It is a great honour to have been asked to deliver this, the first Napier Memorial Lecture since Napier University was granted that title, and to do so as part of the series of Lothian European Lectures leading up to the European Summit in December 1992.

It was rather surprising, coming back to Edinburgh from Luxembourg, to see the genuine enthusiasm with which the city threw itself into the preparations for the Summit. It is really not the Edinburgh way to be overly enthusiastic about anything. Not so long ago anything to do with Europe would have been greeted with a yawn of disdain if not active hostility, as indeed anything to do with Europe is now greeted further south. But in this, as in so many other matters, the north and the south seem to move in opposite directions.

Of course opponents remain here too and I noticed a letter in _The Scotsman_ when the Lothian European Lecture programme was announced, complaining that the choice of lecturers showed a ‘striking imbalance’, undermining the value of the series as a contribution to a ‘democratic debate about the Maastricht Treaty’. I have to confess to being on the pro-Europe side of the debate and therefore part of the imbalance. But it does not seem to me that the complaint of most people is that the two sides are not heard. As far away as Luxembourg we can hear the din of battle between closed minds. The main complaint is rather that people do not understand what the debate is about. They do not understand the issues and they do not know how they could decide which way to vote if they were ever called
upon to do so. So I hope that I can contribute in a small way to the debate by attempting to clarify what it is about.

I begin with what Professor William Paterson described in the first of these lectures as the 'bonfire of certainties' in 1989.1 About that time, a group of members of the European Parliament went on a visit to Berlin. They were greeted by an officer from the British Military Mission, and they asked him what he expected to happen. He replied, 'One thing is quite certain: the wall will remain for the foreseeable future.' By midnight that night, the Wall was down.

The consequences of that event are, I think, at least threefold. The first and most obvious, though it was not obvious at the time, is that the fall of the Wall revealed the total moral and economic bankruptcy of the system that lay behind it. It has been a progressive revelation. It did not come all at once and the fact that the revelation was progressive may explain the euphoric attitude of West Germany towards reunification. As things have become clearer, we have become aware of the decaying industries, the appalling problem of pollution and, in a more detailed and deeper way, the ingrained acceptance of totalitarian practices and the lack of any sense of initiative among the people of many countries of the former Eastern bloc. This may be easier to overcome in countries such as Poland where the totalitarian system was something to react against. It has not been easy to overcome, and will not be easy to overcome, in countries such as the former German Democratic Republic where totalitarianism was accepted and had become a way of life.

A second consequence of the Wall coming down was that it brought into the open problems which had always been there but had been latent. The most obvious is what has been described as the 'restarting' of the Yugoslavian civil war which had simply been put into abeyance by Tito. Elsewhere, we have seen the emergence of ethnic tensions about which we in the West really knew nothing at all, and it has been estimated that there are now at least 40 potential flashpoints for ethnic conflict
in Europe. The same authority estimated that there are 2,000 in
the whole world.

Apart from that, there is, I think, a new and perhaps more
sinister trend emerging. In the spring of 1989 and 1990 there
was an enthusiastic embracing of Western values and methods,
especially the values and methods of the free market and of
democracy. But, if we look at what is happening in the
elections in Romania and Lithuania and if we look at Mr
Yeltsin's problems with the Congress of Peoples' Deputies,
we see a yearning for the old certainties, both economic and
political. The potential for a totalitarian backlash exists, with
or without an intervening period of anarchy. Perhaps that is the
most dangerous aspect of it all, because it is potentially nuclear
anarchy. I have met a businessman who has been offered a cargo
of enriched uranium.

Thirdly, as well as the consequences for the East, there
have been consequences for the West because the bonfire
of certainties has hit us as well. I leave aside the bonfire
of military certainties which Professor Paterson spoke about,
and the certainties inherent in the Yalta settlement at the end of
the last war. The fall of the Wall gave rise in the West as well as
in the East to a euphoria that led to people talking about a new
world order based on free markets and democratic institutions.
That euphoria has gradually given way to a realisation of the
scale of the problem with which we are faced and which, at
least until very recently, politicians were unwilling to admit.
It is perhaps significant and encouraging, in a curious sort
of way, that Chancellor Kohl is now prepared to recognise
the scale of the problem by using words to the effect of 'the
party's over'.

The fundamental problem with which we are faced in
the West is whether the conventional Western certainties
are adequate to cope with the scale of the problem. The
scale of the problem can, I think, be judged by looking at
what has been the effect of reunification on the economy of
Germany. Remember that the German Democratic Republic
was both relatively advanced and relatively small in terms of population. Its population was approximately the same as that of Czechoslovakia, three-quarters of that of Romania, less than half that of Poland, a tenth of that of Russia and a twentieth of that of the former USSR. If you consider that the incorporation of the relatively advanced and relatively small German Democratic Republic into the Federal Republic of Germany has caused a major economic crisis for the Federal Republic, then perhaps you will see the scale of the problem elsewhere.

Please do not be misled by stories of fast cars and fast food in Moscow and Warsaw. I was at the opening of the new university at Frankfurt on the Oder, a city which was devastated at the end of the last war. There you can still go through the streets and see the bullet holes in the stucco on the houses – such houses as remain: most of the rest of the city has all the charm of Easterhouse. On the other side of the Oder is the other half of old Frankfurt which is now in Poland. You cross a bridge on which, every ten yards, there are people selling cigarettes for hard currency. At the ceremony for laying the foundation stone for the Polish College at the University of Frankfurt, the only place capable of offering hospitality to a relatively large group was the restaurant of a hotel for long-distance truck drivers. That is the reality of Polish life outside the big cities, and Frankfurt on the Oder with all its problems is nothing to what lies on the other side of that river.

If the free market is to offer a solution to these problems, then these countries must be allowed to trade with the West and the reality is that the West is arguing about whether we should admit cargoes of Polish strawberries.

A further example of the problem is this. A free market presupposes a working and enforceable law of contract. That presupposes a working legal system. That presupposes trained judges and lawyers. That presupposes law schools, and that presupposes books. I was talking about European Community Law with the Professor of International Law at the University of Wroclaw. He said they took a great interest in it. I asked
'Do you teach it?' His reply was 'We cannot teach it because we have no books.'

The problem of providing the intellectual infrastructure necessary to support the institutions of the Western democratic society is far greater than any of the problems of propaganda during the Cold War.

Most of all, we are faced with the difficulty of providing stable political structures. If change is not to be chaotic, there must be political institutions that are effective. As Professor Paterson pointed out, the available political institutions are those of the nation state: the building block of the international world order. Essentially the institutions in question are the institutions of a unitary state because experience in Czechoslovakia, in Russia, and most of all in Yugoslavia, has shown the difficulty of establishing acceptable federal institutions in the former communist countries. The result is that we are left with a proliferation of nation states, most of them small and economically not self-sufficient, many of them economically inefficient, and many of them, because they have sizable minority populations, potentially unstable.

We should realise that we have been here before. The old order has collapsed before – notably, in Europe, after the First World War. The Europe of kingdoms and empires before that war gave way, in obedience to the doctrine of self-determination, to the Europe of nation states, and that Europe of nation states lasted for rather less than 20 years. One of the main pretexts for the destruction of that Europe was the claim, on the part of Hitler, to protect national minorities within the frontiers of other states.

Let me at this point enter a disclaimer. I am not an apostle of some new world order in which the nation state will wither away. I accept that the nation state is the basic building block of international society. But the nation state has drawbacks and these drawbacks are inherent in its very nature.

If we look for a legal definition of a state, we can find it in the Montevideo Convention on the Rights and Duties of States.
Article 1 of that Convention defined the criteria of statehood. They are four:

- a permanent population;
- a defined territory;
- government; and
- capacity to enter into relations with other states.

These criteria are explained by Professor Brownlie, Professor of International Law at Oxford, in this way: the first, 'permanent population', means that there is a stable community; the second, 'defined territory', means that there is a stable community in control of a certain area; the third, 'government', means that the community supports a legal order in that area; and the fourth, 'legal capacity', means that this government and this community must be independent.³ ‘Sovereignty’ – that greatly overused word – used in this context, ‘is legal shorthand for legal personality of a certain kind, namely the legal personality of statehood’.⁴ The two go together.

This means that the theory of the nation state is based on the hypothesis that there are identifiable nations living within definable territories, and that these nations can and should be able to choose their own form of government and to choose those who will govern them. At this point the theory of the nation state links with the theory of democracy, the theory of democracy being that the choice of those who are to govern shall be the choice of the majority. These are accepted as self-evident truths in most of the West.

Unfortunately the logic of the approach can have other effects and I found a very interesting illustration of that logic in a recent book by Patricia Meehan, The Unnecessary War. She quotes the Final Report presented to the Foreign Secretary, Lord Halifax, by Sir Nevile Henderson, the last UK Ambassador to the Third Reich:

It would be idle to deny the great achievements of the man who restored to the German nation its self-respect and its
disciplined orderliness. The tyrannical methods which were employed within Germany itself to obtain this result were detestable but were Germany’s own concern. Many of Herr Hitler’s social reforms, in spite of their complete disregard of personal liberty, of thought, word and deed, were on highly advanced democratic lines . . . typical examples of a benevolent dictatorship. 5

These are the words of a British Diplomat in 1939. He went on to say that, so long as national socialism remained an article for internal consumption, the government of Germany was the affair of the German people. ‘Or’, Meehan adds, ‘as the Prince of Wales put it more pithily to the Prince of Hess – It’s nobody’s damned business what Germany does to Germany’. This reflects an attitude that goes very deep in British official thinking. You have only to look back at what was being said at the beginning of the break-up of Yugoslavia about the desirability of recognising Slovenia, Croatia and Bosnia.

The attitude is comprehensible. The reason for it is a lack of awareness of frontiers and their significance. It comes from living on an island and, particularly, from living in the southern part of that island. It is an attitude not shared by those to whom land frontiers are real and important. You can see that very clearly if you live where I now live in Luxembourg, where there are three frontiers and you can very easily take a Sunday afternoon drive and pass through four countries. It is also very easy to see in Ireland, although we tend to forget it.

The crux of the problem, so it seems to me, is that the legal criterion of ‘a community living within a defined territory’ necessarily implies the drawing of frontiers, and the drawing of frontiers necessarily implies an element of arbitrariness as regards the division of communities. The problem is to define the unit you are going to look at, and it is illustrated in Ireland. If you look at the island of Ireland, then the majority is the Catholic population of the whole island. If you look at Northern Ireland, then the majority is the Protestant population of Ulster.
How and where do you define the frontier by reference to the ‘community’?

This is a relatively recent problem because the notion of a frontier as a fixed line of demarcation between two equal entities called states is relatively recent. The Roman frontier, the limes, was the ‘limit’ of the claim to rule: it marked out the limit of the Empire within which the Romans claimed to rule. In medieval times the notion was more that of ‘marches’, the Scottish Marches, the Welsh Marches and at the other side of Europe the Mark of Brandenburg – an area between claimed territories rather than a line separating them.

So this idea of frontiers is relatively new, and it is inherent in the legal concept of a state. History shows that it is the essential shortcoming of the nation state as the building block of an international order. The problem lies not just in drawing the frontier but in the consequences that flow from it. Because the third criterion of statehood is ‘government’, the theory that the community in control of a defined area is entitled to produce a government for that area, when taken together with the theory of democracy and majority rule, involves the permanent disadvantaging of the minority within that territory.

Of course, democracy is the least bad form of government and the nation state is the least bad building block. But both call for mechanisms to compensate for their defects, and a major preoccupation of the politicians of Western Europe after the Second World War was the search for mechanisms to compensate for the shortcomings of democracy in the nation state.

One approach, the approach promoted by the United Kingdom, was that of ‘intergovernmentalism’. It led to the setting up of the Council of Europe which still exists and still does valuable work. Intergovernmentalism implies a willing cooperation between nation states but it also requires unanimity for action and we still hear echoes of that favoured method today. A surprising product of this approach, and I mention it because it would be unfair not to mention it, is the European Convention on Human Rights and the Court and Commission of Human
Rights in Strasbourg. These institutions were not intended by Britain to have the effect they have had. The idea of those who wrote the European Convention on Human Rights – principally an official in the Home Office – was that they were writing down the liberties of the British people as guaranteed by the Common Law. The intended targets were Hitler and Milosevic, rather than the Home Office, but that is not quite how it has turned out!

The opposite pole of thinking was the thinking which came to be epitomised by the phrase ‘United States of Europe’. That indeed was an aim promoted by Winston Churchill as a goal for continental Europe, although not for Britain. The aim was nothing less than a superstate. The aim failed then and has consistently failed ever since, but it is very important to distinguish that aim, the creation of a superstate, from the aim which is customarily called in other countries federalism.

The third approach was the economic approach, crystallised in the European Coal and Steel Community and subsequently in the European Economic Community and EURATOM. The choice of coal and steel, as the beginning, was significant strategically and geographically. It was important strategically because in those days it was possible for Robert Schuman, Foreign Minister of France, to refer to coal and steel as ‘the basic elements of industrial production’. It was important geographically because a major, and perhaps the major, zone of production of coal and steel lay in the area of the rivers which divide Alsace/Lorraine from Germany, and the Saarland from France. If we look at European history continuously over the period from Louis XIV right through to 1945, we will see that, for various reasons, conflict concentrated particularly on control of those areas. The aim of the Coal and Steel Community was quite simply to make a further war between France and Germany materially impossible by removing the basic elements of industrial production from the control of either of them and placing them under the control of a supranational authority. But the consequence, for the reason I have just mentioned, was also
to defuse frontier problems because, by taking out of contention access to coal and steel, it became less important who owned Alsace/Lorraine and who owned the Saarland.

The special and new feature of the Community which was set up to achieve this was its institutional structure, because as Jean Monnet, the person who imagined it and got it put into effect, said, 'Nothing is possible without men; nothing is lasting without institutions'. They set up four institutions: the High Authority (now the Commission) to control the production and distribution of coal and steel acting under the supervision of an Assembly (now called the European Parliament) representing the peoples, a Council of Ministers representing governments and a Court. This thinking was followed through in the EEC Treaty, the treaty which we know as the Treaty of Rome. Although it is quite different in scope and significantly different in institutional structure, it remains based on four institutions: the three political institutions – the Commission, the Council of Ministers and the Parliament; and one judicial institution – the Court. The peculiarities, compared with any other system, are that the Assembly or Parliament was initially only supervisory or consultative rather than legislative, the Council of Ministers being the effective legislature, and the institution of a new political animal, known as the Commission, an independent political body with sole power of initiative. A third peculiarity of the system from the British point of view was the establishment of a court with the widely expressed remit of 'ensuring that the law is observed'.

The EEC Treaty is a long and carefully drafted document containing a precise prescription for economic integration, and it is important to emphasise that it is not just a prescription for a free trade area. Such a prescription was tried and has continued to exist in EFTA (the European Free Trade Association). As far as the EFTA states are now concerned, or most of them at least, such a free trade area is insufficient, as is shown by the new treaty between them and the Community creating the European Economic Area.
The EEC Treaty goes much further than setting up a free trade area because it attempts comprehensively to address issues which free trade agreements generally avoid. Let me illustrate some of them:

- hidden non-tariff barriers;
- barriers to trade resulting from legal differences;
- trade in agricultural products, normally excluded from free trade agreement because it has, until very recently with the Cairns Group, been almost universally the case that governments have subsidised their agricultural industry;
- free movement of wage and salary earners;
- free movement of the self-employed including professionals, an area which has hardly been addressed in the United States or in Canada, which are much more deeply integrated units;
- free movement of the families of the self-employed;
- free movement of services, including transport;
- free movement of capital.

Another point I should mention in relation to the EEC Treaty was the remarkable inclusion, remarkable because it was included in 1957, of the rule against any discrimination between men and women in respect of remuneration. But the reason for that was quite simple and it illustrates the kind of problem that can arise: the French had already introduced that rule and they did not want to be faced with unfair competition from states which still allowed women to be paid less than men for the same work.

The Treaty was a complete programme for a market without internal frontiers in goods, skills, services and assets and it was designed to be in place by the end of 1969. The purpose was overtly more than to create a free trade area. On the contrary, it was expressly a political purpose, the political purpose being political integration through progressive economic integration or, as it was put in the preamble, the achievement of 'an ever closer union among the peoples of Europe'. The method
used was the pooling of sovereignty, the exercise of joint sovereignty, for defined if limited purposes. To that extent what they set up was already a constitution, albeit an inchoate constitution.

That the Treaty is a constitution is demonstrated, I think, by two significant developments in the 1960s before the UK became a member. One was, at the beginning of the 1960s, the decision of the Court of Justice (the Court on which I now sit) that the law created by the treaties and the rights that derived from them could be asserted by individuals and companies before their own courts and that the national courts had an obligation to apply that law in preference to their own law. The second development was what was known as the Luxembourg Compromise. This was the consequence of General De Gaulle’s dissatisfaction with the Community system. He withdrew the French representative from the Council of Ministers and insisted that in future, if any Member State considered that a matter affected its own essential interests, any decision must be taken by unanimity. The point of significance of the Luxembourg Compromise is that it was an attempt to escape from the logic of the ‘constitution’, namely that some decisions could and should be taken by majority vote.

What kind of political structure did the treaties create? It is sui generis, but it seeks to reconcile and to harness the conflicting interests of nations or peoples, of states, of commerce and industry, and of individuals – hence the somewhat enigmatic title of this lecture.

The idea of reconciling and harnessing divergent interests through a constitution is not a new idea. More than 100 years ago in 1885, James Bryce, who was at that time Professor of Civil Law at Oxford but later became British Ambassador in Washington, and who was responsible for, among other things, major work on the Australian Constitution and was a great expert on federalism, wrote an essay called ‘The Action of Centripetal and Centrifugal Forces on Political Constitutions’. 
He identified two forces, ‘interest’ and ‘sympathy’ which work in two ways:

- interest – the interest of the trader in having a large market but also the interest of the trader in protection from competition;

- sympathy – the natural bonds between people which produce collaboration between them but can also produce hostility: religion, race, language and so on.

He said that every constitution has three main objects: first of all, to provide the framework of government; second, to provide due security for the rights of the citizen; and, third, to strengthen the cohesiveness of the country. As to the last, he said:

It may do this in two ways. One is by setting the various centripetal forces to work. The other is by preventing all or some of the centrifugal forces from working.

He went on to say:

The most generally available of these centripetal tendencies is trade – that interchange of commodities which benefits all the producers by giving them a market, all the consumers by giving them the means of getting what they want, all the middlemen by supplying them with occupation. A Constitution can render no greater service to the unity as well as to the material progress of a nation than by enabling the freest interchange of products to go on within its limits.

He also saw law and religion as uniting influences. Then he turned to the centrifugal tendencies:
History tells us that the chief among them are race feeling, resentment for past injuries and grievances in respect of real or supposed ill-treatment in matters of industry, or of trade, or of education, or of language or of religion, where these grievances press on a part only of the population.

Having discussed how the centripetal forces are to be set to work, he turned to counteracting the centrifugal forces. He enumerated the means as being, first of all, by force; second, by providing constitutional securities against oppression; third, 'by means of varying general institutions or laws in such a way as to provide for special interests or feelings' and he gives the example of Scotland within the United Kingdom; fourth, by devolution of power to local legislatures; and finally by excluding certain matters from the competence of central government, and here he gives the example of religion in Switzerland and in the United States.

I believe that if we study the European Community system we will find that, as an inchoate constitution, it is already highly sophisticated in these respects. It does promote freedom of trade, it does provide ways of meeting grievances, and it does so by harnessing the law and the legal system to outlaw sex discrimination, discrimination on grounds of nationality and, for example, exclusion from the professions. If you ask 'Is the internal market working?', my answer, as a judge of the European Court, would be, 'Yes of course it is working because there are 700 cases waiting to be judged, and more than half of them come from national courts which are dealing with precisely the problems that have arisen in individual cases because of the rules of the market.' The EC system does respond to special interests or feelings, for example in the matter of language and also in the matter of abortion in Ireland and environmental concern in Denmark, and the powers of the centre are limited.

The constitution is there, but it is what Bryce also called a 'flexible constitution'. He distinguished between flexible
constitutions and rigid constitutions, taking the British constitution as the primary example of a flexible constitution. The Community constitution is a flexible constitution, but it responds to his concerns by balancing the interests of European integration, represented by the Commission which is, as it were, the motor, against those of the Member States, represented by the Council of Ministers, which is the governor on the motor. It balances those interests against those of the peoples represented by the Parliament, ideally elected in the future by a similar method of direct election throughout the Community, all working within a defined legal framework as interpreted by the Court of Justice.

I believe, further, that the current problems with which the Community is faced have actually demonstrated, not the weakness, but the strength of that institutional structure because it has proved to be strong enough to continue in spite of the enormous problems that have had to be faced.

If that is the position so far, what is the argument now about? It is not about sovereignty. If sovereignty is about statehood, then the statehood of the Member States is not an issue. If sovereignty is about powers, then powers are already shared. If sovereignty is about practical independence, then no state in Western or Eastern Europe can claim to have it. As far as sovereignty is concerned, the best quotation I can give you is again from Bryce:

The controversies which the Doctrine of Sovereignty has provoked have been so numerous and so tedious that a reader - even the most patient reader - may feel alarmed at being invited to enter once again that dusty desert of abstractions through which successive generations of political philosophers have thought it necessary to lead their disciples.11

So I leave sovereignty. Is the argument about federalism? I don’t think it is because the system is already significantly federal. It is federal because certain competences, certain powers,
have already been transferred from the Member States to the Community and what the Community does has a direct effect on the citizen, and the citizen can enforce his rights, deriving from the Community, before his own courts. Nor do I think it is about subsidiarity which is really the counterpart of federalism. All of these are words which depend for their value on how we define them.

The real question which the Maastricht debate raises and puts before us is about power. Who is to exercise it, and how is it to be controlled? Who do we want to exercise power in relation to what? And what checks and balances do we require?

In that context a vote against Maastricht is not a neutral vote because it is a vote in favour of the status quo, and the status quo is one in which legislation which affects us is evolved by the Commission, a Commission which is not directly elected and not directly accountable except in a very specific and limited way. It is a status quo in which legislation produced by the Commission is brought into force by the Council of Ministers, representing the governments of the Member States, with only the most rudimentary democratic control through the European Parliament or through national parliaments. As my predecessor in the Chair of European Institutions at the University of Edinburgh said: 'Governments and governmental bodies have as many reasons for conniving amongst themselves as they have for opposing each other.'

If we want to vote against Maastricht, then we are voting for a status quo in which economic and fiscal decisions affecting us are taken by the Bundesbank. If we are voting against Maastricht, we are voting for a status quo in which decisions affecting the control of terrorism, drugs and immigration are taken by ill-defined processes of intergovernmental negotiation without even any certainty that they will produce an effective result at the end of the day. We are voting for a status quo in which, if we or our children are interested in going to work in another country, then in most of
them we will not be allowed to vote unless we change our nationality.

The Maastricht Treaty tries, however imperfectly, to respond to these concerns. If it is not ratified, the flexible constitution which already exists will, I believe, continue to develop. It will go on, but the underlying issues and concerns will remain: and because they remain, they will make it more difficult to respond to the problems revealed or created by the fall of the Wall.

Maastricht is above all a political commitment – a political commitment, not to ditch the nation state, but to compensate more adequately and more effectively for its weaknesses and its shortcomings. It is said in some circles that we should be concentrating on the enlargement of the Community – widening, as it is put, rather than deepening: in the words of Baroness Thatcher, widening ‘on the basis of a co-operation between independent sovereign countries loosely linked in a free trade area’. She should know better. That is not an answer to the problems of Eastern Europe any more than it was an answer to the problems of Western Europe 40 years ago, and our own history and experience tell us that that is so.

Let me end where I began by saying something about a University, in this case the new University in Frankfurt on the Oder. 60% of the students who went there in 1992 are German, 40% are Polish. You have only to be there to be aware that the tensions between those two peoples are not dead. But the fact is that these students want to study together and are prepared to be taught partly in German and partly in Polish. There were nearly 100 applications for the Chair of Philosophy, from all over the world, from people who said they wanted to go there to teach because this new University is symbolic of a new hope.

Neither these students nor others of their generation will forgive us if, through our selfishness, we deny them that hope.
David Edward's Lecture was given as *The John Napier Memorial Lecture* and delivered at St Margaret's Hall, Napier University, on 3 November 1992.

The lecture was chaired by Professor W.A. Turmeau, Principal and Vice-Chancellor, Napier University, and a response was given by A.H. Bridge, Chairman of the Court, Napier University.