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Michael Longo

**THE
EUROPEAN
UNION'S
SEARCH FOR A
CONSTITUTIONAL
FUTURE**



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Introduction

The contemporary European Union (EU) is confronted with many questions of a constitutional nature. Does it *need* a written constitution? If so, *when* should a constitution be drafted and ratified and pursuant to *what* process? Does it already have a constitution, albeit not one in the traditional sense? Does a model already exist for a future European polity (e.g. *federalism*), or is there a need to invent one? These are the questions upon which this paper dwells. Other deceptively simple questions, amenable to empirical inquiry, can inform the whole process of constitutionalisation. Thus, *what*, exactly, does Europe want? Does it want an integrated continent, despite the current impulse towards fragmentation? As the collection of data pertinent to these decisive issues is an ongoing process, and the often marginal results subject to individual interpretation and analysis, as well as being sensitive to a range of shifting circumstances, events and policies, conclusions will be difficult to formulate. Once formulated, they will almost certainly be contested by proponents of differing views. Moreover, Greven, citing Hedetoft,¹ describes the regular Eurobarometer polls, which tend to show 'a majority of Europeans ... has a generally positive reaction to the EU [as] not relevant in this regard.'² In criticising 'the usual interpretation of Eurobarometer-based data',³ these studies call into question the value of casual empirical research, which purports to gage the public's orientation towards the EU, and thus renders the task of analysis infinitely more difficult.

Not to be deterred, the gradual increase of regulatory and policy output emanating from the 'European level of government'⁴ and a prevailing sense of the irreversibility of Europeanisation, which will increasingly influence or impact upon European publics,

foreshadow increased interaction between EU governing structures and the citizen. However, contention remains as to whether increased 'actorness' will produce direct engagement between transnational institutions and citizen or whether the national states will continue to mediate between them. The outcome will influence citizens' perceptions of the EU and whether or not citizens ultimately identify with a supranational polity. For all the uncertainty surrounding European integration, it seems clear that the legitimacy of EU governance will continue to elude the EU as long as its authority is derived from the Member States rather than its citizens. Central to the constitutional discourse, therefore, is the question of legitimacy through the promotion of democracy — in the first instance a matter of institutional/constitutional design.

There are of course numerous other questions framing the constitutional debate, which, while alluded to in this paper, do not constitute its primary focus. Thus, it may be pertinent to inquire into how, if at all, the nation-states could survive in a future European federation without losing their legal character (i.e. their sovereignty) as nation-states within international law? Or are the European federation and the nation-states irreconcilable? Is it in fact possible for the EU to be transformed into a democracy beyond the elite level? How does enlargement sit with a federal vision? These are some of the questions occupying the minds of political scientists tracing the emergence of the European polity and of legal analysts concerned with comparative constitutional systems and European Community law generally.

However the constitutional questions raised require an historical context. They presuppose knowledge of what the European Union is in its present form. Yet, there is a lack of common understanding as to what the European Union might be, by

nature or constitution. An analysis of key rulings of the European Court of Justice (ECJ) serves to remove some of the uncertainty surrounding the constitutional status of the EU, and provides a framework within which the related questions concerning its further constitutional development may be explored. The EU, integrated as a legal community of shared rights and obligations, has, from the very start, provided the foundation for further integration. Thus the integrative force of the law needs to be understood. A legal community providing judicial protection for fundamental rights and freedoms is much more likely to advance the causes of political and cultural integration based on communities of democratic institutions and shared values respectively.

The ECJ's integral contribution to the constitutionalisation of the EC Treaty, which underpins the current constitutional discourse, is examined in Part I of this paper. Consideration is also given to whether the constitutional arrangements can be designated a 'constitution', or not, since important identifying features of a constitution are absent.

Part II of this paper gives focus to, and provides analysis of, constitutionalisation with a view to identifying and accounting for the processes and forces currently shaping the EU's constitutional development and impacting on current governmental arrangements.

Part III ponders whether there would be any point in *formalising* the constitutional construct after vigorous debate following which constitutional choices are made by the European peoples? In other words, would a formal, written constitution improve the transparency of multi-level governance structures, and would it contribute to more effective protection of fundamental rights? These would appear to be the primary purposes of a

European constitution. There would be little point in urging agreement to a constitutional model, if the specific constitution envisaged failed to deliver on the key promises: democratic governance and effective human rights protection. It would therefore be propitious for the adoption of a constitution to be preceded by extensive modelling, simulation and analysis. It is further argued in Part III that the relationship between constitutionalism and political culture (though difficult to pin down) highlights the need for public participation in the constitutionalisation process.

A constitutional debate should put the various constitutional options up for discussion and consideration by European publics. If, as suspected by Fischer,⁵ Schmitter,⁶ and others, final consensus does not emerge in an EU asserting disparate views, a solution might be found in Schmitter's proposal for dual constitutions,⁷ if only temporary, or in Fischer's 'centre of gravity' approach.⁸ Clearly, academic writers and far-sighted politicians will continue to 'enrich the public debate'⁹ with contributions as varied as they are confronting.

PART I**THE PROCESS OF CONSTITUTIONALISATION****1. The role of the European Court of Justice in European integration**

Political scientists in the era of European integration have perhaps been slow to recognise the influence of Community law on the European Integration process and the role of the ECJ in the construction of an EU constitutional order. This may perhaps be due to excessively narrow terms of reference and to the widespread belief, not altogether unwarranted, that courts have a limited role to play in making law, let alone constructing a constitutional order. The task of constitutional construction, according to traditional constitutional theory, falls to the people through their representatives in the legislature and the executive. However, the very significant capacity vested in a constitutional court to interpret and clarify the law, and in so doing to build upon the constitutional rules and practices in accordance with the spirit of the constitutional text, is acknowledged by all.

A reality check of EU constitutional arrangements throws traditional constitutional development into disarray. First of all, the so-called 'constitutional text' in the EU is the Treaty of Rome (EC Treaty), which started its life as an international treaty between sovereign states. The ECJ has itself declared the EC Treaty 'the constitutional charter of a Community based on the rule of law.'¹⁰ This poses the question: how can a treaty be the cornerstone of a constitutional charter based on the rule of law? Moreover, the EC Treaty set out a number of general provisions for the establishment of a common market — primarily an economic objective or so it would seem — again a far cry from a constitutional charter. There

were no specific treaty provisions dictating the relations between the Community institutions and the Member States, or for that matter, the supremacy of Community law over conflicting domestic law.¹¹ There was no clear provision assigning direct effect to certain treaty provisions or to secondary legislation. It was the European Court of Justice which secured direct effect and the supremacy of EC law over conflicting national law through its landmark rulings in *Van Gend en Loos v Nederlandse Administratie der Belastingen*¹² and *Costa v Enel*¹³ respectively.

Examination of the ECJ's Opinion of 14 December 1991,¹⁴ in which the Court conceptualised the EC Treaty as 'the constitutional charter of a Community', together with pertinent judicial decisions, reveals a constitutional edifice incorporating enforcement mechanisms, individual rights and the separation of powers within an autonomous legal order. In *Parti écologiste 'Les Verts' v European Parliament*¹⁵ the Court remarked that 'the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States, nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.'¹⁶ The ECJ's desire to safeguard this edifice and its conception of the constitutional rule of law, even in the absence of a specific Treaty provision, may be seen in other cases including *Zwartveld and Others*.¹⁷ Classical literature on the constitutionalisation of Community law has explained how the Court has gone about developing this constitutional structure.¹⁸

Through its activism, the court has established a federal or quasi-federal system, although an imperfect one.¹⁹ This activism and the resulting product have been justified, mainly by EU enthusiasts, on the ground that the treaty demanded a dynamic

interpretation of its provisions in order to succeed. Had the Court adopted a more conservative approach, the treaty would have been undermined by states simply legislating to roll back some of the less palatable effects of legal harmonisation, with serious consequences for the integration process. Were it not for the doctrine of supremacy of EC law, the Member States would have been free to do so. The Court thereby actively embarked on a program of expansion of EC competence by means of teleological interpretation of EC law, through which the object and purpose of a legislative provision were promoted. In pursuit of a constitutional future for the EC, the Court elevated the EC Treaty to a constitutional charter, and *itself* to a constitutional court. As guardian of the constitutional charter, the ECJ has assumed the duty to ensure that the broad principles defined by the EC Treaty are observed and its objectives attained. Significantly, the Court has rarely felt constrained by the absence in the text of the Treaty of an explicit basis for some of its rulings. Outside of legal literature on this topic, there is, however, insufficient recognition given to the court's judicial activism and its leading place in the integration process.

The magnitude of the contribution made by the ECJ to the integration of Europe has, of course, been recognised by its judges (particularly Pescatore and Mancini) as well as by legal analysts. Shapiro has observed that the ECJ has 'constituted the European Community',²⁰ keeping 'alive the vision of the Community as something more than a trade alliance' at low points in its history.²¹ Such observations help to explain and justify the court's activism. It is beyond the scope of this paper to consider whether or not the Court's judicial objectivity has been compromised. This and related issues have been thoroughly and competently explored by eminent writers, most notably Hartley in his work *'Constitutional Problems of the European Union'*.²² Devoid of its binding elements, the

Community would have been undermined. At best it would have operated along the less ambitious lines of an ordinary international organisation. At worst the construct would have disintegrated.

The pragmatism or single-mindedness with which the Court approached the task of constitution-building should not obstruct from view the fact that it was assisted. Commentators have identified a 'close alliance' between the Court and the European Commission²³ to the extent that the strategies for the promotion of legal integration, such as the selective enforcement of Community law, were very much the result of collaboration between them. The alliance was geared toward creating a 'habit of obedience' in respect of Community law.²⁴ Maduro observes that:

In the first years of the EC Treaty, the Commission carefully decided which actions should be brought against the Member States. The controlling principle was that it was better not to bring an action against a State, notwithstanding the importance of the violation of Community law involved, if the Commission and Court were convinced that the Member State would not comply with the Court decision. Instead, it was preferable to bring before the Court less important issues, where Member States could be expected to comply with the Court's decisions ... The approach of developing Community law while creating a 'habit of obedience' is also visible in the way the legal principles laid down by the Court are sometimes only given full effect in decisions following those in which they are first identified ... each decision following as the logical consequence of the previous one.²⁵

In adopting this softly-softly, building-block approach to constitutional construction, the Court contented itself with establishing a viable constitutional framework over a period of time in the knowledge that 'reactions against the Court's legal principles [would be] softened by the time delay'.²⁶

The Court's pursuit of an effective constitutional order was also aided by the Member States (or many of them), through the European Council. True enough, the Court has progressively established a federal framework through its creative, teleological interpretation of the EC Treaty. The Treaty has, in turn, been regularly updated and expanded pursuant to the Inter-Governmental Conference (IGC) process to cover ever-broader issue arenas beyond the purely economic. Significantly, the Member States' collective will is predominant in the IGC process, which places responsibility for drafting treaty amendments on the Member States. It may be argued that many of the treaty amendments have been inspired by a desire to give a retrospective textual or legal basis to some of the ECJ's inventive jurisprudence.²⁷ However, this was not the only course available to the Member States. They could equally have amended the Treaty to curb the Court's activism.

Thus, while the ECJ may be viewed as the key player in the constitutionalisation of the Treaty, it is not the only player. In addition to the Commission, the drafters of the original and amending treaties have periodically validated the Court's jurisprudence and supplied the textual material to permit the further expansion of EU competence²⁸ and the execution of that 'certain idée de l'Europe' held by the Court's judges.²⁹ The Court acted, and was allowed to act, to 'constitutionalise' the treaty system because it was, more than any other institution, able to implement that certain idea with very little direct political

interference from national institutions. In the words of Stein, the Court was '[t]ucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media...'³⁰

2. Does a European Constitution therefore exist?

It is argued in this paper that the EU already operates in accordance with rules that can only be described as constitutional rules. There is nothing startling or innovative in this claim. Nonetheless, even if it is accepted that the ECJ has through its case-law fashioned a 'constitutional framework for a federal-type structure in Europe',³¹ thereby creating, judicially, a federal union of states, legal formalists and many political scientists would probably still stop short of declaring that the EU has a constitution, and that it is of the federal type. Before progressing further, a definition of the term 'constitution' is proffered.

The term 'constitution', in its relationship with the state, refers to the whole scheme by which a state is governed and encapsulates much more than just law. It includes also the 'values and goals of individuals and social structures within the state',³² in the tradition of Aristotle, Montesquieu, Rousseau and Hegel. Constitutions may be seen as confining or controlling powers as much as expanding them. This is both the function and content of constitutionalism.³³ Moreover, 'the constitution', as traditionally defined, refers to the scheme of government that has been deliberately adopted by the people pursuant to a political process. Though a written 'constitutional' document will usually contain the principal legal rules relating to the government of the state, its institutions and the relations between themselves and the citizens

of the State, it is still necessary to consider extra-legal rules, customs and conventions that evolve around the constitutional document or documents, as is particularly clear from the British constitutional experience.³⁴

Whilst opinion is divided as to what characterises a constitution, legal purists would maintain that a constitution must:

(a) follow a recognisable form and content, including the institutional framework and inter-institutional relations;

(b) entrench rules of amendment which wrests the issue of amendment away from control by politicians. Amendment must be by qualified majority. Normally, constitutions take the issue of political reform beyond the subject of intergovernmental bargaining and treaty-making, and bring it within the compass of constitutional revision.³⁵ For instance, the abandonment of the unanimity rule for the amendment of the EC Treaty and its replacement by qualified voting, would see the entrenchment of rules which are not subject to control by politicians, thereby taking on a primary characteristic of a democratic constitution, as understood by legal theorists;

(c) be subject to fully-fledged judicial review (i.e. the exercise of constitutional powers by Community institutions should be subject to judicial review). At present individual standing to review Community measures, set out in Article 230 of the EC Treaty, is restrictive.³⁶ The requirement in Article 230 of being 'individually and directly concerned' excludes challenges by individuals or groups representing individuals. This restriction would have severe repercussions if the challenge concerned alleged breaches of human rights by the Community;³⁷ and

(d) must incorporate some statement of morality common to the people represented (such as the Charter of Fundamental Rights). It is noteworthy that the Charter of Fundamental Rights has not been

incorporated within the EC Treaty, and is therefore non-binding and not within the jurisdiction of the ECJ.³⁸

If this formalist definition were applied, the EU would clearly not possess a constitution, as such.

Similarly, there is an obvious tension between the formal political elements of a 'constitution' on the one hand, and the idea that the EU has a constitution on the other. Thomas Paine, American revolutionary and journalist, stated in *The Rights of Man* that a constitution is a thing 'antecedent' to a Government, and a Government is only the creature of a constitution.³⁹ Constitutions have traditionally been the culmination of a political decision of the highest order;⁴⁰ a 'founding moment'. In *Brunner v The European Union Treaty*,⁴¹ the German Constitutional Court ruled on the validity of Germany's ratification of the Maastricht Treaty on European Union. Declaring it valid, the Court then expressed the view that political union 'could not happen without a decision of the national state institutions, including the German Bundestag [parliament]',⁴² and that whether such a decision is taken is a political and not a legal matter.

Unless that *political decision of the highest order* can be construed as the decision by the Member States to enter into or accede to the Treaty of Rome and subsequent treaties (overcoming the problem that treaties creating international organisations are not usually accorded constitutional status) then it may be concluded, at least in accordance with conventional political theory, that the EU does not have a constitution.⁴³ Nevertheless, the recognition given by the ECJ to the existence of a Constitutional Charter, constitutional norms and principles upon which the Community legal order has been constructed, has led to the

progressive entrenchment of such norms in law. This has had the effect of widening the gulf between those who support the Court's pronouncements and those within society who refuse to acquiesce to the Court's views. The ECJ's activism has led some to question whether the Court's judgments are really 'politics in the guise of law'.⁴⁴

For those, like Pinder, who envisage that the constitutional process 'should culminate in a constitutional convention for the adoption of the text, with thorough explanation and debate followed by referenda in all the member states',⁴⁵ there is no doubt that a constitution is not yet in existence. However, as may already be apparent, the issue of whether the EU has a constitution is not amenable to a simple, universally accepted answer. The cleavage between the various interpretations and emphases given by conventional political theory and law to this issue does not facilitate proper classification.⁴⁶ As the investigation is open to diverse approaches and methodologies, it is little wonder that the answer is equally variable.

2.1 Towards a realist perspective

Relying on conventional political science or legal formalism, the case may be made that there can be no constitution in the absence of a constitutive political decision; nor can there be a constitution if a vital characteristic of a constitution is missing. It may, however, be at least possible to argue from a different perspective — that of constitutional realism — that the EU does have a constitution, albeit not a formal written constitution.

At least three inter-related, unorthodox and certainly contestable arguments or theories may be advanced under this banner.

2.1.1 Membership of the EU constitutes agreement to enter into constitutional arrangements

The Member States are guilty of collective amnesia, having unequivocally agreed through their membership of the EC to give up sovereignty in favour of supranational institutions within a federal framework. Of course, it could be argued in reply that the Member States (or at least the original six) had done no such thing since the federal construct had been erected some time later by the ECJ through its decisions on 'direct effect' and 'supremacy' in 1963 and 1964 respectively. The counterargument is that the ECJ was only giving effect to the intention of the founding fathers who had provided the tools required for building the European Community within EC Treaty Articles 10 {formerly article 5}, 94 {formerly article 100} and 308 {formerly article 235},⁴⁷ among others. Thus, the Member States knew what they were getting into. Were it not for the Court's creativity, the Community system was destined to disintegrate, which could not have been the founders' intention. On the above analysis, ratification or accession to the treaties by the Member States is the manifestation of the requisite political decision to enter into constitutional arrangements.

Whilst perhaps appealing to the EU enthusiast wishing to give the EU a firm constitutional basis, the interpretation fails to give proper consideration to the many instances since 1957 when various Member States (especially France, the United Kingdom and Denmark) have expressed their resolute opposition to the idea of European federalism or constitutionalism. National leaders such as

De Gaulle and Thatcher, through their words and actions, demonstrated an intention that the Community remain a regime featuring intergovernmental cooperation, devoid of political unity. The above argument may therefore be said to distort the historical profile and remains wishful thinking.

2.1.2 A Constitution by stealth

Despite the absence of a political decision, the ECJ has successfully and effectively constitutionalised the treaty. The important thing is that a federal constitutional system has been achieved, despite rhetoric to the contrary. The onus is now on the Member States, the Council and the people to accept the fact and catch up. This possibility of a constitution by stealth has the potential to alienate legal formalists and political scientists alike who might resist the view that an international treaty can ever be transformed into a constitution. A conclusion that the EU already has a constitution would demonstrate a failure of analysis, due perhaps to the 'failure of definition',⁴⁸ given the absence of universal acceptance. On this analysis, the hitherto essential *political decision* does not precede the making of a constitution, necessitating a new approach to polity building, complete with fresh theories. Mancini, judge of the ECJ once remarked that 'when democracy advances and politics asserts its claims, judges are bound to take a pace back', for the sake of judicial independence.⁴⁹ This statement may be viewed as an implicit justification for the Court's actions in the face of political inactivity; an acknowledgment that the judges were obliged to take charge in light of the Member States' reluctance to fully implement the Treaty to which they had freely bound themselves. As noted by Weatherill, 'Weiler famously detected a relationship between the European Court's activism and inactivism in the political institutions.'⁵⁰

While the ECJ may be viewed both as law-maker and saviour of the Treaty system, it would be unproductive simply to test the accuracy of this statement. Of greater importance is the need to balance the Court's undeniably pivotal role in the integration process against the contribution of the other institutions and actors with a view to better understanding the process of constitutionalisation and the broader integration process.⁵¹ As important as may be the Court's contribution, it is only part of the story. To argue that the Court has single-handedly established a federal system and heroically delivered a constitution; to call for the political apparatus to catch up would be simplistic and cavalier. Moreover, the argument lacks a theoretical foundation.

2.1.3 Multi-level Constitutionalism

The EU is the constitutional answer to the failure of the nation state to exert control over a range of policy areas within traditional and less traditional fields of responsibility. Featuring a system of multi-level governance and constitutionalism, the EU institutions are interconnected with national institutions; legal systems are interconnected (as demonstrated by the referral procedure in Article 234 {formerly 177} of the Treaty)⁵² as is the system of political decision-making.

Thus, there is in place a unique system of fundamental laws and principles upon which the EU is founded, and pursuant to which it operates in co-operation with the Member States. There is judicial support for this construction. In *Brunner* (the Maastricht judgment), the German Constitutional Court acknowledged that:

*protection of constitutional rights would be assured by either the ECJ or the German Federal Constitutional Court, which together are in a relationship of co-operation for the guarantee of constitutional protection, under which they complement each other.*⁵³

This statement represents tacit acknowledgment that neither the ECJ nor the German Constitutional Court has absolute supremacy over the other and confirms the EU as a pluralist construction, thus highlighting the need for co-operation.

In this integrated system, the Member States' citizens have, through the EU institutions and procedures, constituted a coordinated way to exercise their sovereignty in common.⁵⁴ In other words, the question as to whether the EU needs a formal constitution need not be asked since the question is inextricably tied to the requirements of statehood; the citizens of the EU have already found a satisfactory constitutional solution to the division of powers within the existing arrangements. Therefore it is misconceived to talk in terms of a constitutional 'deficit'.⁵⁵ The language of 'deficit' 'clearly suggests a comparative dimension referring to the political form of the state'⁵⁶ which 'begs the normative response to overcome the deficit.'⁵⁷ It follows that insistence on 'deficit' fails to properly differentiate between the EU and a state. Hence, the response is misconceived. It also inhibits the emergence of more useful analysis directly applicable to EU conditions. According to this view, the EU functions in a way that presupposes the existence of a constitution and, in so doing, demonstrates the expendability of a formal constitution.

Although the argument or theory (a version of which Weiler expounds)⁵⁸ has some merit in that it correctly acknowledges the

decline of national sovereignty and the dynamic links between Community and national institutions, it is somewhat contrived in its attempt to find a solution within the existing architecture. In addition, it attributes to the citizens of Europe too great a contribution to the constitutional process described. Consideration of EU policymaking generally, and the principal strategic decisions made by the Community, reveal that the processes have been controlled by the governments rather than the citizens, demonstrating that the Member States have remained 'Masters of the Treaty'. Moreover the existing makeshift constitutional arrangements are open to attack from Member State governments and national constitutional courts alike. On examination, the referral procedure in Article 234 {formerly article 177}, depending as it generally does on the willing co-operation of national courts, would prove ineffective in the event of a rebuff by national judges.

3. Legitimacy of the EU legal order

Though each of the above arguments has some merit, none is credible. They demonstrate that the question as to whether the constitutionalisation of the treaties means that the EU has a constitution, is a sterile argument in the absence of more productive discussion on legitimacy. The premise may be argued either way, adopting the methodologies of the realist lawyer, the formalist or the political scientist, with results that are not entirely convincing. Maduro, insightfully remarks that:

Formalist international lawyers may argue that a Treaty will remain a Treaty no matter how close its operation and effects resemble those of a Constitution and how deeply rooted it will be recognised and applied in national legal

*orders. But this will be a debate about words. The relevant point is that, not only does Community law have constitutional effects and constitutional doctrines, the discourse that dominates its construction and relation with national legal orders is a constitutional discourse.*⁵⁹

Accordingly, there can be no doubt that the treaties have been constitutionalised by the ECJ. The essential question arises: is it possible to identify a constitutional deficit in the EU legal order which can be overcome by the adoption of a democratic constitution, as understood by legal theorists and political scientists. The term 'constitutional deficit' refers to a gap or deficiency within the existing constitutional arrangements which compromises the Community's ability to attain constitutional outcomes or goals.

Debate should therefore be redirected to examine whether the constitutional arrangements pursuant to which the EU operates are suitable and legitimate and, if not, how this might be corrected. Reflections on the formation of a formal European constitution will simply not materialise without the support of European publics. Such support, if it is to happen, is likely to be of the creeping or incremental kind, accumulated over time and in response to the processes currently shaping Europe. It is therefore necessary to examine and understand the setting within which the constitutionalisation debate is located before considering what a constitution can do for Europe and whether existing constitutional arrangements have legitimacy.

PART II

A MILIEU FOR THE CONSTITUTIONAL DEBATE

1. The federal perspective

It is submitted that a distinctive polity is emerging in the EU, which is expressed by the word 'federalism'.⁶⁰ For the reasons outlined in Part I of this paper it is possible to conclude that the EU is a federation, albeit an imperfect one and notwithstanding the absence of a constitutional 'founding moment'⁶¹ or a calculated political decision which has marked the beginning of all the existing federal states. 'Federalism', as a concept, need not be confined to the Westphalian nation state.⁶² Theoretically, federalism may be distinguished from statehood, and therefore is applicable to the EU, precisely because it concerns the allocation of powers between different levels of authority or the sharing of sovereignty between them. The EU demonstrates that the different levels of authority need not be located within the geographical borders of a single national polity in order to qualify as a federation. As the EU may properly be characterised a *de facto* federation or at least an emerging federation, federalist theory is a likely starting point in the search for an appropriate constitutional model. Accordingly, there may be no need for a radical overhaul of Europe's constitutional identity, though the need for institutional reform is widely viewed as necessary.

The question of whether the EU currently evidences a federal constitutional regime, addressed in Part I of this paper, primarily from the perspective of institutional structures, requires further attention from a different approach. Weiler suggests that European constitutional discourse has been characterised:

*[by Kelsenian attempts] ... to describe, define and understand the European 'Grundnorm' — the source whence the authority of European constitutional disciplines derives. The search for this Kelsenian holy grail, whether or not acknowledged explicitly, underscores the great bulk of the academic literature theorising European constitutionalism.*⁶³

It may be asserted, perhaps controversially, that European constitutionalism, in its incipient and current form, represents the collective expression of the acceptance of the rule of law, among other constitutional values (including respect for fundamental rights), in each of the Member States that constitute the EU. This may be confirmed by reference to Article 6(2) of the Treaty on European Union (TEU) which states:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law [my emphasis].

Moreover, the ECJ has acknowledged that in the area of fundamental rights it gets its inspiration from common constitutional traditions. Thus:

Fundamental rights are an integral part of the general principles of law the observance of which the Court ensures. In safeguarding these rights the Court is bound to draw inspiration from the constitutional traditions

*common to the Member States and cannot uphold measures which are incompatible with the fundamental rights established and guaranteed by the Constitutions of these States.*⁶⁴

For these reasons, it can be asserted that, as yet, European constitutionalism has no independent force or existence separate to that of the Member States acting as a unit. On a different, though related point, Pauly observes that '[a]s a functioning polity ... [the EU's] legitimacy ... must necessarily remain derivative of the legitimacy of its constituent nation-states'.⁶⁵ In its current configuration, the notion of European constitutionalism would dissipate on the withdrawal of the Member States from the Union. On this analysis, it is constituted by a political decision, rather than a 'basic norm' or '*Grundnorm*', and can, theoretically, be dissipated by a political decision. Descartes' declaration 'I think, therefore I am' has a parallel in EU constitutional discourse in the phrase 'I act, therefore I am'. The EU's 'actorness', derived from the treaties and sharpened by the ECJ, gives it its existence. This is an acknowledgement, albeit unremarkable, of the essentially consensual or political characteristic of European constitutionalism, a characteristic that is incidentally shared by all the existing federations in the world.

In recognition of the relevance of the federal perspective, the pervasive question of European constitutionalism since the 1990s has been how the EU should orient its Federal/Member State jurisdictions. Subsidiarity, as a constitutional, distributive doctrine entrenched in a federal discourse, whilst initially promising, has proved obscure in practise and limited in both scope and use. The ECJ has not provided elucidation, teleological or otherwise. The judicial activism of the ECJ, which led to an incremental and

sustained increase in Community competencies *vis-à-vis* those of the Member States, appears at present to be in a phase of consolidation rather than expansion. Ostensibly, the shift has been hastened and is exemplified by the not-so-veiled threats by national courts in cases such as *Brunner*, to vet the actions of the EU institutions for compliance with nationally-constitutionally-embedded human rights. Thus, while a decade or so ago writers were predicting the demise of the nation state in the EU context, today there is renewed discussion on its relationship with the EU's centralist institutions and local authorities, as well as its presentation and representation within the EU.⁶⁶ Considerable doubt has been cast over the capacity to reconstitute the EU political space along democratic lines,⁶⁷ which makes it all the more important that nation states survive.

Given the competing, if not contradictory, ascendancy of both the nation state and regional and sub-national actors in recent times, the institutional actors are generally adopting a 'wait and see' approach to the constitutional question.⁶⁸ That there should exist today such uncertainty in the European polity (i.e. should the supranational, national or sub-national units of organisation be dominant?) may be attributed to the multitudinal identities that make up the European political space — European, national, sub-national, regional and local — all of which compete for power. Each, to varying degrees gains strength from one or more of three, at times, conflicting processes, which are currently shaping the EU. The first, the process of 'micro'⁶⁹-regionalisation, sees subnational actors competing or standing side-by-side with national actors for a role in EU decision-making. The second is the process of Europeanisation, through which more and more policy areas have fallen within the competence of the EU. The third process, globalisation, is now beginning to impact upon the autonomy of

states as well as European organisations in certain sectors, such as world trade.⁷⁰

These processes have had, and will continue to have, profound effects on the constitutionalisation of the EU. Both macro and micro regional dynamics threaten to bypass the national state. They must therefore be understood and accounted for. If European publics did eventually agree that a constitution should be drafted, it would be incumbent upon politicians, constitutional lawyers, scholars and citizens to come up with a distinctive EU constitution which takes these processes into account, offering synthesis between the traditional nation-state model of democracy, micro-regionalism and supranationalism. Questions and doubts abound. Will it be possible to craft such a constitution? If so, will it be sufficient to modify current theories of political science and constitutional law to this end, or are new theories required?⁷¹ The need to develop new theories is becoming increasingly clear. Greven correctly asserts that if the EU is 'to continue to develop as a regime of legitimate governance, it urgently requires a new model of democracy that will be acceptable beyond the limits of national political space'.⁷²

Proposals to date that seek to realise this patently ambitious task (such as the Fischer model), of which there is a growing number, generally end up looking like nation state constitutions, giving credence to the view that a 'European federation' is 'after all ... just a euphemistic expression for what is really meant, namely, the European federal state'.⁷³ Mancini, in his 'Case for European Statehood',⁷⁴ reflected on what he saw as the unlikely prospect of the EU actually 'evolving into a democratic entity without becoming a federal state'. He signalled that he would welcome such an event, for '[d]emocracy is the end, states, as we have known them, are

but means.⁷⁵ Nonetheless, scepticism remains as to 'how a "new animal" involving all the legal and political advantages of the federal state can be slipped into the theory of the state while still conserving the full sovereignty of the nation states.'⁷⁶ These doubts will only be dismissed if and when a workable 'synthetic' constitution is finally developed.

2. The politics of centralisation and decentralisation

The power relationships between each of the EU actors, with the possible exception of the supranational, have been in evidence throughout European history, although, as Majone points out, the rise of nationalism, central institutions and state-run education leading up to the second world war had the effect of homogenising the cultural space to the detriment of regional diversity.⁷⁷ The resurgence of regionalism in Europe over the last half a century or so can only be understood against the background of the 'creation of the EC and its institutions and by an expanding network of bilateral and multilateral agreements of cooperation and policy coordination'.⁷⁸ However, the possibility of decentralisation and fragmentation of political power ultimately raises the question of how the political space might be reconfigured to accommodate divergent interests.

Börzel and Risse observe that what is required to 'foster the integration of European societies and increase the legitimacy of European institutions' is the 'comprehensive redistribution of social welfare at the European level' which could only be realised by the grant of 'real legislative and executive powers' (i.e. powers of taxation and spending) to the EU.⁷⁹ This approach, in keeping with the egalitarian traditions of Europe, not only seems to contemplate

and require a federal solution to the constitutional question, but also a sufficiently centralised model of federalism with a clear capacity for redistribution. In contrast, the EU is subject to significant budgetary restrictions and Member State restrictions on EU competencies. The EU has, as noted by von Beyme, '... only 4% of the expenditure of all the national governments, and less than 1.3% of the EU gross social product available to it.'⁸⁰ At the same time, there appears to be little will among the Member States to do anything about the EU's 'shortage of means for redistributive policies.'⁸¹ Implicit in this statement is the idea that diversity, the capacity for regional differences, should be quashed, at least in the sphere of social welfare. This is, of course, a matter of opinion, and on this issue opinions do not always follow ideological divisions between left and right. Territorial politics, national and subnational, can weigh in to complicate the issue. Opposition to structural and cohesion funding has occasionally been observed within the net 'contributing' Member States.

Most federations have experienced creeping centralisation — the so-called centrist drift — in pursuit of the illusive goal of national unity. A heavily centralised version of federalism could guard against fragmentation of political power and multiple autonomous actors in the EU, however this model appears unlikely in light of the widely divergent interests that currently characterise the European political landscape. More likely, and already long apparent, is the move towards functional centralisation and decentralisation according to the issue, of which subsidiarity is an expression.⁸²

3. The forces currently shaping the EU

3.1 Micro-Regionalism: sword or sheath?

Contemporary micro-regionalism as a movement tends to be associated with greater autonomy (self-rule) in decision-making; thus more effective protection of distinctive cultural features and greater democracy through enhanced capacity of communities to choose the form of government to represent them. However, micro-regionalism, 'may aim in several directions',⁸³ with less than positive effects. The increasing autonomistic, micro-regionalisation of Europe, for which the EU is largely responsible, raises the possibility of the emergence of an inward-looking, competitive, xenophobic and culturally protectionist bloc, as foreshadowed by Majone,⁸⁴ 'more exclusive and bigoted'⁸⁵ in practice than the nation states. Micro-regionalism in its populist form may replicate the excesses of nationalism, dependent as they both are upon ethnic or cultural magnification in the face of '*otherness*' through historical manipulation, and mythologising of local cultural forms.

A trend towards micro-regionalism not 'bounded by the nation state'⁸⁶ may be discerned. The capacity for co-operation between micro-regions, across national boundaries, is amply demonstrated by the forms of co-operation entered into between adjacent regions in pursuit of environmental and other imperatives. A possible consequence of increased regional autonomy is the consensual weakening or dilution of state power, or, more likely, the creation of a contiguous site of authority in competition with the state.⁸⁷ The latter contemplates expanded potential for discord. If, for instance, future autonomous subnational administrations were able to exercise jurisdiction over immigration and foreign policy, a future EU polity's ability to protect civil rights could be severely impaired.

Foreign policy and immigration are two policy areas in which the issue of human rights commonly arise. A reconfiguration of the political space which favoured subnational or local units of authority over the Member States would, therefore, hold some risk. The fragmentation of authority between numerous and diverse seats of power would render the task of policy co-ordination infinitely more difficult than is currently the case.⁸⁸

Given the propulsion of the region into the European political space, it would be tempting to assert that the policy-making capacity of regional governments has been improved under the theoretical framework of multi-level governance, which envisages the reallocation of competencies between the EU, national and subnational levels of authority. However, recent research would support the contrary finding that the EU has a differential impact on each region and may, in fact, reinforce regional economic differences.⁸⁹ This differential impact is accentuated by divergent capacities and interests and lack of similarity between regional structures among the Member States and even within Member States. In Spain, for instance, some regions are more autonomous than others. In Italy five regions have a special, 'autonomous' status. In Germany and Belgium, subnational units have a broad range of competencies within their respective federal systems. Across the EU, politically autonomous regions or regions with a strong regional identity are 'driven to Brussels to secure independent representation',⁹⁰ 'thus [exacerbating] ... the role of territorial factors in politics.'⁹¹ Even greater regional mobilisation in Europe would be expected to flow from a form of political integration resulting in expansion of EU-level spending and taxing power and a commensurate shift in resource-control from Member State executives to the EU executive. Conditions that favoured the EU's capacity to allocate resources and the ability of subnational governments to influence spending would

conceivably trigger mass mobilisation of regions in Brussels as subnational governments (powerful, weak, rich, poor, large, small) scrambled to get more money from the EU. Perhaps paradoxically, the impulse towards integration and the possibility of greater central control over finances may generate the conditions that precipitate fragmentation.

Notwithstanding contrary predictions, the notion of a 'Europe of the regions' or 'Europe *with* the regions'⁹² does not necessarily run counter to Fischer's vision of a European Federation, with its main axis the relationship between the federation and the national state.⁹³ Regional authority and representation *need not* compete with national authority and representation. A federation can exhibit a three or more tiered governmental system without impinging on the primary relationship between centre and national state. Indeed, micro-regionalism or, specifically, the dynamics between this level and the centre holds significant interest and potential for those concerned with the re-conceptualisation of democracy beyond the state and with theorising about democratic governance in a post-nation-state era.

3.2 The several dimensions of Europeanisation

Börzel and Risse have commented that '[f]or decades, European studies have mostly been concerned with explaining European integration and Europeanization processes themselves'⁹⁴ with a view to accounting for the emerging European polity from diverse perspectives, *viz.* neofunctionalism, liberal intergovernmentalism and multi-level governance.⁹⁵ Such research adopted a 'bottom up'⁹⁶ approach 'in which the dynamics and the outcome of the European institution-building process are the main dependent variable'.⁹⁷ Among the many writers in this field, this 'institution-

centred' approach is perhaps best represented by Wallace and Wallace.⁹⁸ Notwithstanding the undoubted value of such an approach, Börzel and Risse foreshadow the need for further research 'analysing the impact of European integration and Europeanization on domestic political and social processes of the member states and beyond.'⁹⁹ Accordingly, the move towards a 'top down'¹⁰⁰ or non-institutionalist perspective is required to determine how 'European integration and Europeanization generally affect domestic policies, politics, and polities of the member states...'¹⁰¹ This approach is justifiable on the basis that the nature and extent of Europeanisation¹⁰² can be ascertained only through comprehensive, integrated study of the impact of European institutions, processes, laws and policies on the polities of the Member States, in recognition of the often ignored fact that the EU constitutes, simultaneously, an autonomous structure of governance perpetuated through the institution-building process with which the Member States are directly concerned (bottom up or institutionalist perspective), and a structure designed to transform the political and legal systems of its constituent states through the various processes of Europeanisation, including harmonisation (top down perspective). The tendency of the Europeanisation process to effect change upwards and downwards in the European multi-level governance structure shows the necessity of taking into account the various dimensions of the Europeanisation process in the related, though broader, process of EU constitution building.

More and more policy decisions are being made at EC level within an expanding policy arena. Already, the EU makes approximately five hundred policy decisions per year, while the current armoury of Community legislation comprises in excess of five thousand directives and regulations.¹⁰³ In Table 6.1 of his work, 'Imagining the Future of the Euro-Polity', Schmitter undertook to

'describe the dynamics of the expansion of EC authority across the full range of issue arenas', using the measurement device developed by Lindberg and Scheingold for the foundational period between 1950 to 1970, to which were added projections of the likely impacts on those policy areas produced by the Single European Act (SEA) and the Treaty on European Union (TEU).¹⁰⁴

Schmitter indicates, based on estimates of the impact of the SEA as at the end of 1992 and the probable effect of the Maastricht Treaty by 2001, that 'mostly' or 'all' policy decisions in respect of 11 out of 28 issue arenas, including the key economic policy areas of goods/services, agriculture and capital flows would be made at EC level, with all but 5 policy areas demonstrating (or projecting) a degree of Europeanisation at or above a '3' (policy decisions at both national and EC level).¹⁰⁵ Europeanisation is, however, subject to varying rates of implementation within the domestic legal systems, which threaten and retard the process.

Europeanisation may be understood as 'the most explicit and advanced example of the process of continental unification.'¹⁰⁶ It traces 'the emergence of new rules, norms, practices, and structures of meaning ... which [Member States] have to incorporate into their domestic structures.'¹⁰⁷ Börzel and Risse test the general proposition that whether the focus is on policies, politics or polity, Europeanisation brings about substantial changes in the Member States and conclude that 'a misfit between European-level and domestic processes, policies, or institutions constitutes the necessary condition for expecting any change.'¹⁰⁸ The domestic impact may, however, be differential demonstrating that adaptational pressures alone are insufficient to produce such change.¹⁰⁹

Thus, '[t]here must be mediating factors enabling or prohibiting domestic change and accounting for the empirically observable differential impact of Europe.'¹¹⁰ Börzel and Risse go on to say that one such mediating factor is the existence of 'multiple veto points in a country's institutional structure'.¹¹¹ They explain that:

*The more power is dispersed across the political system and the more actors have a say in political decision-making, the more difficult it is to foster the domestic consensus or 'winning coalition' necessary to introduce changes in response to Europeanization pressures. A large number of institutional or factual veto players thus impinges on the capacity of domestic actors to achieve policy changes and qualifies their empowerment.*¹¹²

A second mediating factor is the existence of formal facilitating institutions, which can provide actors with the resources necessary to exploit European opportunities and thus promote domestic change.¹¹³

Europeanization, on this analysis, exerts adaptational pressures on domestic systems providing new opportunities and constraints, which *may* lead to domestic change to some degree. However, 'domestic actors must have the capabilities to exploit new opportunities and avoid constraints.'¹¹⁴ Hence Europeanization has the dual potential to reinforce the emerging European polity and to transform the constituent states. The process of Europeanization is therefore transformational, though its effects are differential and therefore difficult to predict. Ultimately, the process underpins the demand for the constitutionalisation of EU decision-making, but at the same time undercuts the process of constitution-building by

virtue of the uneven development of political, economic, legal and social mechanisms, networks and alliances which might otherwise encourage the constitutionalisation of the EU.

3.3 The impact of globalisation

The processes of globalisation and Europeanisation have in common a single justification. They demonstrate the inability of the nation state to attain desired outcomes through independent action. Both processes provide external pressure to integrate and counter the nation states' desire to retain sovereignty. Much has been written about the exportability of the EU model and whether the global polity can benefit from research on European integration,¹¹⁵ a much-lauded proposition advanced by neofunctionalists and federalists during the 1960s and early 1970s. This question is beyond the scope of this paper and thus will not be dealt with here. Another line of investigation considers whether globalisation is a parallel process to European Integration or whether European Integration is one illustration, among many, of globalisation. A chicken-and-egg approach to this question, however, obscures the fundamental nature of Europeanisation and globalisation as 'complementary, partly overlapping, mutually reinforcing, but also competing processes.'¹¹⁶ Such an approach should therefore be resisted, though proper consideration needs to be given to the impact of globalisation on Europeanisation. As noted by Snyder, the 'demand for the constitutionalisation of governance in the EU stems partly from the impact and implications of globalisation, [which] is exemplified by economic and monetary union.'¹¹⁷

As frequently noted, globalisation has wide-ranging legal, political, economic, social and cultural dimensions. Whatever globalisation may mean¹¹⁸ and whatever its effects (which are

generally contested), it promotes interdependence as the primary form of communication between world-wide networks over the full range of public and personal relations, at once dispersing powers between various governmental and non-governmental actors, shifting the locus and, in sum, changing the nature of decision-making and government. Accordingly, there is an emerging view that governance in the future will not predominantly be the product of traditional nation-state institutions.¹¹⁹ In consequence, globalisation is likely in the future to render redundant the issue of nation state sovereignty and its retention, as nation states increasingly withdraw from traditional sites of decision-making. Such a development would provide space for the re-conception of governance in ways never before imagined. Zielonka suggests that:

... globalisation has eroded the capacity of any integrated political unit to maintain a discrete political, cultural or economic space within its administrative boundary. Economic sovereignty, in particular has been eroded by massive international labour and capital flows that constrain individual abilities of governments to defend the economic interests of their units. Territorial defence along border lines has been made largely obsolete by modern weapons technology. Migration and other forms of cross-border movements are on the rise, despite all the efforts of border guards and surveillance technology to seal the frontiers. Normative models and cultural habits are spreading via satellite television and the internet in a largely uncontrolled manner. Both the Union and its Member States are losing control over the legal and administrative regimes within their respective borders because they are increasingly being defined by supranational bodies such as the WTO.¹²⁰

Zielonka concludes that 'the instruments of a Westphalian type state are no longer available to contemporary territorial units.'¹²¹ Nor would they be available, by extension, to a fully or partly sovereign EU state, even if it were able to complete a transformation in this direction. Globalisation may be seen as presenting a threat to the continuation of the concept of the 'sovereign' nation-state to the extent that governmental authority in matters of administration that traditionally signalled the locus of sovereignty is being eroded and replaced by non-indigenous forms. The notion of undiluted sovereignty in the Westphalian sense has passed its use by date, leading some to question whether it is still a requirement of governance. If it is accepted that 'only highly diversified and pluralistic societies acting in a complex web of institutional arrangements are able to succeed in conditions of modern competition',¹²² then a multi-layered, pluralistic EU, with a sophisticated understanding of complex, interactive decision-making, and in which sovereignty is pooled, has a distinct advantage over other units of governmental organisation. The search for new perspectives of governance detached from statehood, often thought of as elective and somewhat radical, acquires a new compelling force in light of the seemingly irresistible pull of globalisation.

4. The state of play

The impact of competing forces and processes currently shaping the EU is neither complete nor fully understood. It follows that the substantive issues — *which institutions?; what powers to which institutions?; macro or micro regionalism or both?; do we constitutionalise a strong notion of subsidiarity (thereby encouraging the organic development of power allocation along functional lines) or a clear division of powers in the interest of clarity?* — are open ended and will remain so for some time yet. A serious debate on these issues may suggest solutions, but extensive analysis, simulation and finally public acceptance should precede their adoption. Therefore, while current conditions and uncertainties do not appear to support the enactment of a written constitution at this point in time, it is essential to set the process towards a final solution in train so as to give direction and focus to current developments.

PART III

THE CONSTITUTIONAL IMPERATIVE

1. The case *'for'* a constitution

Many, though not all, scholars of European integration seem to favour a constitution for Europe. There are at least three arguments commonly advanced by analysts as to why the EU needs a formal constitution.

- First, the *ad hoc* treaty revision that has taken place through the IGC procedure has institutionalised a messy constitutional arrangement, which has largely bypassed public approval. The admission of twelve or more new states before the treaties are overhauled could have the effect of making existing institutional arrangements (intended for 6 states rather than 27) unworkable.
- Secondly, there is little support today for the view that current *ad hoc* or piecemeal development of the EU's institutional structures will lead to anything like the grand design once envisaged.¹²³
- And thirdly, that a formal constitution offers new possibilities for the protection of human rights. A constitution incorporating a Bill of Fundamental Rights imposes limits on the exercise of governmental power, obliging government and the citizens it governs to act in accordance with the rule of law and allowing individuals to pursue their rights. This is the essence of constitutionalism. If a constitution variously confines, controls or expands powers and contains the principal rules by which a regime is governed as well as describing the relations between governing institutions and the citizenry, then the perimeters of governmental action needs to be properly understood in order for individual rights to be properly protected. If

the limits of multi-level governance remain obscure or undefined, citizens' rights may be deprived of meaning. For **when** would governmental action encroach upon individual rights; **when** would such action cross the line that activates a protective response. There should be a balanced relationship between one and the other. To understand the limits of governmental action is to give meaning to a right in the same way that setting out the elements of a crime by legislative provision serves conversely to define a prospective victim's rights and remedies. Codification within a single document facilitates awareness, which in turn reinforces the protective response.

1.1 Fundamental rights under a constitution

A democratic constitutional regime is about protecting certain fundamental rights of the individual. As the EU governance structures are meant to affect individual interests through supranational decision-making, the same individuals are entitled to assert the right to fair and just decision-making, and to seek judicial review of those decisions, if aggrieved, in accordance with the ordinary principles pertaining to judicial review. In other words, the decision-maker must be fully accountable for his or her decisions to the citizen. Furthermore, the scope of such accountability is a matter demanding a public contribution. Administrative law, functioning as an expression of the rule of law, must of necessity provide the citizen with an appropriate remedy in the event of a dispute with the Community institutions. In this sense, the nature and value of administrative law in a community are in themselves a measure of the legitimacy of the system of constitutional governance from which it arises. Significantly, the individual's right in Article 230 of the EC Treaty to bring proceedings against a 'decision' of the Community is severely restricted.¹²⁴

Schmitter identifies as the precursor to the ratification of a Constitution, the need for public participation.¹²⁵ The reference to public participation is not used in the populist sense that the people must 'produce their own constitution by some process of massive deliberation'¹²⁶ but rather in the sense that popular consultation in the form of referenda is required to get 'Euro-citizens to think about the meta-rules that should eventually govern the accountability of their rulers.'¹²⁷ Schmitter's call for the participation and contribution of the citizens of Europe in the process of constitutionalisation parallels and evokes the appeal of the ECJ in *Van Gend en Loos*, through its construction of 'direct effect', that the supervision of Community law also be entrusted to the individual. This approach recalls the Kantian assumption that constitutional patriotism is impossible in the absence of legal unity.¹²⁸ The notion of individual participation or empowerment as the key to the effectiveness of the legal and constitutional regimes, as taken up and elaborated on by legal and political writers alike, transcends, more than any other notion in EU discourse, the strictures of the single discipline. Consequently, the individual, through the medium of fundamental rights (broadly defined to include the values of dignity, freedom, equality, solidarity, citizenship and justice) speaks to many disciplines and invites discussion on how the citizen's interests might be reconceptualised, protected or enhanced within a *Community* framework. The substance of 'fundamental rights' encompasses, but also expands on the 'inalienable rights' of the individual, so central to the theory of natural law championed by Locke, which had a profound impact on the development of Western constitutional law and related fields.¹²⁹ The impacts of this theory and of the ECJ's jurisprudence in establishing 'direct effect' as the 'law of the land'¹³⁰ cannot be underestimated or confined to law. The study and protection of the individual within her or his political,

legal, economic and social environments is central to the constitutional discourse.

1.2 Justiciable rights

If European constitutionalism is to have meaning, the Community must direct greater attention to the protection of fundamental rights. The recognition and protection of fundamental rights is at the core of a state's compact with its citizens. This is no less the case in respect of the EU, a non-state entity, though the principles regulating relations between the EU and the citizen are generally underdeveloped. To date the EC has not acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms, although its Member States have.¹³¹ Nor has the Charter of Fundamental Rights, proclaimed in Nice on 7 December 2000, been incorporated within the EC Treaty.¹³² There is, therefore, significant room for improvement within the existing architecture. Incorporation of the Charter into the Treaty¹³³ will have the positive effect of making the fundamental rights provisions contained therein justiciable, thereby bringing the EU closer to having a constitution in the strict sense. A more active approach to human rights protection by the ECJ, however authorised, would help to alleviate the tension between the European Court and the national courts, in so far as an obstacle to the full acceptance of supremacy, namely the protection of fundamental rights, will have been removed.¹³⁴

2. The case '*against*' a constitution

2.1 The existing arrangements work

Weiler has argued against a formal constitution on the ground that the EU's 'own brand of constitutional federalism' works, so 'why fix it'? He sees a dark side to the construction of a formal constitution — such a constitution would give rise to a 'familiar and boring desert'.¹³⁵ Weiler does, however, advocate more EC involvement in Human Rights protection, principally by accession to the European Convention.¹³⁶ Others fear that any downgrading of the nation states and transfer of sovereign powers from the nation states to the EU could threaten the legitimacy of the political system which would be unable to meet the expectations held of it in key areas such as employment and the harmonisation of living standards.¹³⁷

2.2 There is no Common European Identity

Furthermore, the view that the EU needs a constitution is often contested on the ground that a constitution is rooted in a myth of origin, which captures the notion of common identity, which Europe does not and cannot have. Similarly, it is thought that national constitutions in Europe and elsewhere have traditionally followed crises or wars or are designed to repel the threat of aggression, again extraneous to contemporary EU experience. In either case, Europe does not need a constitution. These arguments are unconvincing for at least two reasons. First, they rely too heavily on statist and national antecedents, which hampers creativity in the search for new forms of organisation befitting a unique polity. Secondly, they deny the *integrating* force of European integration and the existence of common values among European publics.

Europeans have been concerned to locate the shared traditions and cultural heritages that underpin the European integration project from its inception. While much research still needs to be conducted, it is unlikely that any traditions — legal, political, cultural or religious — have operated to forge a European collective identity. Catchphrases such as ‘unity in diversity’ and ‘family of cultures’ have been employed by European officials and scholars to counter the idea that ‘cultural diversity’ is exclusive of, or contradictory to, ‘integration’. Similarly, the description of national identities themselves as ‘voluntaristic and pluralistic’¹³⁸ throws doubt on the need for a ‘European collective identity’ as the foundation for the integration of European national states. Smith remarks that ‘[n]ational identifications are fundamentally multidimensional’¹³⁹ consisting of ‘analytically separable components — ethnic, legal, territorial, economic and political’¹⁴⁰ which are ‘united by the nationalistic ideology into a potent vision of human identity and community.’¹⁴¹ Thus, if the ‘nation’ itself makes ‘room for competing focuses of identity ... the conflict between the claims of the nation and those of a looser European identity becomes more situational and pragmatic...’¹⁴² Put simply, if pluralism characterises the modern national state, would not the search for a common European identity appear redundant or banal? Meehan seems to contemplate the multiple focuses of identity in the EU while leaving open the possibility of an emerging distinctiveness, created from interfacing identities. Citing Tassin,¹⁴³ she states that ‘like a multi-ethnic state, it [the Community] does not embody “a cohesive, common, original identity” [although it can be] “a politically constituted public space” in which the plurality of political interests, feelings, wills, initiatives, judgements, decisions and actions come face to face.’¹⁴⁴

In this politically constituted space, the standardisation of certain civil and human rights points towards the establishment of a European identity which encourages social cohesion and common standards of living.¹⁴⁵ True as it may be that the original basis for these civil, social and political rights was the need to prevent distortions to the market, some progress is being made towards a 'generalisation' of rights, an expression of which is the Charter of Fundamental Rights. If European integration is a process that brings about domestic change, as claimed, its capacity to influence the development of a truly European consciousness is established. Integration transforms the participating nation states into Member States, endowing each with a European Community identity, at once notional and real. It brings the peoples of Europe closer together, though it does not make them one. It demonstrates that 'Europe' does not depend upon a *common identity* among the peoples governed by it, but rather on an appreciation of the 'compatibility ... [of] competing identities among Europeans'¹⁴⁶ and a common commitment to the rule of law and to constitutionalism. European integration holds the promise of a genuinely cosmopolitan, post-national culture that supplements, rather than undermines, national identifications. The real challenge will be to draft a constitution that reflects, upholds and consolidates the shared traditions that constitute the notion of egalitarianism — which underpins human rights — without attempting to customise national cultural identities to a European standard.

2.3 The EU is not a state and will continue not to be a state

Some have questioned the purpose of drafting a constitution or even putting a proposal to the public when it is acknowledged that the 'Union is not a State'¹⁴⁷ and will 'continue not to be a State',¹⁴⁸ at least for the foreseeable future. This argument fails, principally

because it assumes that there would be no point in contemplating a European constitution unless it was meant to constitute a state. In so doing, it fails to distinguish between the involvement of European publics in the process of constitution-building (essential) and the enactment of a constitution (conditional) as two separate, though consequential, matters. The former would not necessarily lead to the latter, but could, irrespective of the result, constitute a legitimate means of public involvement. It fails to recognise that it *may* be possible to draw up a constitution which not only differs from national constitutions in content and function, but also sets out to regulate objectives that are far removed from the creation of a nation state. Further, it fails to recognise that the shifting of the derivation of EU authority from the Member States to the citizens is essential to the legitimisation of the EU and thus to the constitutionalisation process. Thus public approval by ratification of whatever constitutional arrangements as are agreed, is the bottom line. Ultimately, the shifting of authority is essential if Europeans are to feel that they, and not their politicians, are the Masters of the Treaty — the masters of their fate — as it were. It is also essential, if Europeans are to have ownership of the integration process and experience. It is expected that from this position a number of sentiments would emerge, among which connection and commitment.

2.4 There is a need for a receptive political culture which is not in evidence

A European constitution will remain academic in the absence of consent by the people. There is clearly a relationship between constitutionalism and political culture. The editors of 'Political Culture and Constitutionalism: A Comparative Approach'¹⁴⁹ contend that 'constitutionalism or more simply put, the rule of law, is more

likely to emerge in a state from a fertile organic environment or political culture.¹⁵⁰ Franklin and Baun ‘...test the proposition that in the absence of a favourable political environment, any institutional design will be inadequate for the development of self-sustaining democratic institutions.’¹⁵¹ This hypothesis rests on a theory of constitutionalism which states that ‘a constitution is much more than a document that spells out a set of laws and lays out the design of government.’¹⁵² Thus the success or otherwise of a constitutional order rests on matters beyond the drafting of the constitutional document. ‘[T]he specifics of institution building are a concern secondary to the building of a constitutional regime’¹⁵³ and a receptive and mature political culture is at the core of a constitutional regime.

Constitutional development may appropriately be seen as incremental, and demonstrably so in the EU context, as the EU is still evolving. The construction of a federal structure may presuppose the presence of constitutionalism, but this is not necessarily the case. As pointed out by Franklin and Baun, ‘[w]ithout a willingness on the part of the community to cede authority to a central government, a federal system is destined to collapse’.¹⁵⁴ The existence or otherwise of such a ‘willingness’ in the EU is open to challenge and opens up debate as to the legitimacy of any political decisions that have or may still be taken to cede authority to central institutions without broad popular support.¹⁵⁵ It follows, in the words of von Beyme, that ‘there are political explosives around in the national party systems that could rebound against any overly hasty steps to integration’,¹⁵⁶ sentiments which are beyond doubt in light of increasing support for nationalist political parties across Europe in recent times.

CONCLUSIONS

Debate has been generated in Europe on whether the EU needs a formal constitution. A debate along these lines is patently good for democracy. As Olsen states:

*A public discourse about the adequacy, or inadequacy, of existing institutional arrangements can be a process of civic education through which European citizens develop an understanding of what constitutes a good society and system of governance, i.e., the legitimate constitutional principles of authority, power and accountability, and the normative-ethical basis, and value commitments and beliefs, of the polity.*¹⁵⁷

Irrespective of how a program of civil education might be undertaken and by whom, European publics need to understand the present constitutional arrangements and be involved in shaping future developments. Throughout the EU's development, decisions regarding the construction of the EU polity have been taken largely in the absence of public discourse and approval. This failing has raised questions as to the legitimacy of the whole enterprise, as demonstrated by the vexed Maastricht ratification process in the early 1990s. This anomaly needs to be rectified given that decisions are being taken and will continue to be taken which alter the nature, dynamics and course of governance and democratic representation within the EU. Thomas Paine observed that 'a constitution is not the act of a government, but of a people constituting a government; and government without a constitution is power without a right.'¹⁵⁸

The debate now in progress in university circles and political arenas is ultimately about rectifying the deficiencies embedded within EU governance structures and outcomes. The achievement of this objective is clearly a long-term process. There is in the short-term a commitment to a new intergovernmental conference in 2004, to deal with the leftovers¹⁵⁹ from the Nice Conference, which unfolded, only partially, in December 2000.

The adoption of a formal constitution requires the successful navigation of numerous obstacles. While there are few certainties in the constitutionalisation process, one thing appears certain. Pursuing a formal constitution would prove futile unless the articulation of constitutional tenets in a formal document served clear purposes.¹⁶⁰ Further, the constitution would have to be *capable* of delivering on these promises. New theories enabling democratic participation and representation beyond the state¹⁶¹ would have to be developed if existing theories of democracy proved inadequate to the task. The difficulty of this undertaking belies the ease with which it is stated. In this context, the sometimes competing — sometimes parallel — interests and processes of Regionalism, Europeanisation and Globalisation will need to be understood and assessed with a view to the eventual ratification of a distinctive constitution unshackled by the language, and untainted by an orientation to the form, of the nation state. Moreover, European citizens would have to accept, following consultation and debate, that a specific constitution for the EU should be adopted in their interests.¹⁶² Such a constitution will be the expression of the peoples' authority. Europe will, it is hoped, be debate-weary over the next few years, but correspondingly well informed.

APPENDIXTable 6.1 *Issue arenas and levels of authority in Europe, 1950 – 2001*

	1950	1957	1968	1970	1992	2001
I Economic issue arenas						
1 Goods/services	1	2	4 (3)*	4 (3)	4	4
2 Agriculture	1	1	4	4	4	4
3 Capital flows**	1	1	1	1	4	4
4 Persons/workers**	1	1	2	2	3	4
5 Transportation	1	2	2	3 (2)	2	3
6 Energy**	1	2	1	1	2	2
7 Communications	1	1	1	1	2	3
8 Environment***	1	2	2	2	3	3
9 Regional development**	1	1	1	1	3	3
10 Competition	1	2	3 (2)	3 (2)	3	3
11 Industry****	1	2	2	2	2	3
12 Money/credit	1	1	2	2	2	4
13 Foreign exchange/loans	1	1	3 (2)	4 (2)	2	4
14 Revenue/taxes	1	1	3 (2)	3 (2)	2	3
15 Macro-economic*****	1	1	2	3	2	4
II Socio-cultural issue arenas						
1 Work conditions	1	1	2	2	2	3
2 Health	1	1	1	1	2	2
3 Social welfare	1	2	2	3 (2)	2	2
4 Education and research	1	1	3 (2)	3 (2)	2	3
5 Labour-mgmt relations	1	1	1	1	1	3
III Politico-constitutional issues						
1 Justice & property rights**	1	1	1	2	3	4
2 Citizenship**	1	1	1	1	2	3
3 Participation	1	1	2 (1)	2 (1)	2	
4 Police & public order*****	1	1	2 (1)	2 (1)	1	2

IV International relations/external**Security issues**

1	Commercial negotiations	1	1	3	4	5	5
2	Eco-military assistance	1	1	1	1	2	4
3	Diplomacy & IGO m/ship	1	1	2	2	2	4
				(1)	(1)		
4	Defence and war	1	1	1	1	2	3

Key: 1= All policy decisions at national level
 2= Only some policy decisions at EC level
 3= Policy decisions at both national and EC level
 4= Mostly policy decisions at EC level
 5= All policy decisions at EC level

* Scores in parentheses () represent ex post revaluations in March 1992 of the original scores in Lindberg and Scheingold (1970) by members of the Consortium for 1992 present at the Centre for Advanced Study in the Behavioural Sciences in March 1992: Geoffrey Garrett, Peter Lange, Gary Marks, Philippe C. Schmitter and David Soskice.

** Category not in Lindberg and Scheingold (1970). Schmitter's estimates for 1950-1970.

*** Defined as 'Exploitation and protection of natural resources' in Lindberg and Scheingold (1970).

**** Called 'Economic development and planning' in Lindberg and Scheingold (1970).

***** Called 'Counter-cyclical policy' in Lindberg and Scheingold (1970).

***** Called 'Public health, safety and maintenance of public order' in Lindberg and Scheingold (1970).

Source: P. C. Schmitter, 'Imagining the Future of the Euro-polity with the Help of New Concepts' in G. Marks, F. W. Scharpf, P. C. Schmitter and W. Streeck, *Governance in the European Union*, (1996) Sage Publications, 125-6.

REFERENCES

P. Alston and J.H.H Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', *Harvard Law School, The Jean Monnet Chair Working Papers* (1999) <<http://www.jeanmonnetprogram.org/papers/99/990101.html>>.

D. Archibugi, D. Held, and M. Köhler (eds.), *Re-Imagining Political Community Studies in Cosmopolitan Democracy* (1998), Polity Press.

A. Arnall, 'References to the European Court' (1990) 15 *Eur LR* 375.

T. A. Börzel and T. Risse, 'When Europe Hits Home: Europeanization and Domestic Change', (RSC Working Papers No. 2000/56, European University Institute, 2000).

T. A. Börzel and T. Risse, 'Who is Afraid of a European Federation? How to Constitutionalize a Multi-Level Governance System', (Jean Monnet Working Paper No. 7/00) <<http://www.law.harvard.edu/programs/JeanMonnet/papers/00/00f0101.html>>.

A. M. Burley and W. Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41, cited in M. Maduro, *We The Court . . .*, (1998), Hart Publishing.

R. Dehousse, 'Rediscovering Functionalism' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000), Robert Schuman Centre for Advanced Studies, European University Institute.

B. de Witte, 'Après Nice: Drafting a European Constitution', (2000-2001 European Forum Discussion Paper, European University Institute, Florence, 25 January 2001).

C. M. Dudek, 'Can the European Union Influence the Functioning of Regional Governments?', (RSC Working Paper No. 2000/49, European University Institute, 2000).

European Commission Communication: A Basic Treaty for the European Union COM (2000) 434 final, 12 July 2000.

European Parliament Report on the Constitutionalisation of the Treaties (2000/2160(INI)), 12 October 2000.

J. Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration', Speech given at Humboldt University Berlin, 12 May 2000 <http://www.auswaertiges-amt.de/2_aktuel/index.htm>; Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000) Robert Schuman Centre for Advanced Studies, European University Institute.

D. P. Franklin, M. J. Baun (eds) *Political Culture and Constitutionalism A Comparative Approach* (1995) M.E. Sharpe Inc.

M. Franklin, M. Marsh and L. MacLaren, 'Uncorking the bottle: popular opposition to European unification in the wake of Maastricht', (1994) 32(4) *Journal of Common Market Studies* 455.

M. Th. Greven, 'Can the European Union Finally Become a Democracy?' in M. Th. Greven and L.W. Pauly (eds) *Democracy beyond the State? The European Dilemma and the Emerging Global Order* (2000), Rowman & Littlefield Publishers Inc.

T.C. Hartley, *Constitutional Problems of the European Union* (1999), Hart Publishing.

T.C. Hartley, *The Foundations of European Community Law* (2nd ed, 1988), Clarendon Press.

T.C. Hartley, *The Foundations of European Community Law*, (4th ed, 1998), Oxford University Press.

U. Hedetoft, 'National Identities and European Integration 'From Below': Bringing the People Back in', (1993) 28, no. 1 *Journal of European Integration*, 1.

L. Holmes and P. Murray (eds), 'Introduction: Citizenship and Identity in Europe', in *Citizenship and Identity in Europe* (1999), Ashgate Publishing Ltd.

C. Joerges, Y. Mény and J.H.H. Weiler, 'Prologue: The Fischer Debate: The Bright Side', C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000), Robert Schuman Centre for Advanced Studies, European University Institute.

K.-E. Jørgensen, 'Europe: Regional Laboratory for the Global Polity' (RSC Paper, presented at European University Institute, Florence, 22 November, 2000).

M. Keating, *Territorial Politics in Europe. A Zero-Sum Game? The New Regionalism. Territorial Competition and Political Restructuring in Western Europe*, (RSC Working Paper No. 98/39, European University Institute, 1998).

C. Leben, 'A Federation of Nation States or a Federal State?' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000), Robert Schuman Centre for Advanced Studies, European University Institute.

K. Lenaerts 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205.

M. R. Lepsius, 'The European Union as a Sovereignty Association of a Special Nature', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000), Robert Schuman Centre for Advanced Studies, European University Institute.

M. Longo, 'Co-operative Federalism in Australia and the European Union: Cross Pollinating the Green Ideal' (1997) 25 *F L Rev* 127.

M. Longo, 'The European Union: A "ferment of change" in the World' [1998] 7(1) *Griffith LR* 124.

M. Maduro, *We The Court . . .*, 1998, Hart Publishing.

G. Majone, 'Preservation of Cultural Diversity in a Federal System: The Role of the Regions' in M. Tushnet (Ed.), *Comparative Constitutional Federalism Europe and America* (1990), Greenwood Press.

G.F. Mancini, 'The making of a Constitution for Europe' (1989) 26 *CMLRev* 595.

G.F. Mancini and J.H.H Weiler, 'Europe – The Case for Statehood . . . and the Case Against: An Exchange', (*Harvard Law School, The Jean Monnet Chair Working Papers*, 1998) <<http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-6-.html>>.

G. Marks, F. Neilsen, L. Ray and J. Salk, 'Competencies, Cracks and Conflicts: Regional Mobilization in the European Union', in G. Marks, F. W Scharpf, P. C. Schmitter and W. Streeck, *Governance in the European Union* (1996), Sage Publications.

E. Meehan, 'The Debate on Citizenship and European Union', in P. Murray and P. Rich (eds), *Visions of European Unity* (1996), Westview Press.

A. J. Menéndez, 'Another View of the Democratic Deficit: No Taxation without Representation', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000), Robert Schuman Centre for Advanced Studies, European University Institute.

P. Murray, 'European integration studies: the search for synthesis', (2000) Vol. 6 (1) *Contemporary Politics*.

J. P. Olsen, 'How, then, does one get there? An Institutionalist Response to Herr Fischer's Vision of a European Federation', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000),

Robert Schuman Centre for Advanced Studies, European University Institute.

T. Paine, *The Rights of Man* (Part 2), Chapter IV, 'Of Constitutions'.
<<http://www.thomas-paine.com/tpnha/archive.html>>.

M. Patrono, 'Bumps in the Road to Federal Europe - European Court of Justice v National Courts', (Paper presented at the Australasian Law Teachers Association Conference, Wellington, 4-7 July 1999).

L.W. Pauly, 'Introduction - Democracy and Globalization in Theory and Practice' in M. Th. Greven and L.W. Pauly (eds) *Democracy beyond the State? The European Dilemma and the Emerging Global Order* (2000), Rowman & Littlefield Publishers Inc.

I. Pernice, 'Which institutions for what kind of Europe?'
<<http://www.rewi.hu-berlin.de/WHI/engli...rs/proposalseu2000/proposalseu2000.htm>>.

P. Pescatore, 'International Law and Community Law: A Comparative Analysis' (1970) 7 *CML Rev.* 167.

P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *Eur. L.R* 155.

J. Pinder, 'Building The Union : Policy, Reform, Constitution', in A. Duff, J. Pinder, R. Pryce (eds), *Maastricht and Beyond - Building the European Union* (1994), Routledge.

J. Pinder, *European Community: The Building of a Union* (1991), Oxford University Press.

J.-C. Piris, 'Does the European Union have a Constitution? Does it need one?'

<<http://www.law.harvard.edu/programs/JeanMonnet/papers/00/000501-08.html>>.

Report of the Robert Schuman Centre of the European University Institute in Florence to the Commission on the Reorganisation of the Treaties, 15/5/2000

<http://europa.eu.int/comm/igc2000/offdoc/repoflo_en.pdf>.

A.S. Rosenbaum (ed), *Constitutionalism: The Philosophical Dimension* (1988), Greenwood Press.

P. C. Schmitter, 'An Excursus on Constitutionalization', *Constitutionalism Web-Papers*, (Con WEB, No.3/2000) <<http://www.qub.ac.uk/ies>>.

P. C. Schmitter, *How to Democratize the European Union . . . and Why Bother?* (2000), Rowman & Littlefield Publishers Inc.

P. C. Schmitter, 'Imagining the Future of the Euro-polity with the Help of New Concepts' in G. Marks, F. W Scharpf, P. C. Schmitter and W. Streeck, *Governance in the European Union* (1996), Sage Publications.

M. Shapiro, 'The European Court of Justice' in A. Sbragia (ed), *Euro-politics: Institutions and policy-making in the "new" European Community* (1992), Brookings Institution.

A. D. Smith, 'National Identity and the Idea of European Unity', in P. Gowan and P. Anderson (eds), *The Question of Europe* (1997), Verso.

F. Snyder, 'Globalisation and Europeanisation as Friends and Rivals: European Union Law in Global Economic Networks', (Working Papers, Law No. 99/8, European University Institute, 1999).

E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law*, 1.

E. Stein, 'Giuristi, Giudici e la creazione di una Costituzione Transnazionale' in *Un nuovo diritto per l'Europa*, (1991) Giuffrè.

E. Tassin, 'Europe: A Political Community?' in C. Mouffe (ed.), *Dimensions of Radical Democracy Pluralism, Citizenship, Community* (1992), Verso.

A. Travis, 'EU poll', *The Guardian* (London, UK), January 15, 2001.

K. von Beyme, 'Fischer's Move Towards a European Constitution' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000), Robert Schuman Centre for Advanced Studies, European University Institute.

H. Wallace, 'Possible Futures for the European Union: A British Reaction' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000), Robert Schuman Centre for Advanced Studies, European University Institute.

H. Wallace and W. Wallace (eds), *Policy-Making in the European Union* (3rd ed, 1996), Oxford University Press.

S. Weatherill, *Law and Integration in the European Union* (1995), Clarendon Press.

J.H.H. Weiler, 'Epilogue Fischer: The Dark Side', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000), Robert Schuman Centre for Advanced Studies, European University Institute.

J. H.H. Weiler, 'The Dual Character of Supranationalism' (1981) 1 *YEL* 267.

J.H.H. Weiler, 'The Transformation of Europe' (1990-91) 100 *The Yale Law Journal*, 2403.

D. Wyatt and A. Dashwood, *Wyatt and Dashwood's European Community Law* (3rd ed, 1993), Sweet and Maxwell.

J. Zielonka, 'Enlargement and the Finality of European Integration' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000), Robert Schuman Centre for Advanced Studies, European University Institute, Florence.

ENDNOTES

¹ U. Hedetoft, 'National Identities and European Integration "From Below": Bringing the People Back in', *Journal of European Integration* 28, no. 1 (1993), 1-28.

² M. Th. Greven, 'Can the European Union Finally Become a Democracy?' in M. Th. Greven and L.W. Pauly (eds) *Democracy beyond the State? The European Dilemma and the Emerging Global Order* (2000) 49. Greven remarks that '[p]olls, in which voters are asked about their general orientation toward the EU, are quite different from elections, in which voters are structurally forced to identify and prioritize issues in order to make coherent use of their single vote', 49.

³ Ibid 59.

⁴ Ibid 49.

⁵ German Foreign Minister, Joschka Fischer, gave a thought-provoking speech at the Humboldt University in Berlin on 12 May 2000, titled 'From Confederacy to Federation: Thoughts on the Finality of European Integration'

http://www.auswaertiges-amt.de/2_aktuel/index.htm

⁶ P.C. Schmitter, 'An Excursus on Constitutionalization, Constitutionalism Web-Papers, <http://www.qub.ac.uk/ies> ConWEB. No. 3/2000; Schmitter, *How to Democratize the European Union . . . and Why Bother?* (2000).

⁷ 'An Excursus on Constitutionalization, Constitutionalism Web-Papers, <http://www.qub.ac.uk/ies> ConWEB. No. 3/2000. Schmitter contemplates that in the face of a divided outcome in a future referendum between a confederal and a federal constitution, an appropriate response would be to proceed with both. Thus '[o]ne sub-set of members – those in which the confederal alternative prevailed – would be bound by a different, less constraining, set of rules than would those whose citizenries had chosen the federal one. Europe would find itself with a "core area" [consisting of the original Six] that was prepared to move ahead further and faster toward political integration and a "periphery" that accepted a common *acquis communautaire*, but was unwilling to extend for the foreseeable future.'

⁸ Fischer outlined the formation of a 'centre of gravity' as a possible interim step towards completing political integration in the following terms: '[s]uch a group of states would conclude a new European framework treaty, the nucleus of a constitution of the Federation. On the basis of this treaty, the Federation would develop its own institutions, establish a government which within the EU would speak with one voice on behalf of the members of the group on as many issues

as possible, a strong parliament and a directly elected president. Such a centre of gravity would have to be the avant-garde, the driving force for the completion of political integration and should, from the start, comprise all the elements of the future federation: 'From Confederacy to Federation: Thoughts on the Finality of European Integration' http://www.auswaertiges-amt.de/2_aktuel/index.htm This vision, as with the Schmitter vision outlined in n 7 above, has variously attracted criticism and praise from politicians and scholars alike. Those who would fall outside the centre of gravity either by choice (e.g. the UK, Nordic states) or through inability to meet the criteria for membership (all of the applicant countries) see the grouping as an unnecessary division giving rise to a second-class membership of the EU. Those within the centre of gravity see it as a means of making progress on political integration. This approach is, of course not new. It reflects the 'two-speed Europe' and 'variable geometry' debates of the 1970s onwards.

⁹ C. Joerges, Y. Mény and J.H.H. Weiler, 'Prologue: The Fischer Debate: The Bright Side', C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer* (2000) 2.

¹⁰ Opinion 1/91 of December 14, 1991 [1991] ECR I-6079, 6080.

¹¹ Subject to Article 249 (formerly 189) of the EC Treaty which relevantly, though somewhat opaquely states that '[a] regulation shall have general application [and] . . . shall be binding in its entirety and directly applicable in all Member States.'

¹² [1963] ECR I. The Court's decision in *Van Gend en Loos* established the direct effect of treaty provisions that impose on the Member States an obligation to abstain from something, such as customs duties. Direct effect means that the provision is directly applicable within the domestic legal order without the need for national measures of implementation. Being directly effective, an individual is able to enforce his or her state's obligations under Community Law. This affirms that individuals are, as a matter of course, the subjects of the EC legal order and not merely its objects. *Van Gend* represents a successful attempt by the court to constitutionalise the treaty system in accordance with the broader conception of a constitution: one that recognises and gives effect to the goals of individuals within the legal order. The Court has in many subsequent decisions, extended the doctrine of direct effect to secondary legislation, including regulations and directives.

¹³ [1964] ECR 585. Comparable to s.109 of the Australian Constitution, which expresses the federal idea that Commonwealth law shall prevail over conflicting

State law, *Costa* established the supremacy of Community law over conflicting national law, though significantly, by judicial means.

¹⁴ Opinion 1/91 of December 14, 1991 [1991] ECR I-6079: '... the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law... The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves [6080]'.

¹⁵ [1986] ECR I-1339.

¹⁶ *Ibid* 1365.

¹⁷ [1990] ECR I-3365. In reliance on Article 5 (now 10) which, in imprecise terms obliges Member States to take appropriate measures to ensure fulfilment of the obligations arising out of the Treaty, the Court was able to justify the imposition of very specific obligations on the Commission, namely the 'duty to cooperate' with national judicial authorities.

¹⁸ See for example E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law*, 1; G.F. Mancini, 'The making of a Constitution for Europe' (1989) 26 *CMLRev* 595; K. Lenaerts 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205; J.H.H Weiler, 'The Transformation of Europe' (1990-91) 100 *The Yale Law Journal*, 2403; P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *Eur. L.R* 155; P. Pescatore, 'International Law and Community Law: A Comparative Analysis' (1970) 7 *CML Rev.* 167. Pescatore, former judge of the ECJ, has tellingly remarked that: '... [t]he reasoning of the court shows that the judges had 'une certaine idée de l'Europe' [a certain idea of] their own, and that it is this idea which has been decisive and not arguments based on the legal technicalities of the matter': 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *Eur. L.R* 155 p. 157. The Court's technique has been rendered possible by the manner in which the EC Treaty was drafted. In 'International Law and Community Law: A Comparative Analysis' (1970) 7 *CML Rev.* 167, Pescatore noted that: '[t]he technique used by the drafters of the European Treaties in a number of areas is to establish *more or less* precisely defined objectives as opposed to specific rules or, in other words, to set in motion a process of evolution towards definite ends', 173.

¹⁹ The preferred definition of federalism highlights the 'sharing of sovereignty' rather than an hierarchical system of governance. The EU federal construct is imperfect because it lacks tax and spending power and is therefore severely constrained in the budgetary sense.

²⁰ M. Shapiro, 'The European Court of Justice' in A. Sbragia (ed), *Euro-politics: Institutions and policy-making in the "new" European Community*, (1992) 123.

²¹ Ibid.

²² T.C. Hartley, *Constitutional Problems of the European Union*, (1999).

²³ M. Maduro, *We The Court . . .*, (1998), 9 citing E. Stein, 'Giuristi, Giudici e la creazione di una Costituzione Transnazionale' in *Un nuovo diritto per l'Europa*, (1991) especially 17-43.

²⁴ Maduro, *ibid* 10.

²⁵ Ibid.

²⁶ Ibid.

²⁷ For instance in *Procureur de la Republique v Association de defense des bruleurs d'huiles usagees* (1985) ECR 531, the Court declared that the protection of the environment is 'one of the Community's essential objectives', which may as such justify certain limitations on the principle of the free movement of goods, 549. It is noteworthy that this decision preceded the amendments made to the EC Treaty by the Single European Act (SEA) 1987. See M. Longo, 'Co-operative Federalism in Australia and the European Union: Cross Pollinating the Green Ideal' (1997) 25 *F L Rev* 127, 134.

²⁸ The area of environmental protection illustrates the point. See generally Longo, *ibid*.

²⁹ P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *Eur. L.R* 155, 157.

³⁰ E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law*, 1.

³¹ Stein, *ibid*; F. Mancini, 'The Making of a Constitution for Europe (1989) *CML Rev* 595, 596. Hartley has remarked that 'as far as its legal system is concerned, the Community possesses most of the characteristics of a federation': See T.C. Hartley, *The Foundations of European Community Law*, (2nd ed, 1988) 47.

³² A. S. Rosenbaum (ed), *Constitutionalism: The Philosophical Dimension* (1988) 89.

³³ Constitutionalism is a multi-faceted concept which may be explained in structural, functional and sociological terms. The democratic constitutionalisation of the EU depends on much more than the establishment of a constitutional

framework, by legislative or judicial means. Important as these factors may be, constitutionalism is also dependent upon the existence of a political culture that promotes not only the rule of law (to prevent the abuse of power, to protect human rights, to support democratic procedures and policy making), but also the idea that a common European future with shared political, legal, social and economic purposes is to be secured by constitutional means.

³⁴ The UK does not have a single constitutional document, but rather evolving practice and acts of parliament.

³⁵ C. Leben, citing C. Eisenmann, states that treaty clauses, though originally subject to rules of international law, are transformed into rules of state law by virtue of the way in which they may be amended. Thus if the treaty provides that the clauses setting up the organisation of the collectivity can be amended by a procedure of domestic legislation, i.e. by majority rule rather than unanimity rule, the treaty is then subject to constitutional revision and therefore becomes a constitution: See Leben, 'A Federation of Nation States or a Federal State?' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 108.

³⁶ This is apparent from the restrictive wording of Article 230, paragraph 4, which states that natural or legal persons are able to: '. . . institute proceedings [generally within two months of publication of the measure or of its notification to the plaintiff] against a decision addressed to *that person* or against a decision which, although in the form of a regulation or a decision addressed to another person, is *of direct and individual concern* to the former.' [My italics] The ECJ's rulings in this area have tended to confirm the restrictive criteria regarding standing to challenge a decision under Article 230 (see *Plaumann v Commission* [1963] ECR 95) although more recently the Court in *Cordoniu SA v Council* [1994] ECR 1853 demonstrated greater receptiveness to the idea of a wider principle of individual standing before the ECJ.

³⁷ See P. Alston and J.H.H Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', (1999) Harvard Law School, <<http://www.jeanmonnetprogram.org/papers/99/990101.html>>.

³⁸ The EU Charter of Fundamental Rights, proclaimed at Nice on 7 December 2000, sets out 50 entitlements grouped around six fundamental values – dignity, freedom, equality, solidarity, citizenship and justice. Specific provisions include the right to life, to education, to free expression, to property, to equality before the law, to cultural, religious and linguistic diversity, to environmental protection, to equality between men and women and to a dignified old age. While the Charter is not legally binding as yet (it is at present, merely a political

declaration), some regard it as 'a first step towards some kind of European Constitution': see R. Dehousse, 'Rediscovering Functionalism' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 195.

³⁹ *The Rights of Man* (Part 2), Chapter IV, 'Of Constitutions'. 'A constitution is the property of a nation, and not of those who exercise the government. All the constitutions of America are declared to be established on the authority of the people. In France, the word nation is used instead of the people; but in both cases, a constitution is a thing antecedent to the government, and always distinct therefrom.' <<http://www.thomas-paine.com/tpnha/archive.html>>.

⁴⁰ M. Patrono, 'Bumps in the Road to Federal Europe - European Court of Justice v National Courts' (Paper presented at the Australasian Law Teachers Association Conference, Wellington, 4-7 July 1999).

⁴¹ [1994] 1 CMLR 57.

⁴² *Ibid* 103.

⁴³ This conclusion would be borne out by the refusal of the governments of the Member States to accept Spinelli's Draft Treaty. This draft was seen 'as an attempt to replace the predominance of intergovernmental relations in the Community institutions by a system of constitutional government, with the rule of law and with representative government': J. Pinder, *European Community – The Building of a Union* (1991) 41. Indeed such refusal may be seen as a political decision to withhold a constitution.

⁴⁴ A. M. Burley and W. Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41, 44, cited in Maduro, above n 23, 11. The regular process of treaty revision undertaken at intergovernmental conferences coupled with the changes brought about to the Community legislative process by the entry into force of the Single European Act and the Treaty of Amsterdam in 1987 and 1999 respectively (viz. qualified majority voting in the Council has been extended and Parliament now plays a more important role) have called into question the appropriateness of judicial activism when other institutions can now provide the impetus for change. There may, however, be 'other adequate justifications for judicial activism' as foreshadowed by S. Weatherill, *Law and Integration in the European Union* (1995) 185.

⁴⁵ J. Pinder, 'Building The Union : Policy, Reform, Constitution', in A. Duff, J. Pinder, R. Pryce (eds), *Maastricht and Beyond - Building the European Union*, (1994) 285.

⁴⁶ Rather, it suggests the need for a political decision or process and the involvement of the peoples of Europe to ratify developments of a juridical nature which have 'constitutionalised' the treaties. This, of course, also gives rise to separate, yet related issues concerning democracy, participation, involvement in and assent to constitutional design.

⁴⁷ These provisions generally provide, in imprecise terms, for the Member States to fulfil their obligations under the Treaty and to act to attain the Treaty objectives: in particular, the establishment of a common market.

⁴⁸ P. Murray, 'European integration studies: the search for synthesis', *Contemporary Politics*, Vol. 6(1), 2000.

⁴⁹ Mancini, above n 18, 613.

⁵⁰ Weatherill, above n 44, 210, citing J.H.H Weiler, 'The Dual Character of Supranationalism' (1981) 1 *YEL* 267.

⁵¹ See for instance recent initiatives of Community institutions: European Parliament Report on the Constitutionalisation of the Treaties (2000/2160(INI)), 12 October 2000; European Commission Communication A Basic Treaty for the European Union COM (2000) 434 final, 12 July 2000.

⁵² National courts have the power to review actions by their governments for the implementation and enforcement of Community legislation. The referral procedure enables national courts to seek guidance from the ECJ on the correct interpretation of Community law. The domestic proceedings are suspended while the ECJ considers the matter and gives its opinion. It will then be up to the national court to apply the ruling of the ECJ in the circumstances of the case before it: see D. Wyatt and A. Dashwood, *Wyatt and Dashwood's European Community Law* (3rd ed, 1993) 142-153. The ECJ has stated on numerous occasions that 'the purpose of that jurisdiction is to ensure the uniform interpretation and application of Community law, and in particular the provisions which have direct effect, through the national courts: *Amministrazione delle Finanze dello Stato v Denkavit Italiana* [1980] ECR 1205, 1223; *Amministrazione delle Finanze v Salumi* [1980] ECR 1237, 1260. Arnall states that it is in the framework of the preliminary ruling procedure that basic principles of the Community legal order, such as direct effect and supremacy of Community law have been developed: A. Arnall, 'References to the European Court' (1990) 15 *Eur LR* 375, 391. Though couched in non-mandatory terms, the procedure has generally received the endorsement and co-operation of national courts. Yet this may not always be the case. For this reason, admonition by national courts such

as that expressed by the German Constitutional Court in *Brunner*, above n 41, should be taken seriously.

⁵³ [1994] 1 CMLR 57, 58. See also paragraphs 13 and 23, at 79 and 81-82 respectively.

⁵⁴ I. Pernice, 'Which institutions for what kind of Europe?'

<[http://www.rewi.hu-](http://www.rewi.hu-berlin.de/WHI/engli...rs/proposalseu2000/proposalseu2000.htm)

[berlin.de/WHI/engli...rs/proposalseu2000/proposalseu2000.htm](http://www.rewi.hu-berlin.de/WHI/engli...rs/proposalseu2000/proposalseu2000.htm)>.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ See: J.H.H. Weiler, 'Epilogue Fischer: The Dark Side', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 238-247.

⁵⁹ Maduro, above n 23, 8 citing J.H.H. Weiler, 'The Reformation of European Constitutionalism' (1997) 35 *JCMS* 97.

⁶⁰ The word 'federalism' lacks a shared meaning, much less a common understanding through experience, among the Member States. For instance the British understanding of federalism in hierarchical terms (see H. Wallace, 'Possible Futures for the European Union: A British Reaction' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9) sees the demotion of the British level of government vis-à-vis the EU level. This may in part explain the very high levels of hostility (58% against) registered in a recent poll of British voters to the Fischer proposal for a federal Europe: A. Travis, 'EU poll', *The Guardian* (London, UK), 15 January 2001, 4. Arguably, a better understanding of the term 'federalism', consistent with its function of 'sharing of sovereignty', is had in other Member States more familiar with the concept. The lack of common understanding among the Member States is, of course, not limited to the word 'federalism'. Other related terms, including 'federation', 'subsidiarity', 'integration' and even 'constitution' are equally contested.

⁶¹ P. C. Schmitter, 'Imagining the Future of the Euro-polity with the Help of New Concepts' in G. Marks, F. W Scharpf, P. C. Schmitter and W. Streeck, *Governance in the European Union* (1996), 149.

⁶² The concept of the sovereign nation state was legally recognised by the Westphalian Peace Treaty of 1648.

⁶³ Weiler, 'Epilogue Fischer: The Dark Side', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 242. Kelsen's 'pure theory' of law was predicated on a belief that a theory of law should validate and give order to law itself; should be value-free and isolated from sociological, ethical and related matters. This purity

of method would thus show up the essential nature of the legal system as a hierarchy of norms in which every proposition was dependent on another proposition for its validity. Through this self-supporting process of norms springing from other norms, the *Grundnorm* or basic norm is finally reached.

⁶⁴ See *Nold v Commission of the European Communities* ECR [1974] 491 and *Liselotte Hauer v Land Rheinland –Pfalz* ECR [1979] 3728, where the Court states the point. To be sure, the German Constitutional Court in *Brunner* reminded the ECJ of its obligations in this regard.

⁶⁵ L.W. Pauly, 'Introduction - Democracy and Globalization in Theory and Practice' in M. Th. Greven and L.W. Pauly (eds), above n 2, 8.

⁶⁶ See for instance, Greven, above n 2, 37.

⁶⁷ Ibid.

⁶⁸ Recent integration initiatives have been generated by Member State politicians (e.g. Fischer, Chirac, Ciampi, Amato) rather than EU supranational institutions.

⁶⁹ Term coined by Holmes and Murray in L. Holmes and P. Murray (eds), 'Introduction: Citizenship and Identity in Europe', in *Citizenship and Identity in Europe* (1999) 5.

⁷⁰ K. von Beyme, 'Fischer's Move Towards a European Constitution' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 82.

⁷¹ Canvassed by Murray, 'European integration studies: the search for synthesis', above n 48.

⁷² Greven, above n 2, 55. Greven opines that '[a] simple expansion of the model of representative democracy is not likely to be adequate to this task of legitimation', 55-56.

⁷³ M. R. Lepsius, 'The European Union as a Sovereignty Association of a Special Nature', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 218-219.

⁷⁴ G.F. Mancini and J.H.H. Weiler, 'Europe – The Case for Statehood . . . and the Case Against: An Exchange', (1998) Harvard Law School, <<http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-6-.html>>.

⁷⁵ Ibid.

⁷⁶ Leben, in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 110-111. A related question arises: if the EU moves towards a constitution, will the Member States really stop being 'Masters of the Treaty'? This question will be dealt with further in Part III, section 2.3.

⁷⁷ See G. Majone, 'Preservation of Cultural Diversity in a Federal System: The Role of the Regions' in M. Tushnet (ed.), *Comparative Constitutional Federalism Europe and America* (1990) 67.

⁷⁸ Ibid 72.

⁷⁹ T. A. Börzel and T. Risse, 'Who is Afraid of a European Federation? How to Constitutionalize a Multi-Level Governance System' (Jean Monnet Working Paper No. 7/00) Harvard Law School
<<http://www.law.harvard.edu/programs/JeanMonnet/papers/00/00f0101.html>>.

⁸⁰ von Beyme, above n 70, 82. 'The EU spends little more than 1 per cent of European GDP': G. Marks, F. Nielsen, L. Ray and J. Salk 'Competencies, Cracks and Conflicts: Regional Mobilization in the European Union' in G. Marks, F.W. Scharpf, P.C. Schmitter and W. Streeck, above n 61, 56.

⁸¹ von Beyme, *ibid*.

⁸² Refer to table in Appendix hereto.

⁸³ M. Keating, 'Territorial Politics in Europe. A Zero-Sum Game? The New Regionalism. Territorial Competition and Political Restructuring in Western Europe', (RSC Working Paper No. 98/39, European University Institute, 1998) 2.

⁸⁴ Majone, above n 77, 75.

⁸⁵ *Ibid*.

⁸⁶ Keating, above n 83, 15.

⁸⁷ The Canadian federal experience of increasing power to the provinces may be seen as having strengthened the separatist movement in Quebec. Perhaps more than any other federal nation state Canada exhibits a decentralised form of federalism whereby the provinces have primary competence in policy areas usually assigned to the central administration, e.g. ethnic affairs, education.

⁸⁸ See for instance Schmitter's insightful study of the 'condominio' model of organisation 'based on variation in both territorial and functional constituencies', in 'Imagining the Future of the Euro-polity with the Help of New Concepts' in G. Marks, F. W Scharpf, P. C. Schmitter and W. Streeck, above n 61, 136.

⁸⁹ See C. M. Dudek, 'Can the European Union Influence the Functioning of Regional Governments?', (RSC Working Paper No. 2000/49, European University Institute). Dudek asserts that 'EU regulatory policy has constrained the ability of some regional governments to create and implement development policies most appropriate for their respective region', 3. This necessitates further research on the 'territorial implication of EU regulatory policy upon regional governments' policymaking ability', 28. See also Keating, who states that '[h]opes that the development of a European political space would create new possibilities for autonomous regional action have been disappointed': Keating, above n 83, 16.

⁹⁰ Marks, Nielsen, Ray and Salk, above n 80, 60. With budgetary constraints and a low capacity for resource redistribution, it is unlikely that regions are setting up

offices in Brussels in order to attract funding from the EU. Member State executives and the European Commission, to a lesser extent, determine the allocation of funding in the EU, 56. Research indicates that 'the most entrenched subnational governments with the broadest range of competencies' and regions with 'a strong sense of separate identity. . . [or those with] a durable party-political orientation that is not represented in the national government' are more likely to mobilise in Europe either because they 'have an intense need for information concerning upcoming legislation or regulation' or 'because they have political demands which conflict with those of their national governments', 61.

⁹¹ Ibid 63.

⁹² Ibid 61. The authors indicate that '[o]ne may explain regional representation in Brussels without referring at all to the notion of a Europe of the Regions. A more suggestive term is that suggested by Liesbet Hooghe (1996): 'A Europe *with* the Regions', which refers to the demand on the part of regional governments for influence alongside, rather than in place of, state executives . . .', 61.

⁹³ Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 27.

⁹⁴ T. A. Börzel and T. Risse, 'When Europe Hits Home: Europeanization and Domestic Change', (RSC Working Paper No. 2000/56, European University Institute) 1.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ H. Wallace and W. Wallace (eds), *Policy-Making in the European Union* (1996).

⁹⁹ Börzel and Risse, 'When Europe Hits Home', above n 94, 1.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² From a viewpoint of sociological institutionalism, 'Europeanisation' may be understood as 'the emergence of new rules, norms, practices, and structures of meaning to which member states are exposed and which they have to incorporate into their domestic structures': Börzel and Risse, 'When Europe Hits Home', above n 94, 10.

¹⁰³ See Börzel and Risse, 'When Europe Hits Home', Ibid 4. EU Law has been described as 'an expression, a means, and an outcome of [E]uropeanisation': F.

Snyder, 'Globalisation and Europeanisation as Friends and Rivals: European Union Law in Global Economic Networks', (Working Paper Law No. 99/8, European University Institute, 1999) 57.

¹⁰⁴ Schmitter, 'Imagining the Future of the Euro-polity with the Help of New Concepts' in G. Marks, F. W Scharpf, P. C. Schmitter and W. Streeck, above n 61, 124. Refer to Table 6.1 in the Appendix hereto.

¹⁰⁵ Ibid 125-126.

¹⁰⁶ A. Smith, 'National Identity and the Idea of European Unity', in P. Gowan and P. Anderson (eds.), *The Question of Europe* (1997) 318-42, at 321.

¹⁰⁷ Börzel and Risse, 'When Europe Hits Home', above n 94, 10.

¹⁰⁸ Ibid 18.

¹⁰⁹ Eg. It has been shown that equal pay and equal treatment directives empowered women's groups in the UK (where public agencies and related institutions provided women's organisations with the means to use these directives to further gender equality) but had virtually no effect in France (where no such assistance was available): ibid 9-10, citing J. A. Caporaso and J. Jupille, *The Europeanization of Social Policy and Domestic Political Change*, in M. Green Cowles, J. A. Caporaso and T. Risse (eds) (2000).

¹¹⁰ Börzel and Risse, 'When Europe Hits Home', above n 94, 18. It may also be said that the so-called 'differential impact of Europe' finds legal equivalence in the differing rates of implementation of Community law within domestic legal systems.

¹¹¹ Ibid 9.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Recent works include: M. Longo, 'The European Union: A "ferment of change" in the World' [1998] 7(1) *Griffith LR* 124; K. E. Jørgensen, 'Europe: Regional Laboratory for the Global Polity' (RSC European Forum 2000-2001 Discussion Paper presented at the European University Institute, Florence, 23 November 2000).

¹¹⁶ Snyder, above n 103, 4.

¹¹⁷ Ibid 57-58

¹¹⁸ It is generally accepted that globalisation puts states in competition against each other for investment capital. States attract capital by providing the most attractive inducements which often take the form of low taxes and limited governmental intervention in the market place. While the process of globalisation

is said to generate wealth, opinion is divided as to its economic and sociological merit and its value as a normative model.

¹¹⁹ See for instance, D. Archibugi, D. Held, and M. Köhler (eds), *Re-Imagining Political Community Studies in Cosmopolitan Democracy* (1998).

¹²⁰ J. Zielonka, 'Enlargement and the Finality of European Integration' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 160.

¹²¹ Ibid.

¹²² Ibid 161.

¹²³ A. J. Menéndez states that '[t]he slow process of integration, based on the idea that one small step now will allow several small steps later on, is no longer useful. Gradual integration without worrying about the picture of the polity that is being forged (the so-called Monnet method) is precisely at the root of present troubles' [i.e. an inadequate institutional framework]: Menéndez, 'Another View of the Democratic Deficit: No Taxation without Representation', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 127. Similarly, the notion that the EU has 'intrinsic dynamics of integration' which will lead inexorably to a closer political union, 'even without any deliberate political act' has been largely discredited as utopian: see Olsen, 'How, then, does one get there? An Institutional Response to Herr Fischer's Vision of a European Federation', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 170. Note, however, that there is still significant resistance to the constitutional blueprint approach (particularly favoured by many politicians in Germany, Italy, Benelux and France) among some Member States, with the United Kingdom at the forefront of this group. The British traditionally prefer the 'organic evolution' approach which reflects the British 'constitutional behaviour . . . defined by evolving practice and acts of parliament, rather than by formal constitutional documents': see H. Wallace, 'Possible Futures for the European Union: A British Reaction' in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 141.

¹²⁴ See notes 36 and 37 herein.

¹²⁵ Schmitter, 'An Excursus on Constitutionalization', Constitutionalism Web-Papers Con WEB, No.3/2000, <<http://www.qub.ac.uk/ies>>.

¹²⁶ Ibid 3.

¹²⁷ Ibid.

¹²⁸ von Beyme, above n 70, 74.

¹²⁹ The theory assumed that certain rights inhered in every individual (religious freedom, freedom of speech, freedom to acquire property, freedom against unfair criminal procedures etc) which governments were incapable of taking away since

the rights were derived from elsewhere. The theory postulated that governments had to be organised in such a way as to effectively protect the individual's rights. This was to be achieved largely through the separation of legislative, executive and judicial functions.

¹³⁰ Weiler, 'Epilogue Fischer: The Dark Side', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 239.

¹³¹ Even though its Member States have acceded to the Convention, there is still the possibility of a lacuna developing in the protection of rights where a Member State is incapable of protecting rights through its action alone. This is where accession to the Convention by the EC would produce useful effects. The ECJ has stated in Opinion 2/94 (on Community accession to the Convention for the Protection of Human Rights and Fundamental Freedoms) [1996] ECR I, 1759 that no EC Treaty provision confers on the Community institutions in a general way the power to enact rules concerning human rights. This limitation would appear to prevent the accession to the European Convention, for fear of encroachment upon Member State competence in this area. Nonetheless, the TEU expresses respect for human rights as a general principle of Community law and the Amsterdam Treaty acknowledges that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. Furthermore the ECJ does look to the substantive obligations of the European Convention and pays considerable attention to the jurisprudence of the European Court of Human Rights in Strasbourg. See Alston and Weiler, above n 37.

¹³² Some Member States favour incorporation, among them, Germany, France and Italy.

¹³³ The European Parliament has resolved that the Charter could be incorporated into the Treaty in the form of a first chapter of a Constitution: See European Parliament Report on the Constitutionalisation of the Treaties (2000/2160(INI)), 12 October 2000, 9.

¹³⁴ It should be recalled that the German Constitutional Court in *Brunner* (the Maastricht judgment) promised (or threatened) to vet the measures of the Community institutions for compliance with Germany's constitutionally-embedded protection of rights.

¹³⁵ See Weiler, 'Epilogue Fischer: The Dark Side', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 238-247. This conservative response to constitutional change is well known to Australians who saw the referendum on the proposed Australian Republic defeated on 6 November 1999 on a similar

refrain, among other reasons. Nonetheless, it would be evasive to side-step the constitutional question by declaring that a constitution would give rise to a 'familiar and boring desert', if there are real and observable negative impacts on individuals and/or governance structures resulting from the failure to refine and/or formalise the constitutional arrangements. However, Weiler considers that existing constitutional arrangements ought to be retained and refined because it is the 'European postwar experiment [which is] so special and, arguably, worth preserving even if it does not have quite the power and quite the constitutional clarity as a State would': J.H.H Weiler, 'Europe: The Case Against the Case for Statehood', Harvard Law School (1998)

<<http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-6-.html> >.

¹³⁶ See Alston and Weiler, above n 37.

¹³⁷ See M. R. Lepsius, 'The European Union as a Sovereignty Association of a Special Nature', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 219-221.

¹³⁸ Smith, above n 106, 319.

¹³⁹ Ibid 324.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid 319.

¹⁴³ E. Tassin, 'Europe: A Political Community?' in C. Mouffe (ed.), *Dimensions of Radical Democracy Pluralism, Citizenship, Community* (1992).

¹⁴⁴ E. Meehan, 'The Debate on Citizenship and European Union', in P. Murray and P. Rich (eds.), *Visions of European Unity* (1996), 219.

¹⁴⁵ Ibid 207.

¹⁴⁶ J. P. Olsen, 'How, then, does one get there? An Institutional Response to Herr Fischer's Vision of a European Federation', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), above n 9, 177.

¹⁴⁷ See Minority Opinion, European Parliament Report on the Constitutionalisation of the Treaties (2000/2160(INI)), 12 October 2000, 17.

¹⁴⁸ See J.-C. Piris, 'Does the European Union have a Constitution? Does it need one?' Harvard Law School (2000)

<<http://www.law.harvard.edu/programs/JeanMonnet/papers/00/000501-08.html>>.

¹⁴⁹ D. P. Franklin, M. J. Baun (eds) *Political Culture and Constitutionalism A Comparative Approach* (1995).

¹⁵⁰ Ibid 1-2.

¹⁵¹ Ibid 2.

¹⁵² Ibid.

¹⁵³ Ibid 9.

¹⁵⁴ Ibid.

¹⁵⁵ Citing M. Franklin, M. Marsh and L. MacLaren, 'Uncorking the bottle: popular opposition to European unification in the wake of Maastricht', (1994) 32(4) *Journal of Common Market Studies*, 455-72, especially 468-71, Holmes and Murray refer to 'a growing realisation among EU officials that the so-called permissive consensus on elite decision-making on EU issues had eroded quite considerably in the 1990s'. See L. Holmes and P. Murray (eds), 'Introduction: Citizenship and Identity in Europe', in *Citizenship and Identity in Europe* (1999), 3. This foreshadows the demise of permissive consensus on elite decision-making as the *modus operandi* for progressing integration in favour of public consensus.

¹⁵⁶ von Beyme, above n 70, 84.

¹⁵⁷ Olsen, above note 146, 175.

¹⁵⁸ *The Rights of Man*, above n 39.

¹⁵⁹ The subject of a 2000-2001 European Forum Discussion Paper given by B. de Witte on 25 January 2001 titled 'Après Nice: Drafting a European Constitution', European University Institute, Florence. See 'Declaration on the Future of the Union to be included in the Final Act of the Conference', adopted at Nice in December 2000. Initiatives for the future development of the EU are in clause 5 stated to include: 1. 'How to establish and monitor a more precise delimitation of competencies between the EU and the Member States, reflecting the principle of subsidiarity [this is the common position of the German Länder, a position supported by the German Federal Government]; 2. The status of the Charter of Fundamental Rights of the EU proclaimed in Nice [should it become a binding text or remain a separate political text?]; 3. A simplification of the Treaties with a view to making them clearer and better understood without changing their meaning [the objective is to improve the legibility of the treaties (particularly messy at the moment) and to reduce the workload of translators by having two documents, one for the fundamental provisions, the other for technical provisions]; and 4. The role of national Parliaments in the European architecture.' See also Report of the Robert Schuman Centre of the European University Institute in Florence to the Commission on the Reorganisation of the Treaties, 15/5/ 2000 http://europa.eu.int/comm/igc2000/offdoc/repoflo_en.pdf; European Parliament Report on the Constitutionalisation of the Treaties

(2000/2160(INI)), 12 October 2000; and European Commission Communication - A Basic Treaty for the European Union COM (2000) 434 final, 12 July 2000.

¹⁶⁰ E.g. the division of competencies between the different levels of authority (so-called competence catalogue), the establishment of a definitive/democratic institutional framework reflective of a distinctive polity, the constitutionalisation of rights and of the rules of amendment (which entails the shifting of authority from the Member States to the people).

¹⁶¹ Greven, above n 2, 35-61.

¹⁶² See Schmitter, 'An Excursus on Constitutionalization, Constitutionalism Web-Papers ConWEB. No. 3/2000, <<http://www.qub.ac.uk/ies>>. It is unimaginable that European publics would passively agree to further political integration on the existing intergovernmental model, through which decisions by political elites are implemented via the treaty system. Therefore, a shift of authority from the Member States to the citizen would appear to be a precondition for political integration.

About the Author

Michael Longo (B.A., LLB (Melb.), LLM (Monash) is a Fellow of the Contemporary Europe Research Centre at the University of Melbourne and Lecturer in the School of Law at Victoria University.

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Dr Philomena Murray

Director
Contemporary Europe Research Centre
The University of Melbourne
Victoria 3010, Australia
Tel: (61-3) 8344 9505
Fax: (61-3) 8344 9507
e-mail: pbmurray@unimelb.edu.au

Prof. Leslie Holmes

Deputy Director
Contemporary Europe Research Centre
University of Melbourne
Victoria 3010, Australia
Tel: (61-3) 8344 7293
Fax: (61-3) 8344 9507
e-mail: leslieth@unimelb.edu.au

A/Prof. Peter Shearman

Department of Political Science
The University of Melbourne
Victoria 3010, Australia
Tel: (61-3) 8344 6559
Fax: (61-3) 8344 7906
e-mail: shearman@unimelb.edu.au

Contemporary Europe Research Centre
The University of Melbourne
Level 2, 234 Queensberry Street
Carlton, Vic 3053, Australia
tel: (61 3) 8344 9502
fax: (61 3) 8344 9507
e-mail: cerc@cerc.unimelb.edu.au
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