

THE DAVID HUME INSTITUTE



**The European Union
and the
Idea of a Perfect Commonwealth**

The Hume Lecture 2006
1 March 2006

Sir Neil MacCormick

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Forward

Professor Sir Neil MacCormick, one of our Honorary Vice-Presidents, delivered the 2006 Hume Lecture on the 1st March this year. As both a long-established associate of the David Hume Institute and one of the premier legal minds of his generation, Sir Neil was ideally placed to so deliver. The fact that Sir Neil also has first hand experience of European politics and constitutional affairs, as a Member of the European Parliament from 1999 to 2004, meant that in addition, he was able to fulfil another element of the David Hume Institute's ambition for its sessions, namely to bridge the gap between theoreticians and practitioners. When we heard that Sir Neil planned to relate some key current issues, on Europe inter alia, to Hume and his thinking on democracy, our cup ran over with expectations.

As all of those reading the pages that follow will appreciate, I trust and expect, those expectations were more than fulfilled. The written page cannot fully capture the passion and humour of our lecturer's delivery. Nevertheless, this edited version adds hugely to our thinking on how to resolve the age-old problems of democracy and the balancing act between the rule of a demagogic leader and the rule of the mob – and demonstrates the insights still to be gleaned from Hume.

Sir Neil's democratic journey commences at the time of the Peloponnesian Wars, when Athenian democracy was shown to be 'too easily roused to enthusiasm by orators'. [En passant, this observer notes how he can imagine Sir Neil in that role of Athenian orator, rousing the fires of enthusiasm]. As a consequence, democracy was for long seen as 'a nice idea in principle, but ... too full of risks and difficulties to be a practical system of government', with any democratic elements needing to be checked and balanced by 'aristocracy and monarchy'.

He then goes on to consider some present grounds for concern about democracy. The first such issue covered is the ‘Legislative and Regulatory Reform Bill, 2006’ which he describes as not so much a Henry VIII clause – something he learned to fear as a young lawyer – but a Henry VIII *bill*! He then moves on to the European Arrest Warrant and its implications (including the extension to the US) and the whole question of the defeat in referendums of the proposed new European Constitution. This last is a prelude for a debate that follows regarding democracy and the EU.

Then it is back to Hume, and how he proposed to achieve practical democracy, with his ‘perfect commonwealth’ involving both a Senate and a set of indirectly elected county assemblies at which the will of the people is paramount. This is the system Hume sees as democratic but avoiding the ‘rule of the mob’.

The surprise package is that Sir Neil sees close parallels between what Hume proposed and what has emerged in the European Union. He sees the ‘indirectly elective way of coming into office of the European Commission [as] most likely a better and wiser kind of democratic election than if there were a direct election in all of Europe’. He also sees the power of the European Parliament being not in that institution as a whole – where the problem of scale that Hume had anticipated is apparent – but in the specialist committees, through which ‘members of the European Parliament have a greater influence on the content of European Legislation than members of the United Kingdom Parliament or the Scottish Parliament can have’.

This amounts to a very positive vote of confidence in the potential for a system of rule to emerge in the EU that would be applauded by Hume and his followers. That potential is not yet fully realised, but for so eminent an authority as Sir Neil to be so positive, must give us all pause for thought.

However, he does see the EU as suffering not so much from a democratic deficit as from an information deficit. This is a serious problem that must be addressed if the European people, not least in the UK, are to become enamoured of the EU ways of government and decision-making.

In conclusion I must make three important points. First, the David Hume Institute is exceptionally grateful to the Royal Bank of Scotland for once more sponsoring the Hume lecture and to Sir Stephen Lamport of RBS for most effectively and engagingly chairing the session. Second, please note that, as a charity, the Institute holds no collective views on these or other issues and policies, while being wholly convinced that they are very worthy of debate. Finally, we must extend most sincere thanks to Sir Neil both for delivering such an excellent lecture and for preparing this edited version for publication.

Jeremy Peat
Director
August 2006.

Professor Sir Neil MacCormick

Regius Professor of Public Law and the Law of Nature and Nations in the University of Edinburgh since 1972; Leverhulme Research Professor 1997-9 and since 2004 (Dean of Law Faculty, 1973-76, 1985-88; Provost Faculty Group of Law and Social Science and Dean of Faculty of Social Science, 1994 –97; Vice-Principal for international affairs, 1997-99)

During leave of absence 1999-2004, served as Member of the European Parliament (Scotland, Scottish National Party/European Free Alliance). Member of European Parliament Committees on Legal Affairs and the Single Market (co-ordinator for the Greens/European Free Alliance Group); Constitutional Affairs Committee; Vice-President of the Temporary Committee (2000-01) on the Echelon Interception System. Alternate member on the Convention on the Future of Europe 2002-3. A Vice-President of the Scottish National Party 1999-2004.

Member, Houghton Committee on Financial Aid to Political parties 1975-6; Member, Broadcasting Council for Scotland 1985-89; Member, Research Council European University Institute (1989-95); Member, Scottish Examinations Board 1993-95; Member, Sutherland Committee on Criminal Appeals in Scotland 1995-96; Member, Economic and Social Research Council 1993-99; Member, Governing Council, European Science Foundation 1997-99

David Hume Lecture 2006

The European Union and the Idea of a Perfect Commonwealth

[Note: This is the text of the lecture, more or less as delivered in the Royal Society of Edinburgh on Wednesday 1 March 2006, but revised to allow for the difference of the written from the spoken word. I should express again here my gratitude to the Institute for inviting me to give the lecture, and to the Royal Bank of Scotland for sponsoring it and the surrounding hospitality, and for providing an able and genial Chair for the evening in the person of Sir Stephen Lamport. Having been involved in the David Hume Institute since its inception at the hands of Sir Alan Peacock, I took particular pleasure in the occasion. N. MacC]

This lecture will rather boldly try to bring together a significant historical text, that of David Hume's 'Idea of a Perfect Commonwealth' and some current problems about democracy in the UK and in the European Union. Has Hume anything to say to us about democratic government that remains worth our attention two hundred and fifty years on? Risking yet further incredulity, I will draw attention to a yet older text concerning democracy, by the ancient Greek historian Thucydides.

The lecture has four parts:

1. Why is democracy a problematic form of government?
2. Are there particular present grounds for concern about democracy?
3. What has Hume to say about a democratic constitution?
4. Are Hume's views helpful in tackling either general problems about democracy or our own particular and present difficulties?

1. Why is democracy a problematic form of government?

My main text for the day is 'The Idea of a Perfect Commonwealth'. In the eighteenth century, a 'commonwealth' meant a democratic polity as distinct from a tyranny or a constitutional monarchy or an aristocracy or oligarchy. Hume favoured democratic government, but had to acknowledge that it was a highly problematic form of government.

Democracy was notoriously a fickle and difficult kind of government to have. It got a bad name away back in the fifth century BC. One source of its ill-fame was the Athenians' Sicilian Expedition, as that was written up by Thucydides in his *Peloponnesian War*. The Sicilian Expedition was the greatest mistake that Athens made. At a time of relative peace in mainland Greece, with the Spartans recently defeated, the first democratic empire in the history of the world went off on a diversionary war in Sicily. It was comprehensively defeated at Syracuse, as some of its own statesmen had foreseen would happen.

I was reading a little thing off the internet today, in summary of Thucydides.¹

“Nicias, Alcibiades and Lamachus were chosen to lead the expedition, although Nicias had no interest in leading it. Five days after they were chosen, there was a debate in the assembly, between those against the expedition, led by Nicias, and those who supported it, led by Alcibiades.

“Nicias argued they should not be dragged into a war that did not involve them, and that Athens should not feel so secure despite the peace treaty he had set up only a few years before. Sparta was still their enemy, and they could not afford to waste time and men fighting a far-away war while their own enemies were so close to them. Even if they did somehow conquer Sicily ... it would be impossible to govern.

“Athens' weaker and poorer allies continually revolted against them, and they were much closer. The Sicilians, he said, would be more fearful of Athens if Athens was not tested in battle, just as Athens had been more fearful of Sparta before they were able to defeat the Spartans in war. Finally, he hoped his fellow citizens would not be persuaded by the young and arrogant Alcibiades, who he felt was only looking for personal glory.

“Other speeches were made, mostly in favour of the expedition, before Alcibiades responded to Nicias. After defending his youth and arrogance, he claimed the situation was similar to Athens fighting Persia while they had enemies closer to home. Their victory over Persia had led to Athenian glory and the foundation of the Delian League, and this expedition would bring them the same results. The expedition would also help keep Athens active in a time of peace, so that they would be ready for future Spartan attacks.

“Nicias then made a second speech. He said Athens would need a much bigger fleet and army to accomplish their goal, far more than the sixty ships that Segesta offered to equip. He hoped the Athenians would begin to have doubts when they realized this, but instead, they became even more enthusiastic. Nicias reluctantly suggested that they set out with at least 100 triremes and 5000 hoplites, plus thousands more light troops and other supplies.”

That is how the first tragedy of democracy occurred. For centuries afterwards, among historians, commentators, and political and legal thinkers, this became a byword for the problem of democracy. A democracy, as Thucydides showed so vividly, was all too easily roused to enthusiasm by orators. Democracy is full of factions led by brilliant and attractive people, persons of charisma as we would now call them. But the result is an absence of firmness or steadiness in policy. Adventurism and opportunism can too easily prevail, and lead to disaster.

We may well think how good it is that we live in times in which democratic government is protected from the risk of going on foreign adventures without exit strategies – an exit strategy was just what the Athenians lacked in relation to their expedition to Sicily. We might feel, “Thank goodness that we have a balanced constitution, as have our friends and allies in America, who learned so much in their constitutional debate of 1787 from David Hume.” We might think the type of mistake the Athenians made can’t be made nowadays, for we have developed more mature forms of democracy. Or perhaps not.

Anyway, we should remember that when people thought about democracy, for fifteen or twenty centuries, they thought it was perhaps a nice idea in principle, but that it was too full of risks and difficulties to be a practical system of government. At the most, it might be good to have some democratic element in a ‘mixed constitution’, but the democratic parts needed to be balanced and checked by elements of aristocracy and of monarchy.

One of Hume’s gifts to political thought was to suggest ways out of the famous difficulties about democracy. We shall come to that in the main part of this lecture. His ideas remain of genuine relevance and interest to us today. So much, however, for the preface or prelude to the main lecture. The point is to establish from the outset that democracy can be problematic – it has been thought so in the past.

2. Are there any present grounds for concern about democracy?

My next question is to ask whether there are ways in which, in our own time, democracy has problematic aspects, things that we need to worry about. In due course we’ll also ask if Hume gives any help about such problems. I am going to mention three examples that are worthy of serious attention.

The first example is the ‘Legislative and Regulatory Reform Bill, 2006’ currently being debated in Parliament. This has been commented on two or three times lately in *The Times* and this Monday in *The Scotsman* by Duncan Hamilton², all comments being highly critical ones. The bill aims to extend the much praised regulatory reform initiative, which created mechanisms for speedily - and with a light touch - diminishing the burden of regulation, by repealing laws and particularly Statutory Instruments where these were considered too burdensome for any value they achieved. This was a way to free business from regulatory burdens deemed disproportionate to any gain they brought.

The Bill, however, proposes to generalise this in a sweeping and highly alarming way. The new bill actually provides that ministers may by executive order repeal or amend any legal provision in existence. Here is the very text:

‘A minister of the Crown may by order make provision for either or both of the following purposes

- a) reforming legislation
- b) implementing recommendations on any one or more of the United Kingdom Law Commissions with or without changes

‘An order under this section must be made in accordance with Part 3.

‘In this part legislation means the provision of any public general act or local act or any order in council, order, rules, regulations, scheme, warrant, by-law or other subordinate instruments made under a public general act or local act but does not include any instrument which is or is made under Northern Ireland Legislation’

and so on.

When I was young and studying administrative law, we were taught to be greatly fearful of what was known as a ‘Henry VIII clause’. That was a clause in an Act of Parliament which authorised a minister by Statutory Instrument to amend the Act of Parliament itself, as distinct from to carry out other reforms or detailed regulations within the scheme of the Act. The Legislative and Regulatory Reform Bill is a Henry VIII Bill, not just a Henry VIII clause, because it doesn’t merely empower ministers to alter that act, it empowers them to alter any Act of Parliament whatever, with very little parliamentary scrutiny. No wonder some have taken to describing this as the ‘Abolition of Parliament Bill’.

Now it is quite possible, as I believe, that this is intended only for benign purposes and only for what you might call ‘tidying up’ measures.³ Yet measures intended only for good purposes may remain on the statute book long after those who initially intended the good purpose, and promised they would be restricted by it, have gone away. Any provision according to which laws may be reformed by Statutory Instrument that a minister lays before Parliament, subject only to a negative resolution procedure, is effectively stripping the constitution of the whole essence of democratic control of the executive by elected representatives. So I think that really is a more serious matter and I am sure that it will come under close and critical discussion in the weeks and months to come.

But to the extent that my first example involves executive over-empowerment, it is mirrored by aspects of current European Union Law. Since the Treaty of Maastricht, under the so-called ‘Justice and Home Affairs Pillar’, the European Union runs itself, in matters of justice and home affairs, inter governmentally, by decisions of ministers meeting at the Council of Ministers. It does not use the ‘Community method’ involving co-decision by the Council of Ministers and the European Parliament.

One upshot of this, which became evident in the last few years and which I discuss at some length in a recent little book *Who's Afraid of the European Constitution?*,⁴ is the European Arrest Warrant. It came to prominence in the discussions following the awful events of 7 July 2005, when the question arose of a suspected terrorist being sent back from Italy to the UK. The issue then discussed was whether or not the Italian authorities would fulfil their obligations under the EU Framework Decision mandating states to adopt the European Arrest Warrant through national legislation. They did, in fact, fulfil that obligation.

The European Arrest Warrant is itself, I venture to say, a rather good idea. We live in a Europe with substantially diminished borders and we live in a Europe which therefore has cross-border crime on a scale never before envisaged, particularly at risk in areas involving drug trafficking and terrorism, or involving people trafficking. It is very important that speedy action in one state should be followed up in another. But the process by which we acquired the European Arrest Warrant was one whereby a decision of the Council of Ministers taken in private, taken in secret, resulted in what is called a 'framework decision'. This was not merely empowering. It imposed a requirement for all the member states of the EU to pass legislation whereby a warrant issued by a magistrate say in Rome or Madrid or Copenhagen can be immediately executed with the very briefest of judicial scrutiny in Edinburgh or in London, and vice versa Madrid – Rome, Rome - Copenhagen. We are all in it together.

This took effect in the UK by virtue of the recent Extradition Act 2003. As that Act was going through Parliament various people said 'This is not good enough. We can't just strip out the old law of extradition, we can't take away all scrutiny by British judges of the case against persons being sent abroad to face trial. We want to debate this more thoroughly and look at it more closely'. 'Too late' was the cry. For we had an obligation under European Union Law to implement the framework decision on the European Arrest Warrant.

Parliament had no discretion to diminish in any way the provisions of that, although they could make them more stringent. In one respect they did make them more stringent, because they applied them to America as well, although America has yet to reciprocate.

At a gathering sponsored by the Royal Bank (of which I have been a creditor for many years and a tolerably glad contributor to its recently announced profits) it is worth remarking what has been the first use of this power in relation to extradition to the USA. This has been the very questionable procedure of sending three bankers, whose alleged crimes were essentially committed in this country if at all anywhere, to face trial in America, under the rather sweeping extra-territorial provisions of some American legislation.

That is the type of thing which needed much greater testing before our democratically elected representatives. As I say, many elements in it are good in my opinion. But we got it as a result of a cabal of executives, through a unanimous agreement at the Council of Ministers, in a procedure which was subject to consultation of the European Parliament but which allowed no possibility of amendment by Parliament. Along with other MEPs, including John Purvis and Elspeth Attwooll who are in the audience this evening, I put forward the idea that we ought to demand that the Council consider some kind of amendment. We proposed writing a kind of 'one hundred and ten day rule', or a form of 'European *Habeas Corpus*' into the European Arrest Warrant rules. But that was a failure.

Domestically, in effect, the Executive acts in a way that binds Parliament, via Europe, that is, via the procedure whereby the Council of Ministers can take decisions which are binding for everybody in the European Union including the parliaments of the member states. This occurs without any need for effective prior debate in the national parliaments, but also without any possibility of effective critical amendment in the European Parliament.

No democratic assembly controls any of the holders of executive power who can, acting together by unanimity, do these things. This violates any reasonable conception of the separation of powers, one of the cornerstones of constitutionalism and thus of democracy. It is the same evil as that represented by the Legislative and Regulatory Reform Bill.

My third worry about democracy concerns the European Constitution and in particular the way in which it was defeated in referendums in France and the Netherlands. Incidentally, in a context that reveals me as a still rather star-struck fan of David Hume, I now can claim one thing in common with him. In his autobiography, in the biographical note of himself written shortly before his death, Hume remarked that his first book fell dead-born from the press. Well, I have to say that, because of the exigencies of domestic politics, although I finished *Who's Afraid of the European Constitution?* in February 2005, publication did not take place until after the General Election in May 2005. The book actually came out on Thursday 26th May 2005. This was just in time to be made completely irrelevant by the French Referendum three days later, so mine fell dead-born from the press as well. Only in this respect, however, can it be mentioned in the same breath as the *Treatise of Human Nature*.

What seemed to me most significant after the French and then the Netherlands referendum was to reflect upon the large majorities, substantial majorities, against adopting the draft constitution. It was not just the fact that the constitution was defeated; what really struck me was the quality of the debate, the apparent grounds of the decision. Especially in France the critique was very much of the British-American Anglo-Saxon liberalism of the economic order foreseen in the draft constitution. The rhetoric of constitutional debate included much about the threat to services of general economic interest, the superimposition of a free market ethic on top of the good old European social model, an attack on the European way of doing things.

The opposition to the constitutional proposals in France seemed to have stressed very much that we want to keep the good old European way of doing things, and should thus reject this constitution out of hand. I think you could say similar things about aspects of the debate in the Netherlands.

Why that should concern us is because these aspects of the European Union, which were stressed as being catastrophic for the future of Europe, are not novelties of the Constitution. As Sir David Edward has pointed out on a number of occasions, they have been in the treaties effectively since 1957 and certainly since the Single European Act of the nineteen eighties. The project to complete the Single Market and to achieve effective and fair competition throughout Europe has been the driving motor at the centre of the European Union, especially since and during the Commission Presidency of Jacques Delors. So the democratic ennui, the democratic distress, expressed in France and the Netherlands earlier this year - but not in Spain and not in Luxembourg who also held a referendum - is distress which exhibits alienation, not really from the draft constitution, but from the existing constitution, from the existing way things work.

Europe is not well understood and currently not well loved among its citizens. We have all been citizens of the European Union since nineteen ninety-two, all of us who hold citizenship of a member state. But that citizenship is apparently not a prized possession of the great majority of those who voted in France or the Netherlands, nor in many other countries, this included, I dare say. That, surely, is cause for concern. It is vital that in some sense the European Union becomes better connected to European people. When you think of it, you have to acknowledge that if you believe that there is a democratic mandate in the French referendum that merits a response, the response has to be by way of by repealing what we already have, not merely by declining to adopt what we do not yet have.

Think what an Intergovernmental Conference ('IGC') to bring about such a repeal would be like. It would be fraught with grave difficulty. We cannot but conclude that there are real concerns about the democratic connections between the people in Europe and the institutions of the union.

I want, in the last quarter of the lecture, to return to that and see if there is anything that can be done about this. Suffice it for the moment to have registered the thought that nowadays not all is faring well in the house of European democracy – not in the member states, and not in the common institutions of the Union.

3. What has Hume to say about a democratic constitution?

The time has come to pick up the main text for the day. Let us move on to 'The Idea of a Perfect Commonwealth'.

Before going into detail, let me pick out from the middle of the text one little fragment, and pose a question about it.

How is it that David Hume, the Tory atheist, can argue (as he does) that in his perfect commonwealth:

'The presbyterian government is established; and the highest ecclesiastical court is an assembly or synod of all the presbyters of the country. The magistrates may take any cause from this court, and determine it themselves.'

How very Presbyterian! Yet this is the David Hume who, quite apart from his Toryism, was at least once denied the Chair of Moral Philosophy at Edinburgh University on account of his dangerous atheism. It wasn't just the evangelicals, it was the moderates in the Church of Scotland, who kept Hume out of the chair. They in particular were afraid that he would give moderatism a bad name.⁵

Well he was a better friend than the Presbyterian moderates thought, because in writing ‘The Idea of a Perfect Commonwealth’ he quite discountenanced ideas of episcopacy or papacy. He said in effect that a good, sound, well-ordered commonwealth required a Presbyterian establishment. I would invite you, as you sit listening to his thought unfold, to reflect on why on earth that might have been the case.

Meantime, let me move on. We left the Sicilian expedition and eighteen hundred years of worry about democracy, and now we must return to Hume. Hume in the ‘Perfect Commonwealth’, while acknowledging the attractiveness for some purposes of Utopian thought, warned against going too far down that line. It is better, he said, to work by reflecting on constitutional reform through thinking about how we can improve, to a greater or less extent, what we already have. Even using that more cautious method, he said, there is room for adventurous speculation in political thought, aimed at figuring out how to construct a perfect commonwealth, a successfully democratic polity in these islands. (For he was particularly writing in terms of Great Britain and Ireland.) Could you establish a successful commonwealth that would be genuinely democratic through and through, but that would be safe from the risks and dangers of which the fifteen hundred years of political theory had taught us?

With that in view, here is a nice little quotation from towards the end of my text:

‘All free governments must consist of two councils, a lesser and a greater, or, in other words, of a senate and people. The people ... would want wisdom without the senate: the senate, without the people, would want honesty.’

This harks back to the cautionary tale of Athens and the Sicilian expedition. People can be rushed into decisions. They do not have collective wisdom, especially when demagogues are about. How do you guard against this? You must have an upper house of wiser heads, an aristocracy of intellect rather than of birth.

You must have some gathering which can control the enthusiasms of the lower house. But if you let the aristocrats run everything, they become dishonest; they will favour their own interest and the interests of their class. The trick is therefore to establish a balance between the two.

But there's a problem: how do you represent everybody? Here is how Hume saw the problem:

'A large assembly of 1,000, for instance, to represent the people, if allowed to debate, would fall into disorder. If not allowed to debate, the senate has a negative upon them, and the worst kind of negative [that is, 'veto'], that before resolution.'

That is to say, if you don't let the lower house debate, then the Senate can prevent them getting even to make up their minds about something. A very good example of that is provided by the European Arrest Warrant in just the way I mentioned. We'll come back to this later. If you think of the Council of Ministers as the Senate of the European Union, in these matters of justice and home affairs it can completely exercise a negative over the popular assembly, that is to say the European Parliament.

'Here then', goes on Hume, 'is an inconvenience that no government has yet fully remedied but which is the easiest to be remedied in the world. If the people debate all is confusion, if they do not debate they can only resolve and then the Senate carves for them. Divide the people into many separate bodies and then they may debate with safety and every inconvenience seems to be prevented'.

So this is Hume's answer: have a Senate, and have a popular form of assembly, but subdivide the latter. Break it up to ensure that it doesn't meet in a vast concourse such that nobody can properly debate anything.

How does he propose we might achieve that? By this means: you can take a country of the size of Great Britain and Ireland and divide it into a hundred counties, probably slightly more than the number of counties that there then were. He said you could divide every county into a hundred parishes, (which may for all I know be not altogether unlike the parochial map of Britain and Ireland in that period). And then he said you could hold a system of annual elections. The people of each parish meet in the parish church and they elect ten representatives. They would elect a representative to go to the county, so each county will then have a gathering of a hundred parish representatives at it.

(Now when I say all the people, Hume, as was typical of his time, was a property owning democrat in a reverse sense to that which the late Ian MacLeod tried to popularise in this country. That is to say, Ian MacLeod thought that people who were democrats should get to own property, whereas Hume thought that only people who already held property should get to be democrats. And Hume does think, typically of his time, that there should be a property qualification such that only the property owners will take part.)

The argument for subdividing the popular representatives goes like this: At the level of the parish assembly people will be dealing face to face with people they know. If they are choosing somebody to represent them they will judge from knowledge and they will pick a person of sound wisdom. That person, thus attested as a person of sound wisdom by his fellows, will go next to the county assembly. There, in a similar manner, the hundred representatives from the parishes will choose ten of their own number to be what Hume called 'county magistrates', and one of their own number to be a senator. This will mean that you have a Senate of a hundred people, one from each county; a small manageable assembly and an assembly chosen on the basis again of face-to-face acquaintance between the electors and those whom they elect.

The hundred county representatives over time will, after a sequence of annual elections, know each other quite well. They will know which people are of sound judgement and capable of contributing to the public well being. They will send them then to the Senate and let the Senate appoint the magistrates for the country as a whole ('ministers' we would call them, so let us just use that term henceforward) and there will be a 'Protector'. Interestingly Hume was really quite outspokenly republican in what he said in the rest of his essay, and this shines through in his suggestion to call the chief magistrate 'the Protector'. You may suppose he might have been thinking back to Wallace's appellation as 'Guardian of Scotland', but it really seems more probable that Cromwell (the 'Lord Protector') must have been in his mind.

However that may be, Hume's 'perfect commonwealth' ends up with a Senate and a set of county assemblies. How do they make laws? Answer, the Senate may propose laws, ministers must propose laws to the Senate and the Senate must deliberate upon them. If they think fit they may then send draft legislation to the counties. Each county then deliberates in its hundred, so again there is a possibility for people to debate it carefully to hear all the arguments. If a majority of the counties support it, it becomes law. If not, not. Up to a third of the counties may resolve that something should be considered as a proposal for a law, in which case it must be put before the Senate and voted on or not and then sent back to the counties.

So by this means, says Hume, you can have the whole thousand, the assembly of the people, acting together with the Senate in making laws. But you don't have the thousand together sitting in one room where a debate is impossible. You have a hundred - my arithmetic begins to fail - you have lots of counties and lots of assemblies and people deliberating away without sensible debate becoming impossible

The riddle I posed earlier can now be answered. We are now in a position to see why Hume favoured the Presbyterian principle of church government - because actually, when you think of it, this principle more or less replicates his model for the state. Under Presbyterian church government, each Kirk session sends people to the presbytery, and the presbytery send them to the synod and to the general assembly. Particularly (I suppose) impressed by the influence of the moderate clergymen then dominant in the Church of Scotland, Hume thought that this actually works remarkably well. It gives ordinary people a very substantial say in the running of ecclesiastical affairs, but it does it in a way which prevents the creation of large tumultuous assemblies in which religious enthusiasm - they were all a bit afraid of religious enthusiasm in those days and well they might be - is prevented from taking a grip. As still is the case in the Church of Scotland, resolutions of a substantial kind affecting the doctrines of the church, after debate and adoption at the General Assembly, must go back to the presbyteries and be decided upon and the presbyteries will send them to the Kirk sessions to think about before it all comes back to the General Assembly for final decision.

This is a kind of government which can't be hurried into rapid and rash decisions. Our present Prime Minister believes that hurry is of the essence of necessary reform, although, of course, he thinks himself not given to rapid or rash decisions. Yet it behoves us to remember that effective democratic government is inefficient - it is deliberately inefficient. There was a debate during the European Convention when Vice-President Giuliano Amato made a brilliant speech saying we must surely find some way of simplifying European legislation, and won quite general approval. But I intervened, and said that actually if you only want to simplify law making you must abolish democracy. Democracy is a complexification device. Democracy demands that even what seems obvious to nearly everybody must be discussed before it is enacted.

Once discussion takes place, new opinions may emerge, and so qualifications will be applied to what at first looked plain and straightforward. If you believe in democracy, you necessarily believe in complex and often slow decision-making in government.

Of course that doesn't mean that the Executive shouldn't be able to act speedily and effectively in matters which demand its attention, so long as the law provides for adequate Executive authority. I know of no instance in any contemporary state where there is any absence of sufficient Executive authority to act in cases of urgency. But the idea that you can make your laws without long and careful deliberation is, I think, a dangerous one. So did Hume and, even if you don't believe me, you should believe him.

May I then just come to my final quotation, the final bit of the text?

‘[The] circumstances, which facilitate the erection of commonwealths in cities, render their constitution more frail and uncertain. Democracies are turbulent. For, however the people may be separated or divided into small parties, either in their votes or elections, their near habitation in a city will always make the force of popular tides and currents very sensible. Aristocracies are better adapted for peace and order, and accordingly were most admired by ancient writers; but they are jealous and oppressive. In a large government, which is modelled with masterly skill, there is compass and room enough to refine the democracy, from the lower people who may be admitted into the first elections, or first concoction of the commonwealth, to the higher magistrates who direct all the movements. At the same time, the parts are so distant and remote, that it is very difficult, either by intrigue, prejudice, or passion, to hurry them into any measures against the public interest.’

That is actually one of the most important paragraphs that Hume ever wrote in all his writings, for a reason which Professor Garry Wills drew to our attention forty years ago and which became very salient in the debate surrounding the bicentennial of the United States constitution in 1987. When James Madison and the Federalists went to work at the constitutional convention in Philadelphia, and all the more afterwards when they were writing the Federalist Papers and trying to gather a majority to adopt the constitution of 1787, they had to make a case for trying to set up a democratic republic on a continental scale. Yet it was conventional wisdom that democracy is only manageable in small places, such as the city of Athens or the city of Venice. The common belief was that you can't have democracy on the grand scale, for it must prove unmanageable. What Madison, Hamilton, Jay and others did was to turn that idea on its head. Actually, it is safer to have democracy in a larger country rather than a smaller one. For the worries about the influence of demagogues and factionalism apply most specifically to small states.

This is just a version of the argument I quoted from Hume: Take a large country, where people live in places far distant from each other, and you can establish an appropriately structured republic. Distance and diversity will render it free from the evils of faction and from any opportunity for excessive influence by demagogues. That idea was adopted eagerly by Madison and others and became part of the currency of political debate in the United States, or the about-to-be-United States in 1787-9. Hume's was really one of the most influential pieces of writing ever to have emanated from this city.

4. Are Hume's views helpful in tackling either general problems about democracy or our own particular and present difficulties?

Now for the last question, reflecting about the European Union. Does Hume's text have anything to tell us?

If it was helpful to the Americans two hundred years ago could it be of passing interest to us now, even in the twenty-first century? Let's just pick up one or two little points. It is commonly said that the European Union is very unsatisfactory and undemocratic because we don't elect the government. It is true indeed that we don't have campaigns to elect a President of Europe and the people who are most afraid of the European Union would be the first to object if we did. The idea of having some such election would be anathema to the people who are least friendly to the kind of Europe that we currently have, and for good reason.

Is it true that we don't elect people at all? The Commission can take office only by a vote of the European Parliament. The President of the Commission may not take office as President until his nomination by the Council is confirmed by the Parliament. This confirmation now follows immediately upon the European parliamentary elections and, to the extent that political parties have made an issue of who shall be the next President of the Commission, then it becomes directly a reflection of the results of the election. Moreover, a most important thing happened, whether justly or not, at the moment of the appointment of the Barroso Commission a couple of years ago. Mr Buttiglione, when appearing for his confirmation hearing before relevant committees of the Parliament, gave answers that provoked grave dissatisfaction among MEPs. The Parliament made it quite clear to the Council that it would not agree to a Commission's taking office if Mr Buttiglione were in it as a Commissioner. For a while, it was thought that Mr Berlusconi could never back down. Buttiglione was Berlusconi's man, and it would be too great a loss of face were he rejected. But wiser counsels prevailed. The Council would not have got a Commission appointed at all had they not bowed before the will of the Parliament.

I am not saying this means that the Commission is a directly elected form of Executive government, but I am saying that it is in a very serious way subject to a significant form of indirect election.

Suppose you were to agree with Hume that at a certain level of appointment it is probably better to get the people who have had experience of each other working together, who have been elected by other people who have experience of them, to make the final decision about the holders of Executive power. If you agreed with that, then you would think actually that the indirectly elective way of coming into office of the European Commission is most likely a better and wiser kind of democratic election than if there were a direct election in all of Europe.

The Council is very like the Senate described by Hume. After all, the Council consists of people elected from each of the 'counties'. Of course they are not counties, they are member states; and of course unlike Hume's counties they are of very unequal size and all the rest of it; we have to deal with the realities of the real world. But the Council, whether it is an agriculture council, a fisheries council, a home affairs council, a general affairs council or indeed the European Council, always comprises and gives votes only to people who hold elected office in the member states. Again, of course, in most of the member states they are indirectly elected. People in this country don't get to elect the cabinet, they get to elect the Parliament. But the cabinet can hold office only with the approval of the Parliament. Similar conditions apply in the other member states of the Union, so the democratic control of the Senate, the Council, is again roughly speaking within the broad range of the union's citizens.

The European Parliament directly represents the people. But is it not too large? It is not quite an assembly of a thousand people, but it is approaching that scale. It has, currently, 732 Members, and that number will increase by about another thirty if Rumania and Bulgaria succeed in fulfilling the conditions for joining the Union before 2009. Conventional wisdom has it that the total number should never grow too much above 700, for the Humean reason that an assembly any bigger than that cannot seriously debate anything.

Already, however, Europeans have perhaps made the mistake of gathering the near-thousand all together in one assembly room where they cannot debate anything effectively. Maybe, therefore, what we have is not a ‘large government which is modelled with masterly skill’. Is there here ‘room enough to refine the democracy from the lower people who may be admitted to the first elections, the first concoction of the commonwealth, to the higher magistrates who direct all the movements’?

It is here worth remarking that the European Parliament is nowadays elected by a system of proportional representation. In most places, though by no means yet all, this now operates by the device of party lists, through primary elections organised by political parties in the several member states or the several regions of the several member states. Where that system prevails, people who elect one person on to a list preferentially to another, do so on the basis of relative familiarity with those who have come forward for election. They are electors who have some chance to decide, on the basis of their own information, who is likely to have suitable practical wisdom for the task. They may make mistakes, of course, but the systems of proportional representation which are evolving may still produce in a curious way a roughly Humean effect in the way people emerge as candidates for that sort of Parliament and achieve election to it and do their job there.

Whether this represents ‘masterly skill’ is another question. Maybe the very fact that the parliament is party-based is a way of institutionalising factions. The European Parliament does sit in a number of party groups. Because of proportional representation and because of the multiplicity of states, it is practically speaking inconceivable that there will ever be a single party with an overall majority. It is also in the highest degree unlikely that there will ever be fewer than five or six party groups contending in the legislature.

There again, some people think that this deprives them of the neat squad-like movement exhibited in a parliament such as that at Westminster, where, whatever the issue, it's a two-way choice, to vote for the government or against it.

Other people would say that if you want deliberative democracy in which ideas are discussed, and as far as possible compromises reached, it might be a good idea to have a parliament with many shades of opinion represented, more like the European model than the sharply adversary Westminster one. If so, however, there remains the problem of scale of representation. This Parliament, to repeat, is over 700 strong. Yet we are warned that 'a large assembly of a thousand to represent the people, if allowed to debate, would fall into disorder'. In fact, the European Parliament isn't particularly disorderly – much less disorderly than Westminster, in fact.

The European Parliament works as a deliberative assembly, not because its deliberations are divided out into all the different 'counties' – that would simply mean taking all the decisions in the member states without any collective European will-formation. The principle of division is different from Hume's. As everyone knows who has studied the workings of the European Parliament, its most important deliberations are all conducted in large committees.

I was very surprised when I first took part in a meeting of a committee of the European Parliament. (I served on the Legal Affairs and Single Market Committee and on the Constitutional Affairs Committee). 'Committee' had hitherto suggested to me a group of people capable of sitting together comfortably round a largish oval table - anything bigger than that wouldn't really be a committee. Yet if you go into a committee room of the European Parliament it is more or less the size of the chamber of the Scottish Parliament and there are more or less the same number of people in the room. Only about forty to fifty of the people in that room at any time have speaking or voting rights.

There are also assistants present. There are also members of the public present on interesting days, sometimes members of the press also present. There are visiting groups of citizens from all over the Union. Anyway, the group of people actively engaged in the debate is a quite large one. On any issue of importance, involving new legislation, the debate goes on typically over many weeks with numerous interchanges of views. There are many writings and redraftings of reports with amendments and compromises among political groups.

The report that leaves the committee for consideration at the Parliament's plenary session is the product of much work and much exchange of argument. Sometimes what is achieved is a reasonably substantially agreed report which has been thrashed out both in committee and in separate meetings of the different political groups whose representatives report back from the committee. The debate that takes place in the plenary session is then something of an anti-climax – it is too late by then to persuade people to change their minds or to re-think the issue, though amendments defeated in committee may be re-tabled for the vote in plenary. The voting in plenary matters greatly, and given the multiplicity of party and cross-cutting constituency interests and positions is often unpredictable, in detail if not in overall result. Voting is done under great pressure of time and with no opportunity for thought at that stage – people's voting lists have to be composed in advance in order to follow through the very large number of amendments up for consideration at one of the three or four heavy-laden voting periods set aside during each plenary session.

It is easy to misunderstand this way of proceeding if you see no more than its concluding stages. One example that sticks in my mind concerns the tied vote on the Takeovers Directive in 2001.

After long and difficult debate in committee and plenary, after a second reading by Parliament that adopted some amendments unacceptable to Council, after a ‘Conciliation’ procedure between Council and Parliament, a text of the Directive returned to the parliament for final vote at third reading. Klaus-Heiner Lehne, German Christian Democrat MEP and rapporteur on the Directive, argued for the Parliament to reject the Directive, on account of amendments agreed at Conciliation. Others of us argued to accept the final compromise version. The debate was very thoughtful and well-argued on both sides, despite extreme shortness of debating time – but few MEPs attended that debate. When the votes were cast, there was a tie – exactly equal numbers of votes for and against adopting the Directive. So the Directive was not adopted and thus fell at the very last hurdle.

Mr Andrew Neil, then editor-in-chief of the *Scotsman*, visited the Parliament over the two days of the debate and the vote, and subsequently wrote a very dismissive piece in the *Scotsman*.⁶ Effectively, he declared that the European Parliament was a waste of space and of time. Its debates, he said, were thinly attended. Nobody gave much impression of attending closely to points made in the debate anyway. Nobody seemed to vote on the basis of the debate, but rather on account of other grounds and agendas, forged perhaps far away from the Chamber, and much influenced by national governments and industrial or financial vested interests. He saw the European Parliament as little more than a sham, a simulacrum of parliamentary democracy, without any of its reality and substance.

If all that the European Parliament did were the bits that Andrew Neil observed and took into account, his would be a very fair objection. The truth however is far from that. Most of the really important activity of the European Parliament happens prior to the plenary. The effect of distributing specialist domains of European competence over two dozen specialist committees means that you do in fact get a meeting of minds; you do in fact get sober and sensible deliberation.

In truth, members of the European Parliament have a much greater influence on the content of European Legislation than members of the United Kingdom Parliament or the Scottish Parliament can have. For approximately eighty per cent of the texts of those European laws which are subject to co-decision as finally enacted owe their origin to amendments moved in the Parliament and adopted initially in Committee prior to confirmation in the final, summative, plenary vote. It is not the text originally proposed by the Commission, nor the amendments favoured initially in the Council, that predominates in the final version of the enacted laws.

The Parliament has huge influence and its members seemed to me to act pretty faithfully in attempting to represent their electorate. There is one huge deficiency affecting its debates and particularly its important committee debates. They are, I think I can say, never, not ever, reported in the press on television or on radio in this country, and pretty rarely in others. There is sometimes a brief discussion when it comes to plenary. There was a plangent appeal in the *Times* the other week (in the second leader) that Parliament should vote through the Services Directive in its then existing form. This was an absurd time to publish such a leader. By the time the Plenary meets, though votes may still be hard to predict, it is already a foregone conclusion how the votes are going to go. The time when it is worth publishing leaders and articles seeking to influence the way that the European Parliament will form its view on a matter is while the proposal is still under consideration in committee. Lots and lots of citizens and particularly representative groups are well aware of this and use the internet and other electronic media to contact MEPs directly in ways that completely fail to be reflected in the ordinary print and broadcast media.

The most effective medium of democratic communication between the Parliament and its electorate is the internet, I would say. This is not because MEPs don't work at trying to catch the attention of print and broadcast media.

Things seem to be improving somewhat, and the hard work of MEPs and their staffs may be beginning to bear better fruit. But for five years I spent great efforts, and got much help, but found it desperately hard to penetrate the wall of silence about European parliamentary affairs sustained by the Scottish and British media. Perhaps they thought that a handful of Scottish MEPs, and a fortiori the mere two representing the SNP, could have no effective impact in so huge an assembly. So why bother about them?

The balance between many parties in the Parliament is, however, so fine in fact that small parties may have a capability to make a difference, especially in alliance with like-minded others. I would say, with all due modesty, that on a number of things that matter to my constituents I was actually able directly to influence the upshots of important debates. That is not because of a special virtue on my part, but because of the way that a place like that works, because of this idea of dividing out the large assembly into smaller parts.

It does seem to me that an important part of the oft-deplored 'democratic deficit' is actually as much as anything else an information deficit. Citizens who have only a vague idea what is going on are in a weak position to secure accountability of their representatives. The French and Netherlands referendums, at any rate in the aspects to which I drew attention earlier, are particularly glaring cases in point.

Two further points (and I shall be very brief on these). One of the most attractive innovations in the draft Constitution-Treaty (the 'Treaty Establishing a Constitution for Europe') was the so-called 'subsidiarity mechanism' it introduced. This is the mechanism whereby, before the Commission laid a proposal before the European Parliament and the Council for decision, it had to publish it to the parliament of each member state as well as (naturally) to the governments of all the member states. The parliaments were then invited or empowered to respond by way of reasoned opinions about legislation.

In particular, they were to be enabled to raise objection if they considered that the European Union was, with its draft legislation, likely to entrench upon powers appropriate to national parliaments or regional parliaments. For this would violate the fundamental 'principle of subsidiarity' that is written into the draft constitution (and all its predecessors since the Maastricht Treaty of 1992). The arrangements proposed in the relevant Protocol suggested that each national parliament, each member state parliament, should be able to set up similar consultative mechanisms with the regional or national parliaments within the relevant member state.

This more or less replicates the Humean idea of passing a proposal back down the line, and having it debated before a final decision is taken, not after decision. (Contrast the framework decision that mandated the European Arrest Warrant.) The great weakness of the Council of Ministers procedure is that, with the exception of Denmark and to some extent the UK, debate does not happen in a national parliament till it is much too late. From an early stage in the life of any proposal, the topic is set up to be deliberated first of all at the Committee of Permanent Representatives. Possibly a basis for agreement and compromise can be established there. The matter then goes forward for discussion by ministers meeting in the Council, and for a final decision, again usually by a process involving give-and-take, and compromise, and decided effectively there. Any real element of parliamentary control is hopelessly missing in this process.

We have come back to the problem of executive over-empowerment through the Union. Reforms are urgently needed that ensure law-making in the European Union is really subjected to parliamentary control, both in the member states and by means of the European parliament. The Draft Constitution made decisively important proposals in that direction. It is a shame that people who feared for the cause of European democracy effectively torpedoed the proposals that would have at least diminished the democratic deficit, but we have to live with that for the time being.

The second point in this section, and the last of the lecture, concerns an objection that democracy is impossible in the European Union, because there is no single European people, but rather a multitude of peoples each with different culture and traditions, none sharing a common political class with any or all of the others. A crude version of this argument says that democracy means rule by a people, a demos. If there is no single European demos, there can therefore be no European democracy. As for all this stuff about peoplehood, the more I think of it, the more I think it is phoney. ‘How can you democratise Europe’ people demand, ‘when there is no demos. Europe is not one people but many.’

I think objectors may have become mesmerised by words. I came to think this even more as I reflected upon what Hume had to say. Recall again these words:

‘At the same time, the parts are so distant and remote, that it is very difficult, either by intrigue, prejudice, or passion, to hurry them into any measures against the public interest’

Distant and remote parts may not share any particularly strong anterior sense of cultural or social community with others equally distant and remote. Yet all can contribute to a common decision making process, provided they are brought into a broadly fair balance. A sense of community or of ‘peoplehood’ is more likely to be a consequence of participating together in a common enterprise of democratic self-government than a necessary precondition for establishing such a process.

It may not be a good thing to try and create a single cohesive sense of collective popular ‘selfhood’ on a European scale. It might be better to have many different senses of collective selfhood and make sure that nothing happens unless a good majority of these senses of collective selfhood work together to a common decision.

Subsidiarity for ever! What emerges will not be the decision of an imagined ‘demos’ which doesn’t exist. But democracy does not mean rule by a single personified demos, *Volk*, or people. It means a system of rule in which everybody affected gets a say on broadly equal terms in circumstances of fair and broadly equal opportunities of political participation. Current, and still improvable, constitutional arrangements in Europe point to that as a serious possibility, already partly realised.

Well we could go on and on about this, but I promised to stop at seven o’clock and I have broken my promise by two minutes.

I hope at least to have persuaded you that reflecting on the ‘Idea of a Perfect Commonwealth’, even although that admirable work is nearly two hundred and fifty years old, might still give us cause to consider our contemporary concerns in a new light.

¹ This is from Wikipedia. From school and university memory, it strikes me as an excellent summary. See http://en.wikipedia.org/wiki/Sicilian_Expedition#The_debate

² *Scotsman*, 27 February 2006

³ Since the time of delivering the lecture, amendments have been proposed by the government to its own Bill, in response to protests, that to some eliminate much of what was most objectionable in the Bill as it lay before Parliament at the time of the lecture. Not all public and parliamentary protest is unavailing., but vigilance is surely at a premium

⁴ N MacCormick, *Who’s Afraid of a European Constitution?* (Exeter: Imprint Academic, 2005), chapter 1.

⁵ See M A Stewart, *The kirk and the infidel* . (Lancaster:Lancaster University, 1995; corrected edn, 2001)

⁶ *Scotsman*, Saturday 19 May 2001

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