all too often literally been the case in Europe's history? Is this why leading European states appear content to sacrifice Greece and Greeks by means of inhuman "saving packages" that save recklessly parasitic financial institutions instead of Greeks? Nancy's perceptive linkage of sacrifice and political theology in the passage quoted above remains crucial for any incisive understanding of contemporary European politics. The sacrificial political theology of the northern European insistence that Greece and other faltering economies of Europe be subjected to paralysing austerity demands has been well recognised at the time by probing journalism. *Le Monde Diplomatique* published an illuminating Weberian analysis of northern

⁵⁶ For further elaboration of this point, see Van der Walt, "Vertical Sovereignty," 102–129.

Europe's response to the faltering Greek economy.⁵⁷ Northern Europe, at least in comparison to southern Europe and Greece in particular, has been exemplary as far as their protestant work and savings ethics are concerned. Their economies, therefore, deserve the relative health that they are still enjoying. Southern Europe has not, and the time has come that they own up to and suffer for their lack of industriousness and thrift. Only thus might they receive expiation and hopefully come to mend their worldly ways. These are the key terms of Europe's latest political theology.

One can imagine the ridicule that will meet any suggestion that northern Europe might turn away from this economy of sacrifice to an economy of the gift. One can even imagine someone throwing the Derridean insight into the impossibility of the gift right into the face of this suggestion. There is no such thing as a gift that is not embedded in a reciprocal transactional scheme, the objection will assert. And what can one expect the Greeks to offer in return for any gifts that one may bestow on them now. This would be a perverted Derridean line, though, as we have already pointed out: True, there is no such thing as a pure gift, but neither is there something like a pure transaction. And if northern Europe might ever become as marginally magnanimous as to begin to think this thought, it might just become interested in taking a closer look at some of its past exchanges with Greece. One need not consider here the trans-epochal side of the spectrum, the Greek marbles in the British and Pergamon museums, the latter a couple of stone throws away from the *Kanzleramt* in Berlin. One would surely not want to affirm the reciprocity of these exchanges, would one?

The question whether the legacies of Kant and Hegel would have been thinkable without the antecedent legacies of Plato and Aristotle, whether the geniuses of Goethe and Schiller can be contemplated without Sophocles and Aeschylus, should not detain us, for no book-

⁵⁷ Mona Chollet, "Aux sources morales de l'austerite," *Le Monde Diplomatique*, March 2012, 3.

keeping is conceivable when the gifts of the gifted are exchanged with the unfathomable abundance and inoperative abandon that mark these exchanges. Inoperative abandon. Nancy contemplates, in contrast to the sacrificial and operative community, a literary, inoperative, and non-sacrificial community. Does Europe's cultural wealth derive from the way its literary communities know and have always known how to partake without taking, to contribute without ever appropriating or owning anything? We have seen from the *Essai sur le don* that the ancients created wealth by giving and circulating wealth and by proscribing any appropriation of wealth. Thus did they solicit benevolent spirits and a generous abundance of things. What mattered to them was to be in touch with wealth, not to own it. Such is the literary community's relation to literary wealth. That is why Umberto Eco can observe that Europe at least shares a culture if it shares nothing else.⁵⁸ And by refusing to share anything else, Europe is surely moving to the verge of scandalously and shamefully betraying and destroying the spiritual ancestry that it does share.⁵⁹

Are Europe and the world as financially bankrupt as they increasingly appear to be because of the opposite logic at work in

⁵⁸ Gianni Riotta, "Nur die Kultur verbindet Europa," *Süddeutsche Zeitung*, 26 January 2012, 24.

⁵⁹ See in this regard Gunther Grass' stinging lament "Europas Schande," *Süddeutsche Zeitung*, 28 May 2012, 15. To quote here just four lines: 'Dir trotzend trägt Antigone Schwarz und landesweit/ kleidet Trauer das Volk, dessen Gast Du gewesen/. . . Geistlos verkümmern wirst Du ohne das Land,/dessen Geist dich, Europa, erdachte'. See also the discerning response to Grass by Ulrich Greiner, "Die Antike in Ehren," *Die Zeit*, 31 May 2012, 1.

financial speculation and market exchanges? For here, wealth is only ever circulated – invested – when certainty or high likelihood of extraction and appropriation prevails. Speculative capitalism has not only lost the ties it may once have had with gift exchanges, it has become the bizarre inverse or opposite of gift economies. When one creates toxic debts, sells them before they go putrid on your own books, and then pull out of the circulatory transfers before they find their way back to you, one does not give in order to give time. One “gives” in order to buy time for an exit. One counterfeits, trades in for real value, and gets the hell out of town before the hoax has time to get back to you. This is what happens whenever someone pulls out of a circle of speculative debt creation. It is, in fact, the whole point of entering the speculative circle. And *this pulling out* is exactly what the Standard and Poor’s and Moody’s of this world facilitate under guise of neutral monitoring. The active and performative role that credit rating agencies play in pulling the plug on circulatory speculation, always at the right time for some and at the wrong time for others, received far too little attention in attempts at understanding the global financial meltdown in recent years.⁶⁰ But we are digressing. The Greek tragedy of our time concerns the termination of another circulatory exchange. Specifically at issue in the current tragedy of Greece is the structural dynamics of European export and import markets that resulted from the creation of the Euro. An interview with the Cologne political theorist Fritz Scharpf recently published in the *Süddeutsche Zeitung* under the

⁶⁰ See the damning observations regarding the role of the credit rating agencies in the genesis of the subprime crisis in the reports of Permanent Subcommittee on Investigations of the U.S. Senate, http://www.hsgac.senate.gov/imo/media/doc/Financial_Crisis/FinancialCrisisReport.pdf?attempt=2, 243–317 and the Financial Crisis Inquiry Commission of the United States, http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_conclusions.pdf, xxv. I am indebted for these references to an excellent assignment on Mauss and the financial crisis (submitted in the course Sociology/Anthropology of Law, University of Luxembourg, 2012) by M. Kriening.

provocative title *Noch verteidigt Deutschland jeden Meter Boden*, provides a clear analysis of these dynamics.⁶¹ The unification of the weak and strong European currencies of respectively manufacturing and exporting Member States, on the one hand, and non-manufacturing and importing Member States, on the other, in one single European currency, was bound to have disastrous consequences for the latter. The weakening of the German currency and the strengthening of the Greek currency that resulted from replacing both the Mark and the Drachma with the Euro literally created export subsidies for the German and import tariffs for the Greek economy. The only way that Greece and other non-manufacturing Member States could play the importing role that the single currency designed for it, was to obtain money that its own economy stood no chance of producing, hence the debt or recession trap or combination of both that became Greece's fatal destiny. This was one of the major design faults of the Euro that benefited especially the German and disrupted especially the Greek economy in recent years. This was, hopefully, not intended and there is little point in excessively lamenting what may well have been little more than technocratic oversight or a neo-liberal blind spot. Deeply lamentable, however, was and is the predominant response of those who benefitted for years from this design fault when the fault lines started to crack up. No one in her right

⁶¹ Fritz Scharpf, "Noch verteidigt Deutschland jeden Meter Boden," *Süddeutsche Zeitung*, 23 December 2011, 12. A later observation by Habermas captures much of Scharpf's argument in a nutshell: "In one and the same currency area, the export surplus and low unit labour costs of the one country are systematically interconnected with the import surplus and high unit labour costs of the other." See Jürgen Habermas "Bringing the Integration of Citizens into Line with the Integration of States," *European Law Journal* 18, no. 4 (2012): 487.

mind would suggest that the Greeks are completely blameless as far as governmental failure is concerned. But all of a sudden they became scapegoats paying with nothing less than lifeblood for a miasmic spread of ambiguous pollution that was surely not a unilateral sin. Arbitrary expiatory coercion akin to that which René Girard discerned in archaic sacrificial rituals is written all over Europe today.⁶²

Will Europe commence with a gift or sacrifice? Will the constitution that Europeans might one day have given themselves pivot on an exchange of gifts or the imposition of sacrifices? Probably both. We have seen from our reading of Mauss' text that gift and sacrifice are inextricably entwined. But, we have also seen from this reading that Mauss nevertheless continues to maintain a precarious distinction between gift and sacrifice. This precarious and unstable distinction may well be the key to any constitution that Europeans may one day have come to give themselves. For now Europe appears stuck in the logic of sacrifice that allows no distinct or distinguishable consideration for the economy of the gift. And this sacrificial logic is currently manifest as an apparently insurmountable impasse in European politics. This impasse has been pointed out masterfully by both Germany's leading social theorist, Jürgen Habermas, and the Dutch journalist, Geert Mak. As Mak puts it, Europe is as paralysed with fear as *De Hond van Tisma* that got stuck in the Danube on a block of drifting ice. Tisma called the dog repeatedly but it remained as if frozen on the block of ice, drifting downstream. Someone needed to grab it by the collar to save it. "*Uiteindelijk wist een van de kinderen hem bij zijn nekvel te pakken, en alles liep goed af.*"⁶³ Habermas observes similarly:

⁶² René Girard, *La Violence et le Sacré* (Paris: Editions Bernard Grasset, 1972).

⁶³ Geert Mak, *De hond van Tisma. Wat als Europa klapt* (Amsterdam: Atlas/Contact, 2012), 5.

The German Government has come to accelerate the destruction of solidarity across Europe, because it has for too long closed its eyes for the only constructive solution. . . . All governments involved have thus far lacked courage [to act]. They fidget around helplessly in the catch–22 between demands of big banks and rating agencies, on the one hand, and the fear of losing legitimacy in the eyes of their constituencies, on the other. Their mindless incrementalism [*kopflöse Inkrementalismus*] betrays their lack of any further-reaching perspective.⁶⁴

The opening lines of this essay already mentioned Neil Walker’s probing inquiry into the question whether the Convention on the Future of Europe (2000–2003) could be understood in terms of a constitutional moment. Walker’s essay pays special attention to the community-mobilizing force that Bruce Ackerman associated with constitutional moments.⁶⁵ Much talk of such a community mobilizing moment indeed went around at the time of the Convention, observed the essay.⁶⁶ During a recent workshop in Luxembourg, Walker observed that this aspirational spirit has largely fallen silent in the years that followed.⁶⁷ Since the emergence of the financial crisis, it has basically fallen into complete oblivion. Whatever space it may have occupied for a while is now fully occupied by the unilateralism of bureaucratic elites that

⁶⁴ Translated from Habermas, *Zur Verfassung Europas. Ein Essay*, 41.

⁶⁵ Walker, “The Legacy of Europe’s Constitutional Moment,” 384–388.

⁶⁶ *Ibid.*, 398.

⁶⁷ Workshop ‘On the Way to a European Constitution?’ University of Luxembourg, 3–4 May 2012.

Habermas has come to call *executive federalism* (*Exekutivföderalismus*).⁶⁸ In his response to the Greek elections on 6 May and the political crisis that it precipitated, the then President of the European Commission, Jose Manuel Barosso, appeared determined to caricature the European Union's lack of community and communal spirit by describing the European Union as a club, membership in which is conditioned by adherence to the rules. When one does not play by the rules, one has to leave the club, Barosso said.⁶⁹ A deeper reflection on why a country, which has over millennia been an integral and definitive part of the historical and cultural reality that came to call itself Europe, is no longer capable of playing by the rules, of a little over fifty year old club, was evidently not one of Barosso's concerns. In the aftermath of the week of 7 to 14 May 2012, a general acceptance that Greece must leave the European monetary union threatened to settle in the minds of Europe's political and financial elites. Given the way Europe's incremental and technocratic efforts to save the Euro zone were nailed to a narrowly fixed mind-set, it will come as no surprise if they would eventually run out of time and simply pass into nothingness. Fixed mind-sets, like all things present, do not endure. Only non-present time, and the regard for time as non-present and infinitely broad, endures.

F. Between Merkel and Mandela

⁶⁸ Habermas, *Zur Verfassung Europas*, 48.

⁶⁹ See <http://www.euronews.com/2012/05/13/european-central-bankers-mull-greek-euro-exit/>. The Greek Prime Minister (at that time) later denied the rumour that he had asked Barosso to make the statement. See <http://greece.greekreporter.com/2012/05/30/reuters-report-papadimos-asked-barroso-to-threaten-greece-out-of-eurozone/>; <http://www.athensnews.gr/portal/8/55845>.

Timeo Danais dona ferre. Is there a way out of the sacrificial protestant political-theological trepidation that fears bringing gifts to the Greeks? An incarcerated Nelson Mandela risked alienating his constituency when he retreated from the logic of sacrifice to commence discussions with a regime that had been oppressing that constituency brutally for generations on end and without any end yet in sight. Greece and the governments of Greece may well have made serious mistakes in the past, but they have not systematically oppressed anyone outside Greece since the time of Alexander the Great. They have a lot for which they need to forgive one another, but the mistakes for which they might need pardoning from non-Greeks, from fellow Europeans, cannot even remotely be compared to those to which Mandela responded with the epochal pardon (*par-don*) of our time.

The one leader of Europe who has the sovereign stature to unite Europe, not by the blood sacrifice of fellow Europeans, but by an unprecedented gesture of European solidarity, is sadly held captive by the protestant political theology of her domestic constituency. Her eyes are on domestic electoral politics, not on Europe, as the celebrated Italian journalist Eugenio Scalfari observed in 2012.⁷⁰ No one in the United States would contemplate dropping California from the Union because of its now almost endemic bankruptcy, the Harvard legal scholar Joe Singer told me some weeks ago. Germany is not

⁷⁰ Eugenio Scalfari, “Das wäre die vierte Schuld,” *Die Zeit*, 15 March 2012, 7. Habermas, “Bringing the Integration of Citizens into Line with the Integration of States,” 485–488, at 488, observes similarly in a cutting fashion: “Time and again, the party leader Angela Merkel seems to admonish the chancellor Angela Merkel to put European integration on the back burner out of consideration for the reservations of her Eurosceptic voters.”

completely unfamiliar with this kind of solidarity. Saarland has been bankrupt and held on a federal financial lifeline for years on end now. And that federal lifeline has not been thrown to the Saarlandians on condition that thousands of them compete for food from garbage cans, as is the case with the saving packages currently imposed on Greece. Europeans will not give themselves a Constitution until such time as the solidarity between citizens within Member States is extended to citizens of other Member States.

What will it take for this kind of solidarity to emerge? An inter-European social solidarity will surely not emerge from a European jurisprudence that is perceived by too many Europeans to be bent on destroying whatever social solidarity structures still exist within Member States. That recent jurisprudence of the European Court of Justice is currently perceived to be doing exactly this is evident from an extensive list of academic publications that responded to the ECJ's decisions in the *Laval*, *Viking* and *Rüffert* cases.⁷¹ The insistence that informs most of these publications turns on the intuition that one cannot create solidarity by destroying solidarity. The intimations of potential constitutional self-protection that the German Federal Constitutional Court has articulated in a whole series of judgments should not surprise anyone against the background of European jurisprudential and political developments that potentially pose significant threats to national social democratic politics, and pose them, moreover, not for the sake of greater inter-European solidarity, but for the sake of a reckless free market ideology that shows no concern whatsoever for anything worthy of the name solidarity.⁷² Any

⁷¹ Case C-341/05, *Laval*, (2007); Case C-438/05, *Viking*, (2007); Case C-346/06, *Rüffert*, (2008).

⁷² See BVerfG 37, 271 (*Solange I*); BVerfG 73, 339 (*Solange II*); BVerfG 89, 155 (*Maastricht*); BVerfG, 2 BvR 1481/04 (*Görgülü*, 2004); BVerfG 123, 267 (*Lisbon*, 2009); BVerfG, 2 BvR 987/10 (*Rescue Packages*, 2011). Whether the German Constitutional Court will or can really put its money

jurisprudence that might be perceived to promote social dumping and destroy domestic social securities in Europe is bound to elicit more and more antipathy as far as broader European social solidarity is concerned.⁷³ If the German Chancellor might still come to entertain the idea of taking her constituency with her on the journey towards greater European solidarity, instead of herself remaining captive to their protestant trepidations, the jurisprudence of the ECJ in its *Laval*, *Viking*, and *Rüffert* cases is not the kind of thing that will make her task any easier.⁷⁴ Perceptions of “social dumping” will not spread social democratic solidarity in Europe; it will only destroy what is left of it.

where its mouth is as another question. See Weiler’s brutal exposure of the emptiness of the Court’s rhetoric regarding the protection of German democratic sovereignty against erosion by the increasing powers of the European institutions in Joseph H.H. Weiler, “Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision,” *European Law Journal* 1, no. 3 (1995): 219–258.

⁷³ Even Mario Monti recognised this. See the *Proposal for a Directive of the European Parliament and of the Council on the Enforcement of Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services*, Brussels, 21 March 2012, 5: “Professor Monti . . . recognised that the controversy fuelled by the rulings ‘has the potential to alienate from the Single Market and the EU a segment of public opinion, workers’ movements and trade unions, which has been over time a key supporter of economic integration’. He further added that ‘the Court’s cases have exposed the fault lines that run between the Single Market and the social dimension at national level.’”

⁷⁴ Catherine Barnard, “Employment Rights, Free Movement Under the EC Treaty and the Services Directive,” *Europa Institute Mitchell Working*

The suggestion here is not that these perceptions regarding the solidarity-destroying jurisprudence of the ECJ are “correct.” The jurisprudence that informed the ECJ’s judgments in the *Laval*, *Viking*, and *Rüffert* cases may well have been informed by a forceful argument that the overall effect of this line of jurisprudence does not destroy but promotes solidarity. *Laval*, *Viking*, and *Rüffert* can indeed be argued to open up the exclusive employment markets of the better-off workers in the EU’s stronger economies to less well-off workers in the EU’s weaker economies. Even Catherine Barnard, one of the most critical among scholars who are critical of *Laval*, *Viking*, and *Rüffert*, concedes this point.⁷⁵ Her position will surely not convince those that firmly

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http://www.law.ed.ac.uk/file_download/series/44_employmentrightsfreemovementundertheectreatyandtheservicesdirective.pdf; Catherine Barnard, “Social Dumping or Dumping Socialism? Case Note on *Laval* and *Rüffert*,” *Cambridge Law Journal* 67 (2008): 262; Christian Joerges and Florian Rödl, “Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*,” *European Law Journal* 15, no.1 (2009): 1ff.; Robert Rebhahn, “Grundrechte und Grundfreiheiten im Kollektiven Arbeitsrecht vor dem Hintergrund der neuen EuGH Rechtsprechung” referenced on this page, <http://www.etui.org/fr/Themes/Dialogue-social-et-negociation-collective/Legislation-sociale/Interpretation-de-la-Cour-europeenne-de-Justice/Reaction-aux-jugements/Articles-Presse-etc>, but no longer accessible (Prof. Rebhahn kindly provided me with a copy on request); Rebhahn, “Grundfreiheit Vor Arbeitskampf,” *Zesar* (2008): 57–65; Fritz Scharpf, “The Only Solution is to Refuse to Comply with the ECJ Rulings” http://www.boeckler.de/164_92433.html. See also, poignantly, Emiliios Christodoulidis, “A Default Constitutionalism? Some Cautionary Remarks on the Many Constitutions of Europe” in Kaarlo Tuori and Suvi Sankari (eds), *The Many Constitutions of Europe* (Farnham: Ashgate, 2010).

⁷⁵ Catherine Barnard, “A Proportionate Response to Proportionality,” *European Law Review* 37 (2012): 122–123.

believe that the destruction of social solidarity structures in stronger economies will only spread vulnerability. It will not improve the conditions of the vulnerable. But this is beside the point; the point is that a court of justice should not enter this kind of political disagreement. No one, and no court, can identify “the right answer” in cases such as these, where the key question concerns issues that are socially deeply divisive. The decisions in *Laval*, *Viking*, and *Rüffert* – if taken in the same way that they were taken in these cases – would have remained as problematic and socially divisive had they gone the other way.⁷⁶

⁷⁶ I would like to argue that these decisions should have gone the other way, but it should have gone the other way on the basis of a completely different jurisprudence than the one the ECJ developed in these cases. I articulate this argument fully in Johan van der Walt, *The Horizontality Revolution and the Question of Sovereignty* (Berlin: Walther de Gruyter, 2014), 334–360. The essence of the argument can nevertheless be captured in four crucial steps or points: 1) The balancing of broad legal principles (fundamental freedoms and rights) which has come to dominate contemporary judicial review in many jurisdictions of the world and also informed the judgment in *Laval*, *Viking*, and *Rüffert* should be reserved for the exceptional cases in which legislation or absence of legislation (*tacitus consensu populi*) applicable in the case gives rise to the *destruction* of the essence of a fundamental right or limits that fundamental right *irrationally*. 2) These kind of balancing procedures should especially be avoided in the case of socially divisive issues. When existing legislation or absence of legislation that governs such socially divisive issues does not destroy the essence of a right or limit it irrationally, the court should not engage in any finer or further balancing procedures. 3) Such “finer” balancing procedures should be reserved for “purely” private law disputes where concerns of

“individual justice” and the need to “resolve” or at least terminate private disputes are at stake. They are acceptable and unproblematic as an integral part of private law adjudication in which recourse to general principles of private law have always played a crucial role. They have no role or place in disputes that raise divisive social convictions that can obviously neither be resolved nor terminated but ultimately only aggravated by judicial decisions. 4) Democratic politics and electoral processes provide the only means through which deeply divisive social issues can be legitimately laid to rest – at least for a while. Judiciaries cannot play a significant role in these processes apart from checking for the wholesale destruction or irrational limitations of rights, both of which (destruction of the essence and irrational limitation of a right), when positively identified, should be self-evident enough to render possible scope for significant social or political disputation negligible. When the disputes in *Laval*, *Viking*, and *Rüffert* are tested against these principles, it becomes evident that the court should not have entered the fray here by taking recourse to “balancing procedures.” These disputes all concerned deeply divisive social concerns that go to the heart of a class struggle that has been defining and dividing European societies for more than a century. No judiciary can or could have laid these disputes to rest by “balancing” the class interests involved. All that any judiciary can or could have achieved through such balancing is to earn for itself the reputation of being or having become partisans in the conflict, whichever way they end or ended up judging the matter. The *Laval*, *Viking*, and *Rüffert* judiciary should have deferred to legislation or absence of legislation as the will of the legislature. The issue was clear under the circumstances. There was no EU legislation that clearly governed these cases. That is why the Court resorted to balancing procedures. But instead of resorting to balancing procedures, the court should have taken the absence of EU legislation as an indication of the will of the EU legislator that Member State law still applies to these cases.

What might, then, come to spread instead of destroy social democratic solidarity in Europe? Ultimately, one does not and cannot know for sure. At issue here will be a new configuration of partial knowledge and utter ignorance that is not subject to prediction. Neither will it warrant predictions. No destiny is entirely in the hands of mortals. Both benevolent and malevolent spirits appear to be primordial realities that condition a time or an epoch in some way or another. Humanity has always had to contend with these realities and the disenchantment of the world brought about by the advent of modernity and the age of Enlightenment has not made us complete strangers to invocations of “the spirit of an age.” Nicolo Machiavelli, the pioneering theorist of modern politics, was surely incisively aware of the extent to which politics concern the art of managing humours.⁷⁷ However, the modern disenchantment of the world, without which Machiavelli’s sublime political thought can also not be fully understood, has finally led to apparently insurmountable incredulity regarding the possibility of politics as a non-manipulative solicitation of a benevolent age and benevolent times.⁷⁸ The banal technocratic strategies of the *Prince* have come to displace the awesome insights into promising conjunctions of fate and virtue articulated in *The Discourses on Livy*.⁷⁹

⁷⁷ Niccolò Machiavelli, *Discourses on Livy* (Oxford: Oxford University Press, 1997), 38–40. See also the explanatory note of Peter and Julia Bondanella at 364, note 38; and Anthony Parel, *The Machiavellian Cosmos* (New Haven: Yale University Press, 1992).

⁷⁸ Alasdair MacIntyre, *A Short History of Ethics* (London: Routledge, 1966), 121–145; Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 1978) II, 18.

⁷⁹ Louis Althusser, *Machiavelli and Us* (London/New York: Verso, 1955), 17–19.

But the ancients, Mauss tells us in the *Essai sur le don*, were convinced that benevolent spirits could be solicited by an exchange of gifts. How might this wisdom return to us, non-manipulatively, in the wake of the disenchantment of the world precipitated by the advent of modernity and the age of Enlightenment? How might this wisdom return without re-invoking pre-Enlightenment mythologies? This is exactly what we do not and cannot know for sure. However, one can imagine that, should this wisdom have returned one day, it will have returned in the form and format of a first gesture of giving. On the shoulders of this gesture will rest the chance of the first significant distinction between manipulative and non-manipulative relations between Europeans.⁸⁰

The first gesture of giving, the first gift, will itself probably only become possible on the back of the insight that the first gift is neither a pure gift nor truly a first gift. At issue in this observation is again the extension of the Derridean regard for the impossibility of the pure gift, to a regard for the impossibility of a pure transaction. The first gift and first gesture of giving will be conditioned by a regard for margins of benefit, already received, that exceed the terms of strict reciprocal exchanges under which they may have been presented. Benefits previously received will not always be readily identifiable. Who or what implanted the gift of super-human generosity in the heart of Nelson Mandela will remain clouded in mystery, mystery of the kind that the ancients explained with reference to the generosity of the gods and to which some South Africans still refer as *Ubuntu*, the spirit of African humanism.⁸¹ But, one need not and should not indulge in obscure

⁸⁰ See Scott Veitch, *Law and Irresponsibility – On the Legitimation of Human Suffering* (New York: Routledge-Cavendish, 2007), 55; Alasdair Macintyre, *After Virtue* (London: Duckworth, 1985), 26.

⁸¹ Drucilla Cornell and Nyoko Muvangua (eds), *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (New York: Fordham University Press, 2011).

mythologies and neo-paganisms. Profound respect for the reality that an epoch or lifetime is conditioned by irreducible temporal horizons that cannot be named from within the boundaries or parameters of that epoch or lifetime is a minimal, but sufficient, condition for remaining alert to the circular hermeneutic or phenomenological task of soliciting and sustaining those horizons with meticulous care. The surest way of killing gods and rendering them ancient is to give them operative names that render them present.

G. Unknown Origins, Inexplicable Grace

Besides, benefits received previously are frequently not that difficult to discern. We learn from Fritz Sharpf that Northern Europe's ungriving and unforgiving response to Greece's current woes pivots on deliberate ignorance regarding the extent to which it has, since the construction of the Euro, benefitted from these very woes. We need not allude again to the gifts the ancient Danaians (*dessen Geist Dich, Europa, erdachte*⁸²) bestowed on Europe. At issue is the short history of little more than a decade of single monetary currency in Europe from which Northern Europe gained and will gain far more than it can reasonably fear to lose, a short history of irreducibly entangled cross benefits and harms. Northern Europe is currently in the grips of an exacting sacrificial (purifying, sanitising) spirit that appears determined to establish who owns and deserves what in Europe. Only an unforgiving, ungriving, and vindictive spirit would contemplate such a pointless endeavour exactly at a time when an unquestioning solidarity appears to be the only constructive and productive way forward. One knows not whence might the grace come, assuming it might come still,

⁸² See Grass, "Europas Schande," *supra*.

that will render Europe, perhaps for the first time since its Aegean beginnings, truly gracious.⁸³ Again, such advents are not fully subject to knowledge and understanding. When they come, they always precede full comprehension. One always understands later, ex post facto, that something has or may have been given; hence also the future anterior employed throughout this essay: *the constitution that Europeans may one day have given themselves*. The gift economy, Mauss teaches us, requires initiation by a first absurd gesture of giving that exceeds knowledge and understanding, a gesture that exceeds and, therefore, precedes the capacity of the most advanced and sophisticated hermeneutics conceivable.

There is a quaint story of a grandfather who took his grandson to view his strawberry patch. "Look," he told the boy, "these rows over here I planted for us. These are our strawberries. And those two rows over there are for the birds. Those strawberries are theirs." The boy responded with perplexed disbelief: "But, Grandpa, the birds won't know, they will also eat our strawberries." "That is quite all right," the old man said, "then we also just eat some of theirs."

⁸³ If Europe does not have a demos, it is more fundamentally due to the lack of political grace and graciousness (one can also just call it solidarity), than a lack of a common language, as Dieter Grimm, "Does Europe Need a Constitution?," *European Law Journal* 1, no.3 (1995): 296, suggests. If everyone is well aware that every Member State is only in the Union to protect and promote their own interests, nothing more than the current (and centuries-old) mix of disastrous mutual suspicion, faltering instrumental cooperation and desperate technocratic tinkering can ever be expected. And the big question is who will have the political greatness or graciousness to break this circle of mutual suspicion, self-interest and mindless technocracy.