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**Affirming and Refining European Constitutionalism:
Towards the Establishment of the First Constitution
for the European Union**

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**AFFIRMING AND REFINING EUROPEAN CONSTITUTIONALISM:
TOWARDS THE ESTABLISHMENT OF THE FIRST CONSTITUTION
FOR THE EUROPEAN UNION**

*Michiel Brand**

I INTRODUCTION

1 The debate on the future of Europe

Europe's functional or Monnet¹ method of "piece-meal engineering" and "result-based masterminding",² has always been the followed approach in the European integration process. Today, it appears that this functional strategy has borne fruit.³ However, one significant consequence of the use of this pragmatic method was the avoidance to thoroughly discuss and determine the ultimate objectives of the integration process on the political level. Functionalism made European integration an incremental process without any blueprint for Europe's finality. This can be seen when looking at the Treaty establishing the European Community and the Treaty on European Union, which, instead of mentioning the exact direction and finality of European integration, speak of "an ever closer union among the peoples of Europe".⁴ There have of course always been some debates and discussions on the possible and desirable direction of European integration, mainly in the academic world. The debate on Europe's future, however, has always been rather limited, because it was not really constructively occurring on the political level.⁵ Moreover, the debate was also largely remaining outside the attention of the media and public opinion.

However, things have fundamentally changed. It may perhaps already be deemed an eternal cliché, but it is certainly true that the European Union currently "stands at a crossroads, a defining moment in its existence".⁶ The Union has become a quite complex structure, remote from its citizens and characterised by a deplorable democratic deficit. At the same time, the Union is facing the tremendous challenge of the coming enlargement, which is without precedent in terms of scope as well as diversity. The widening of the Union of up to 25 members in the near future simply entails that the Union has to be reformed structurally in order to accommodate this

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¹ Jean Monnet, who was the actual designer of the Schuman plan, wrote: "European unity is not a blueprint, it is not a theory, it is a process that has already begun, of bringing peoples and nations together to adapt themselves jointly to changing circumstances", Monnet (1962), p. 211.

² Lenaerts and Desomer (2002), p. 1224.

³ Salmon and Nicoll (2001), p. 66.

⁴ See the preambles to the TEC and the TEU and art. 1 TEU.

⁵ The European Parliament must be mentioned here as the exception to this observation: see Lenaerts and Desomer (2002), p. 1223 and note 28 there.

⁶ Laeken Declaration on the Future of the European Union, Annex I to the Presidency Conclusions of the Laeken European Council of 14 and 15 December 2001.

vast increase in members. In these exciting times, the Union is in desperate need of structural change in order to function effectively in the future and to remain able to live up to the high expectations. This has effectively resulted in an intensified interest in the future of European integration: the fundamental question of Quo Vadis Europa has explicitly been posed.

The debate on the future of Europe was started with the already famous speech of Germany's Foreign Minister Joschka Fischer on 12 May 2000 to the Humboldt University in Berlin, where he presented his own view on the future shape of Europe.⁷ His speech received a wide degree of public attention and subsequently, at the European summit in Nice in December 2000, a "deeper and wider debate about the future of the European Union"⁸ was called for and was formally launched on 7 March 2001.⁹

1.1 The Convention on the Future of Europe

The debate reached another phase with the establishment of a Convention on the future of Europe by the Laeken declaration of December 2001.¹⁰ The Convention, which held its inaugural session on 28 February 2002 and which has done the preparatory work for the current IGC where amendments to the treaties will be made, comprised 105 members¹¹ and was composed, quite similarly to its 'predecessor' that drew up the Charter of Fundamental Rights, as follows:¹²

- The Praesidium of the Convention comprised one Chairman (Valéry Giscard d'Estaing) and two Vice-Chairmen (Giuliano Amato and Jean-Luc Dehaene). The Praesidium was supplemented by nine members drawn from the Convention (three representatives of the governments holding the Council Presidency during the Convention (*i.e.* Spain, Denmark and Greece), two national parliament representatives, two European Parliament representatives and two Commission representatives. Later, also a representative from the accession states (in the person of Slovenian parliamentarian Alojz Peterle) was added to the Praesidium. Peterle was, however, merely designated as an 'invitee');
- 15 representatives of the Heads of State of Government of the Member States (one from each Member State) ;
- 30 members of national parliaments (two from each Member State);
- 16 members of the European Parliament;
- 2 Commission representatives;
- Furthermore, the 13 candidate countries were fully involved in the Convention's proceedings and were represented in the same way as the current Member States without, however, being able to prevent any consensus emerging among the Member States;

⁷ Fischer (2000).

⁸ Declaration no. 23 to the Final Act of the Treaty of Nice.

⁹ Statement initiating the debate on the future development of the European Union, 7 March 2001, <http://www.europa.eu.int/futurum/documents/speech/sp070301_3_en.htm>.

¹⁰ Laeken Declaration, *supra* n. 6.

¹¹ In practice, however, this number was a lot higher, since the alternate members often played a full role in the Convention in addition to the full members.

¹² See part III of the Laeken Declaration, *supra* n. 6.

- In addition, there were thirteen observers: three representatives of the Economic and Social Committee, three representatives of the European social partners, six representatives from the Committee of the Regions, and the European Ombudsman.

2 A European constitution

It is exactly the issue of a European constitution that has been put to the centre of attention in the debate on the future of Europe, as the debate is mainly concerned with issues of a fundamental and constitutional nature, affecting the very basis of the EU. The four issues which the debate should *inter alia* address and which are mentioned in declaration no. 23 to the Treaty of Nice on the future of the Union,¹³ are all matters which traditionally belong in, or are at least strongly related to, a constitution. There have been many political statements favouring a European constitution.¹⁴ Quite remarkably, also the more eurosceptic forces, whereas they first “engaged in a symbolic practice of ‘constitutional denial’”,¹⁵ now seem to have become reconciled to the idea of a European constitution and participate in the constitutional debate,¹⁶ perhaps mostly because of the potential restrictive rather than expansionary function of a constitution.¹⁷ Further, the Laeken declaration signalled the very first use of the words “constitution” and “constitutional” by the European Council, which Bruno de Witte describes as “[o]ne of the most spectacular innovations” of the document.¹⁸ Under the heading: “Towards a Constitution for European citizens”, the declaration reads:

“The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?”¹⁹

¹³ *I.e.* the delimitation of powers between the EU and the Member States; the status of the Charter of Fundamental Rights; simplification of the Treaties and the role of the national parliaments in the European architecture.

¹⁴ *E.g.* Fischer (2000), Chirac (2000), Verhofstadt (2000), Kok (2001), Rau (2001), Jospin (2001), Ciampi (2002).

¹⁵ See Walker (2002c). He adds that the “concern that motivates this approach is that the very acceptance of the EU as an appropriate site for constitutional debate should endow that entity with greater authority and momentum as a putative self-standing polity than is deemed appropriate by the Eurosceptic, typically jealous of creeping encroachment on national sovereignty and perhaps also sceptical of the objective legitimacy of the EU’s constitutional claim – particularly in the light of its ‘democratic deficit’ and its anaemic conception of citizenship”, at p. 334.

¹⁶ See *e.g.* Straw (2002).

¹⁷ “Eurosceptics may want a constitution in order to delimit the competencies and limit the authority of the EU”: Wilkinson (2002). However, Neil Walker makes two interesting points in connection to this: “(1) The attitude of the sceptics remains highly ambivalent, vacillating between general antipathy to a Constitution and acknowledgement that one, and only one, particular type of Constitution may be acceptable. (2) A number of distancing tactics are used, often with the consequence of minimizing active engagement in the debate over the full implications of a Constitutional settlement.”, Walker (2003b), at n. xii.

¹⁸ De Witte (2002b), p. 1281.

¹⁹ Laeken Declaration, *supra* n. 6.

The constitutional debate reached its climax in the Convention on the Future of Europe, which – although not intentionally set up like this – transformed itself into a constitutional Convention from the very beginning.²⁰ In October 2002 the Convention put forward a “Preliminary Draft Constitutional Treaty”²¹ that formed the basis for the final “Draft Treaty establishing a Constitution for Europe”^{22,23} that the Convention presented as the outcome of its work to the European Council in Rome on 18 July 2003.²⁴ Currently, the draft is under discussion by the Intergovernmental Conference that started on 4 October under the Italian presidency. Whereas there is much disagreement in the IGC about the *content* of the constitution to be established, the constitutional terminology itself seems accepted. It is thus highly likely that the European Union will in the near future be endowed with a constitution.

This paper focuses on the theoretical aspects of the “constitutional question” in the EU. It will be argued that, as is supported by many,²⁵ the present European Union *already* is endowed with its own constitution. At the outset, it is thus important to understand the current constitutional process not as intending to create a constitution for Europe, but as intending to bring about a *new, modified, different and more explicit form of* constitution for Europe. It will, moreover, be asserted that this process towards the elaboration of a future European constitution, is a useful and desirable exercise, signifying an affirmation and refinement of already existing European constitutionalism.

It is obvious that this argument is subject to much and heavy criticism. These critical positions will be closely looked at in this paper and I will try to provide convincing counter arguments against them. The fiercest and most well-known of those critical positions is the no demos thesis, with which we shall start the discussion.

²⁰ Before the start of the Convention, its President Valéry Giscard d’Estaing already compared the body to the Philadelphia Convention that wrote the United States’ constitution in 1787, see *Giscard wants to be Europe’s Benjamin Franklin*, <<http://www.euobserver.com>> of 7 February 2002.

²¹ CONV 369/02.

²² CONV 850/03 (hereinafter also “Draft Constitution”).

²³ The term “Constitutional Treaty” was mentioned early on by President Giscard d’Estaing as the one to be used for the final document that the Convention would put forward: see Giscard d’Estaing (2002): “In order to avoid any disagreement over semantics, let us agree now to call it: a ‘constitutional treaty for Europe’”, at p. 11. The final outcome of the Convention, however, is labelled as “Draft Treaty establishing a Constitution for Europe”. In its provisions, the document consistently refers to itself as being a “Constitution”. The draft thus signals a slight shift in terminology, to the “benefit” of the term “Constitution”. The label of the draft, however, confirms that the *nature* of the instrument remains a Treaty. This approach seems the right one to me, since it reflects the fact that we will have, as is already presently the case, a Treaty in form and a constitution in substance.

²⁴ See also *Report from the Presidency of the Convention to the President of the European Council of 18 July 2003*, CONV 851/03 and the *Rome Declaration* by Giscard d’Estaing (2003b).

²⁵ See *e.g.*: Van Gerven (1996), Zuleeg (1997), Snyder (1998), Weiler (1999), Hirsch Ballin (2000), Douglas-Scott (2001), Føllesdal (2002), Lenaerts and Desomer (2002).

II THE NO DEMOS THESIS

I Analysing the no demos thesis

The no demos thesis constitutes a fundamental challenge to the contention that Europe is already endowed with its own constitution. Moreover, the thesis holds that Europe should not, and in principle also is not *able* to, have a constitution. The no demos view also touches upon, and has implications for, other closely related issues such as democracy and statehood which will necessarily have to be discussed here.

The no demos thesis finds its origin in German constitutional thinking and has been put forward most notably by Dieter Grimm²⁶ and by the (in)famous Maastricht judgement of Germany's Federal Constitutional Court, the Bundesverfassungsgericht.²⁷ What follows is a brief account of the no demos thesis. It should be noted at the outset, however, that this account is of course not a universal one, as the no demos argument has been used in different variants.²⁸

The no demos thesis conceives of a demos as an ethno-cultural, organic and static concept, characterised by a certain degree of homogeneity.²⁹ This view of demos is an extremely rigid and indivisible one, setting high and demanding criteria for the existence of a people. It is obvious that this extreme conception of demos is almost exclusively linked to the state, rather than to a non-state polity such as the European Union³⁰ where the strong criteria are hardly met. The Bundesverfassungsgericht states that “[t]he Union Treaty (as explained) establishes a federation of States for the purpose of realising an ever closer union of the peoples of Europe (organised as States) and not a state based on the people of one European nation (**Article A** of the Union Treaty)”.³¹ It is said that the “Volk predates historically, and precedes politically the modern state”.³² The state is the political embodiment of a people and state rule-making should logically reflect and express the will of the largely homogeneous people. The Maastricht judgment shows this well, as its key passage reads:

“Each of the peoples of the individual States is the starting point for a state power relating to that people. The States need sufficiently important spheres of activity of their own in which the people of each can develop and articulate itself in a process of political will-formation which it legitimates and controls, *in order thus to give legal expression to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically.*”³³

²⁶ Grimm (1995).

²⁷ *Brunner v. The European Union Treaty*, [1994] 1 Common Market Law Reports 57.

²⁸ Moreover, the Maastricht judgement and Grimm's article both encapsulate a complex, sophisticated and sometimes contradictory argument, which makes it hard to flesh out the argument comprehensively. In the same way, it is to be realised that the critique of the no demos thesis I will present below is necessarily not directed against all variations, ‘soft’ or ‘hard’, of that thesis. For a “composite version of the No Demos thesis culled from the [Maastricht judgment] and some of the principal exponents of this thesis”, see Weiler (1995), p. 224 *et seq.*

²⁹ See further Weiler (1995), pp. 225-226.

³⁰ This is an obvious fact. A general supposition is that the European Union can be placed “somewhere between being a society of states and a federal state”: Sap (1997), p. 257.

³¹ *Brunner*, *supra* n. 27, para. 51.

³² Weiler (1995), p. 226.

³³ *Brunner*, *supra* n. 27, para. 44. Emphasis added.

How the no demos thesis is related to constitutions, is shown by Dieter Grimm. First, he points out that there is, in principle, a possibility to disconnect the constitution from the state because “[w]hat needs legalisation once the State’s monopoly of power goes and it shares its authority with non-State bearers is, then, sovereign power, irrespective of whether it lies with the State or a suprastatal entity”.³⁴ He also states that the European Treaties “have various functions in relation to the European Union’s public power that domestically go to constitutions”.³⁵ In his opinion however, it can be said that “it is inherent in a constitution in the full sense of the term that it goes back to an act taken by or at least attributed to the people, in which they attribute political capacity to themselves”.³⁶ The European Union lacks this fundamental requirement because European public power is “not one that derives from the people, but one mediated through states”.³⁷ In other words: there is at present no European demos, no true European democracy and the European Union thus does not have a constitution in the full sense of the term. This also entails that the European Parliament actually is not a real parliament and that extending its powers would probably even exacerbate the problems of European democratic legitimacy.³⁸

Instead of enumerating rigid criteria to be fulfilled for the existence of a demos, Grimm takes a more cautious approach, distancing himself explicitly from the ethno-centric, Schmittian idea of a “homogeneous ‘Volksgemeinschaft’”.³⁹ He simply states that there is no European people, pointing to the “weakly developed collective identity” of the Union citizens.⁴⁰ His main argument, however, focuses on the conditions for democracy. He states that a prerequisite for a democratic society is the existence of mediatory structures closely linking the institutions, as the framework that exercises state power, to the people, as the possessor of state power.⁴¹ At the European level however, the conditions for a European mediation process are largely lacking, as there are no mediatory structures, no Europeanised party system and no European media. These conditions also cannot simply be created, the main impediment being Europe’s linguistic diversity. The absence of a European lingua franca obstructs the possibility of a true European democracy, as it constitutes “the biggest obstacle to Europeanisation of the political substructure, on which the functioning of a democratic system and the performance of a parliament depends”.⁴²

³⁴ Grimm (1995) p. 289.

³⁵ *Ibid.*, p. 291.

³⁶ *Ibid.*, p. 290.

³⁷ *Ibid.*, p. 291.

³⁸ *Ibid.*, p. 296-297: “[F]ull parliamentarisation of the European Union on the model of the national constitutional State will rather aggravate than solve the problem. On the one hand it would loosen the Union’s ties back to the Member States, since the European Parliament is by its construction not a federal organ but a central one. Strengthening it would be at the expense of the Council and therefore inevitably have centralising effects. On the other hand the weakened ties back to Member States would not be compensated by any increased ties back to the Union population. The European Parliament does not meet with any European mediatory structure in being; still less does it constitute a European popular representative body, since there is as yet no European people.” The Bundesverfassungsgericht, however, seems to put forward a different view: “At the same time, with the building-up of the functions and powers of the Community, it becomes increasingly necessary to allow the democratic legitimation and influence provided by way of the national parliaments to be accompanied by a representation of the peoples of the member-States through a European Parliament as the source of a supplementary democratic support for the policies of the European Union.”, *Brunner, supra* n. 27, para. 40. Weiler mentions this as one of the Court’s inconsistencies, Weiler (1995) p. 231.

³⁹ Grimm (1995), p. 297.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, p. 292 *et seq.*

⁴² *Ibid.*, p.295

Because of Grimm's insistence on a common language, it can certainly be argued that his endeavour to avoid the ethno-centric connotation of the demos fails.⁴³

The perceived weakly developed collective identity and low capacity for transnational discourse of the Union citizens lead Grimm to the conclusion that "the European democracy deficit is structurally determined" and that the "achievement of the democratic constitutional State can for the time being be adequately realised *only* in the national framework".⁴⁴ However, if we would add to the treaties "those elements that still separate it from a constitution in the full sense of the term", *i.e.* change the legitimating basis of the Union from being based on the Member States to being based on a single European people, "this would end up turning the European Union into a State".⁴⁵ This would, however, "not be an immediately desirable goal" because such a European state "could not meet the democratic requirements of the present [states]",⁴⁶ for it would actually be based on a fictitious legitimation: a structurally non-existent European demos. Grimm thus links the concepts of constitution, people, democracy and the state inextricably together. Even though Grimm at first recognises that non-state entities could in principle have a constitution, his observations make him conclude that "when it comes down to it constitutions are still something to do with States, and anyone calling for one for Europe should be aware what movement he is thereby setting going".⁴⁷

The no demos thesis can thus be summarised as follows. The demos is defined in ethno-cultural and organic terms and is conflated with the concepts of state, democracy and constitution. The European Union lacks a demos, is not an independent democratic source and does not have a constitution. If the EU were however to have a constitution based on a single European demos, however unlikely⁴⁸ and undesirable that may be, it would transform automatically into a state thereby replacing the national states and demoi.

2 The Critique

The no demos thesis has been the subject of severe critique,⁴⁹ and rightly so. Below, I will offer some lines of responses to the no demos view to show that it is fundamentally flawed in certain respects.

⁴³ Cf. also Mancini (1998), pp. 34-35.

⁴⁴ Grimm (1995) p. 297. Emphasis added.

⁴⁵ *Ibid.*, p. 298.

⁴⁶ *Ibid.*, pp. 297-298.

⁴⁷ *Ibid.*, p. 299.

⁴⁸ Grimm does keep the theoretical possibility of the future existence of a European people open, as he explicitly speaks of the fact that "there is *as yet* no European people", Grimm (1995), p. 297 (emphasis added). However, his insistence on a common European language, definitively impeding the existence of European communication systems as well as his statement that the democracy deficit is "structurally determined", indicate his scepticism as to the idea that a real European democracy based on one European people might ever be realised. It should further be pointed out here that also the Bundesverfassungsgericht seems to keep the possibility of a future European demos open: *Brunner, supra* n. 27, para. 41-42.

⁴⁹ Weiler is particularly harsh in his critique, stating with regard to the Maastricht decision: "I consider the Court's decision as regards the existing Community embarrassing: as regards its future evolution I find the decision sad, even pathetic.", Weiler (1995) p. 222.

2.1 Self-legislation, essentialism and constructivism

Hans Lindahl has provided a critical response to the no demos thesis, by focusing on the concept of popular sovereignty, or self-legislation.⁵⁰ The concept of self-legislation begs the question what the actual relationship is between the enactment of norms and the identity of a people.

The Bundesverfassungsgericht in its Maastricht decision has given a specific answer to this question. It held that the people, as the *pouvoir constituant*, is “the starting point for a state power relating to that people” and that the “process of political will-formation” gives “legal expression to what binds the people together”.⁵¹ In other words: the identity of a people is the prior normative closure, preceding the enactment of legal norms that express that identity. Thus, “to give legal expression to the identity of a community means, in the Constitutional Court’s opinion, to *reproduce* the values defining the people’s identity”.⁵²

This position, which can be called essentialism, stands in symmetrical opposition to the idea of constructivism,⁵³ supported by, for example, Jürgen Habermas:

“A nation of citizens must not be confused with a community of fate shaped by common descent, language and history. This confusion fails to capture the voluntaristic character of a civic nation, the collective identity of which exists *neither independent of nor prior to the democratic process from which it springs*. Such a civic, as opposed to ethnic, conception of ‘the nation’ reflects both the actual historical trajectory of the European nation-states and the fact that democratic citizenship establishes an abstract, legally mediated solidarity between strangers.”⁵⁴

Constructivism inverts the logic of the no demos thesis by claiming that legal norms can also *produce* identity and that the conceptual sequence standing opposite to that of the no demos thesis can also apply: first a state/constitution, then a people.⁵⁵ Whilst essentialism views the demos as the *starting point* of legal power, constructivism on the other hand sees it as its *end point*.

However, as Lindahl makes clear, adhering *either* to essentialism *or* to constructivism, is an unsatisfactory approach. Both have to be seen as conjunctive, rather than disjunctive. After all, if the enactment of legal norms is purely *reproductive* as in the view of essentialism, then “legal power becomes tautologous, the *a priori* confirmation of extant political boundaries”.⁵⁶ On the other hand, if “legal power is purely productive, such that the normative closure that counts as its point of departure cannot be recognised in the enacted norm, then legislation is no longer self-legislation. The enacted norm would no longer express the identity of a people, thereby forfeiting its claim to legitimacy.”⁵⁷ Thus, we have to conceptualise the “law-

⁵⁰ Lindahl (2000).

⁵¹ Brunner, *supra* n. 27, para. 44.

⁵² Lindahl (2000) p. 241. See further also Lindahl (2003).

⁵³ See also Cederman (2001).

⁵⁴ Habermas (2001) p. 15. Emphasis added.

⁵⁵ Lindahl (2003), p. 438: “Far from being radical, the idea of a *creatio ex nihilo* is simply the inverted image of pure repetition, and in this sense no different from the latter: both are manifestations of originalism.”

⁵⁶ Lindahl (2000), p. 243.

⁵⁷ *Ibid.*

making as *both* reproductive *and* productive of identity.”⁵⁸ Adopting “an unorthodox variation on a Kelsenian theme”⁵⁹, Lindahl shows that positing a legal norm *creates* the higher norm it *applies*.⁶⁰ To state that law-making is merely the application of a higher, more general norm, fails to appreciate the dynamic character of law. Due to changing contexts and insights, the enactment of legal norms does not merely apply a higher norm, but at the same time, to a greater or lesser degree, creates and transforms that higher norm. At the top of this hierarchical structure of norms, stands the basic norm of the legal order: the identity of its people.

Thus, the dialectical structure of a legal act means that the process of which the Bundesverfassungsgericht speaks, of giving “legal expression to what binds the people together” not only repeats and applies the identity of the people, it also transforms and creates that identity.⁶¹ The preamble to the Treaty of Rome speaks of “an *ever closer union* among the peoples of *Europe*”.⁶² This shows that unity is the *telos* of integration. However, this sentence also shows that, when the Treaty of Rome was signed, there *already* was a union, a community of peoples that aspires to grow closer through integration. This community was not initiated by the Rome Treaty. Rather, the Treaty builds on and repeats this normative closure, which at the same time is transformed and created by the Treaty. Similarly, the preamble to the TEU speaks of “reinforcing the European identity”⁶³. Important is that the word “reinforcing” is used, indicating the *repetition* of a normative closure. In a minimal sense, a European identity, a European people is seen both as the starting point and as the terminus of the European integration process. The European identity is the presupposition of the process of integration, which builds on, gives more concrete content to and reinforces that identity. This shared identity, this single European demos, by no means precludes the existence of a plurality of diverse European peoples on which it is based: there is unity in diversity.⁶⁴

The simultaneous application and transformation involved in enacting legal norms, entails that legal acts are always to a certain extent transgressive and that identity is in a constant flux:

“[T]he act of positing a legal norm is always, to a greater or lesser extent, *ultra vires*. In as much as positing a legal norm not only applies a normative boundary but also creates it, power moves outside the law. Legal power is also always more or less unbounded power, and the legal act is also always, to a greater or lesser extent, a transgression of identity. Thus, the relation of dependence between power and legal boundaries is always *two-way*. On the one hand, power cannot claim to

⁵⁸ *Ibid.*, p.244.

⁵⁹ *Ibid.*

⁶⁰ Lindahl uses the ECJ’s evolving interpretation of Article 28 TEC to illustrate this double structure of a legal act: Lindahl, *ibid.*, pp. 244 *et seq.*

⁶¹ As Lindahl convincingly argues, this holds for “every legal act, not merely for the acts of the ‘highest’ legal body in a democratic polity, e.g. parliament, for the creation of identity takes place in contracts as much as in the enactment of statutes, in adjudication no less than in administrative acts”. Lindahl, *ibid.*, p. 248.

⁶² Emphasis added.

⁶³ It is true that this phrase in the preamble only refers to the limited context of the common foreign and security policy, but “[c]learly, however, presupposing European identity determines the integrative process as a whole”, Lindahl (2000), p. 250.

⁶⁴ Interesting to note is that the Convention’s Draft Constitution states that “[t]he motto of the Union shall be: United in diversity”, Article IV-1 of CONV 850/03.

be legitimate unless it is conditioned by – applies – a prior normative boundary. On the other hand, the legal act also conditions this normative boundary, establishing its meaning for the situation in which it must be applied. Hence, if the legal act *repeats* a normative closure, it also introduces difference therein. The ‘end point’ of legal power neither fully coincides with, nor entirely abandons, its ‘starting point’. The legal act is neither pure repetition nor pure difference; rather, repetition deploys difference, and difference contains repetition. [...] And, to the extent that the applied norm itself concretises the identity of a polity, legal dynamics ultimately deploys a dialectic of identity. The structure of the legal act suggests, therefore, that identity has no ‘zero point’. There is no identity of a people that law could capture in its pristine originality. Not unlike Midas, the legal act transforms the identity of a people in the very act of apprehending it.”⁶⁵

Lindahl does not give an answer to the question how the European identity and demos, as ‘*Grundnorm*’ of the EU legal order and as presupposition and *telos* of the integration process, must be “defined” or perceived. After all, in his view identity is no *a priori* given that is independent of representation.⁶⁶ Rather, identity is something that is in constant flux and that consequently can only be “defined” *ex post*, and always in a provisional way. However, in order to come to a stronger rejection of the no demos view, it is relevant in my opinion to take a closer look at the concept of demos to see what it actually means.

2.2 The concept of demos

It is argued that the specific view of the demos put forward by the no demos thesis, is to be used with great care and in any case is an *incomplete* one.

Firstly, when we have regard to our present Western, multi-cultural, pluralistic societies, we should realise that the ‘thick’ demos, which the no demos thesis advances should be used in a relative, rather than in an absolute sense. As Koopmans remarks on the Maastricht judgment:

“In zijn nogal lyrisch gestemde passages over het ‘Staatsvolk’ valt het gerecht bijv. terug op de gedachte van de homogeniteit van de bevolking als wezenskenmerk van de democratie, met een beroep op Herman Heller. De implicatie is kennelijk dat een stedeling uit Aarhus of Aberdeen zich niet erg homogeen zal voelen met een boer uit de Peleponnesus of een kloosterling uit Trapani. Daar steekt op zichzelf wel iets in, maar het is als argument lichtelijk lachwekkend in een tijd waarin honderdduizenden Turken in Berlijn wonen en waarin Londen, *for all practical purposes*, een multi-etnische stad is geworden. Als de

⁶⁵ Lindahl (2000), p. 248.

⁶⁶ Lindahl (2003), p. 447: “If constituent power claims to represent the common good, the inverse holds as well: there is no direct access to the common good; it is only accessible mediately, by way of its representations. Deprived of representations which *concretise* it, the common good is but an empty normative signifier which provides no normative orientation whatsoever.” Emphasis in original.

homogeniteit van het ‘Staatsvolk’ al mocht worden bedreigd, dan is het van binnen, en niet door de monetaire unie.”⁶⁷

Thus, the homogeneity of the national people, of which the Bundesverfassungsgericht speaks, should be treated cautiously. Whereas a national demos is obviously thicker and more homogeneous than the European demos, it is to be realised that any reference to national homogeneity is relative rather than absolute.⁶⁸

Secondly, Weiler has convincingly challenged the view that the concept of demos be understood *exclusively* in organic cultural homogeneous *Volkish* terms. Rather, we should also understand the concept of demos (and the European demos in particular) “in non-organic civic terms, a coming together on the basis not of shared ethnos and/or organic culture, but a coming together on the basis of shared values, a shared understanding of rights and societal duties and shared rational intellectual culture which transcend organic-national differences”.⁶⁹ National and European citizenship can be distinguished as well as related in terms of a value matrix that has

“two civilizing strands: material and processual. The first subordinates the individual and the national society to certain substantive values. The second subordinates them to the discipline of decisional procedures representing a range of interests and sensibilities going beyond the national polity. Naturally, the two are connected. We are willing to submit aspects of our social ordering to a polity composed of “others” precisely because we are convinced that in some material sense they share our basic values. It is a construct which is designed to encourage certain values of tolerance and humanity.”⁷⁰

In this sense, by pointing to the European identity and the common basis of Europeanness,⁷¹ we thus partially take the no demos thesis on board, albeit with a

⁶⁷ Koopmans (1994), p. 248. Translation [MB]: “In its rather lyrical passages on the ‘Staatsvolk’ the Court for example falls back to the thought of the homogeneity of the people as a fundamental feature of democracy, referring to Hermann Heller. The implication is apparently that a citizen from Aarhus or Aberdeen does not feel very homogeneous with a farmer from the Peloponnesus or a conventual from Trapani. This holds some water, but as an argument it is slightly ridiculous in a time in which hundreds of thousands of Turks live in Berlin and in which London, for all practical purposes, has become a multi-ethnic city. If the homogeneity of the ‘Staatsvolk’ were threatened at all, then it is from the inside, and not by the monetary union.”

⁶⁸ See also Van Gerven (1996), p. 83: “If the notion of ‘State’s people’ refers instead to the identity of the people living in the territory of a state, then it has a very vague and loose content assuming as it does, when applied to a multicultural state like my own, Belgium, that there is a Belgian people, which is not exactly the identity which the Flemish and the Walloons living in Belgium ascribe to themselves. But if that is nevertheless the kind of *Staatsvolk* that Kirchhof has in mind also for a multicultural state, then there is not only a Belgian people but also a European people which is as real as the Belgian people (as distinguished from the Flemish or Walloon peoples).”

⁶⁹ Weiler (1995), pp. 243-244. Pernice (1999), p. 721 states: “[T]his foundation of identity emerges from the agreement on common values, which express an emerging political culture based on equal rights and which include the liberty to be different. Thus, the identity of the European citizen is founded on law expressing common values, not on any kind of presumed homogeneity.”

⁷⁰ Weiler (1999), p. 347.

⁷¹ Think of the shared European values of mutual social responsibility and respect for human rights, most obviously in the EU context the prohibition of discrimination on grounds of nationality. At the start of the integration process, Europe was already ‘united’ in sharing these common values; it was ‘united’ in its belief that international cooperation was a necessary response to cross-border problems that could not be dealt with sufficiently by the weakening Nation State in an increasingly

fundamentally different conception of the European demos.⁷² True, the European integration process in its constructivist form has been dominant, continuously giving further and more concrete shape to European identity. However, it would go too far as to state that the inception of the integration process simultaneously marked a *complete construction* of identity and of those shared values. The phrase “an ever closer union among the peoples of Europe” might have caused some confusion when it first appeared in the 1957 Rome Treaty. However, it precisely indicates the existence of certain ‘pre-ingredients’, constituting the minimal essentialist and legitimating basis of the integration project that constructivism has not truly affected.

The concept of a civic demos requires us to decouple nationality (in the organic, national-cultural sense) and citizenship and *Volk* from demos, something that is inconceivable for the no demos thesis. Weiler remarks:

“Is it really not possible for an individual to have very strong and deep cultural, religious and ethnic affiliations which differ from the dominant ethno-cultural group in a country and yet in truth accept full rights and duties of citizenship and acquit oneself honourably? [...] Note, too, that the view that would decouple Volk from Demos and Demos from State, in whole or in part, does not require a denigration of the virtues of nationality – the belongingness, the social cohesion, the cultural and human richness which may be found in exploring and developing the national ethos. It questions whether nationality in the organic sense, as a guarantor of homogeneity of the polity, must be the exclusive condition of full political and civic membership of that polity. Let me not mince my words: To reject this construct as impossible and/or undesirable is to adopt a worldview which ultimately informs ethnic cleansing.”⁷³

The TEC’s provision on citizenship is striking:

“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.”⁷⁴

interdependent world; and it was ‘united’ in its desire to create a framework that would guarantee much-desired and needed peace and security in Europe by taming the ‘national’ (Eros, as Weiler (1999), Chapter 10 calls it) through the ‘supranational’.

⁷² As indicated before, Lindahl does not agree with giving any kind of particular, set content to the demos, as it is a fluid and ever-changing concept. In this sense, he disagrees with Weiler’s efforts to define the civic demos: “[B]y enumerating a series of *shared* values as the normative foundation of the European Union, Weiler effectively postulates a form of relative homogeneity (!) as conditioning the legitimacy of European law, albeit not necessarily a ‘cultural-organic’ homogeneity. [...] The Constitutional Court (and Schmitt) would no doubt concur!”, Lindahl (2000), at p. 242. However, this is not an entirely satisfactory approach in contesting the ethno-cultural concept of demos as advocated by the Bundesverfassungsgericht. Thus, despite the fact that identity is in constant flux as a result of the constructivist element present in the positing of legal norms, it is nevertheless argued here that the idea of a civic demos, as a material and core concept on which identity is based, is useful in offering an alternative notion of identity to the unnecessarily thick and rigid concept that the German constitutional court has advanced.

⁷³ Weiler (1995), p. 251.

⁷⁴ Art. 17(1) TEC.

This provision could be understood “as the very conceptual decoupling of nationality/*Volk* from citizenship and as the conception of a polity the demos of which, its membership, is understood in the first place in civic and political rather than ethno-cultural terms”.⁷⁵ Thus, one can belong simultaneously to two, co-existing demoi: a ‘thick’, national demos and a ‘thin’, civic, European demos. The latter does not replace the former but rather complements it.

2.3 Some erroneous conflations

The no demos thesis tends to conflate the concepts of state, constitution, demos and democracy.⁷⁶ The demos, characterised by a certain degree of spiritual, social and political homogeneity and (often) characterised by the use of a common language, is linked almost inextricably to the state. A constitution of a democratic polity needs to be based on a single, thick demos. Such a demos and constitution necessarily implicate a state. Remarkable is the enslavement to the notion of state, which is considered the only viable framework for constitutional democracy.

However, these conflations are ill-founded. First of all, the ‘thick demos’ is often, but certainly not *exclusively* linked to the democratic state as reality shows. Mancini points, amongst others, to states like South Africa and India, which are comprised of several nations, or thick demoi, but which are nevertheless democracies.⁷⁷ Examples like these tell us that democratic states need not necessarily be based on a largely homogeneous people but may also be based on a plurality of nations and languages. Next, Paul Craig explains that constitutions, as Grimm asserts, do not necessarily have to go back to an act taken by or attributed to the people as the empirical and normative foundation for that claim is not readily apparent.⁷⁸ Also, the alleged indissoluble relation between constitution and state, especially when having regard to our post-Westphalian world, is unjustified.⁷⁹ After all:

“When considering the evolution of the notions of ‘State’ and of ‘Constitution’ from an historical perspective [...], one can note two things: first, that the notion of ‘Constitution’ is older than the notion of ‘State’, and, secondly, that a constitution is not necessarily reserved to the ‘sovereign state’ as defined in the modern age. [...] A prerequisite for a constitution is the existence of a political community: a state as such is not required. In other words, the shape of the political system depends upon the provisions of the constitution. With the notion of ‘constitution’ thus understood in a wider sense, notably as the basic

⁷⁵ Weiler (1995), p. 252.

⁷⁶ Again, it needs to be borne in mind that not every version of the no demos thesis would make the same extreme conflations (*e.g.* the Maastricht judgment hints at the possibility of post-State democracy, see *supra* n. 38). Also, as we will see in Chapter IV, Joseph Weiler, even though being a fierce opponent of the no demos view, nevertheless subscribes to certain parts of this cluster of conflations.

⁷⁷ Mancini (1998), pp. 36-37.

⁷⁸ Craig (2001), pp. 137-138.

⁷⁹ As Di Fabio (2001), p. 163 phrases it: “One who simply dismisses the idea of constitutionalizing the European Union ignores the fact that Europe has long been in the midst of a transitional era in which the connectivity between the sovereign state and the constitution is being dissolved. The opening of states both internally and externally, the emerging triumph of economic rationality over the power plays of territorial politics, and the accelerated search for legal and political forms and for future-oriented cultural concepts for the global economic community no longer permit unequivocal insistence on the classical concept of the constitution as the expression of state autonomy.”

legal order of a political system, there is no obstacle for the capacity of the European Union, being not a state but a supranational entity *sui generis*, to have a constitution. Moreover, the term ‘constitution’ has already been applied to the foundation charters of other international organizations.”⁸⁰

A European constitution does not *inevitably* lead to a European state.⁸¹ The changes that would be needed in order to create a European state (such as full EU sovereignty in all external matters, a European army and police force, a common European fiscal policy etc.) would not be brought about by the mere enactment of a constitution. Of course, it would certainly be possible “for a European Constitution with the ‘people at the helm’ to frame its substantive content in a more pro-centralist manner, but there is no necessary reason why this should be so”.⁸² After all, “[t]here is a range of options as to the substantive content of any European Constitution, and this is so even if one posits the states as the Masters of the Treaties”.⁸³ However, it has to be accepted that there remains a strong link between the two concepts, as constitutions are often *traditionally* defined as the basic law of a state.⁸⁴ Adopting a broad view of a constitution, requires us to cut “the umbilical cord connecting the constitution and the nation-state”,⁸⁵ something not everyone considers as acceptable.

The no demos thesis conceives of the relationship between Europe and its Member States in either-or terms. This exactly is the big danger and fallacy of the thesis. Proponents of the thesis hold that presently, the only legitimate source of democracy is the Nation-State and that if we were to create a European demos, as construed in their conception of it, it would necessarily mean the destruction of the separate national demoi, thereby creating a European state. It is thus a zero-sum game, the existence of national demoi alongside a European demos is simply excluded. In the European context, such a view is particularly difficult. The thick conception of demos simply denies the existence of a European democracy, and puts all weight solely on national democracies. This surely cannot be so:

“Whether or not there is a European demos, it is hard to see how in the already *existing* stage of European integration both pre- and post-Maastricht, statal structures, processes and institutions alone, including the German Federal Constitutional Court itself, can possibly provide adequate democratic guarantees for the European construct. [...] Whatever the original intentions of the High Contracting parties, the

⁸⁰ Dorau and Jacobi (2000), pp. 417-418. Regarding the last observation in the quote, Piris (1999), pp. 558-559 notes: “A magnificent example exists in international law, for an entity which obviously does not pretend in any way to be a State: the International Labour Organization (ILO) was created in 1919 by the adoption of a ‘Constitution’; the ILO is still governed to this day by its founding ‘Constitution’.” Fassbender (1998), pp. 568 *et seq.* specifically terms the UN Charter as a constitution.

⁸¹ Craig (2001), p. 138. Also politicians advocating a European constitution have continuously stressed that they do not thereby envisage the creation of a European superstate. See *e.g.* Chirac (2000), Jospin (2001) and Rau (2001).

⁸² Craig (2001), p. 139.

⁸³ *Ibid.*

⁸⁴ See Dutheil de la Rochère and Pernice (2002), pp. 6-7, where it is pointed out that the Austrian, Finnish, Spanish, Luxembourg, Greek, Italian and German reports to the FIDE Congress of October 2002 all give a definition of a constitution as being related to states only. It is however stated that this *traditional* concept of constitution has been questioned “with regard to the recent developments of the European Union”.

⁸⁵ De Witte (2002a), p. 39 at n. 1.

Treaties establishing the European Community and Union have become like no other international parallel, and national procedures to ensure democratic control over international treaties of the state are clearly ill-suited and woefully inadequate to address the problems posited by the European Union.’⁸⁶

The European Union is already based on a European demos, it does have its own democratic source and is indeed capable of having a constitution. This is not to deny that the national democracies are not valuable, on the contrary. But it must lead us to the conclusion that national states surely are not the *only* framework in which the democratic constitutional state can be adequately realised as Grimm suggests. Both the Member States and the European Union constitute a source of democracy and their relationship is complementary rather than exclusionary.

3 Concluding remarks

To conclude, it can be said that the no demos critique, in the words of Neil Walker, “is surely overstated, its essentialist premise unsustainable”.⁸⁷ The double structure of the legal act shows that the position of essentialism, which underlies the no demos thesis, is but a half-truth as it must be seen in a conjunctive relation with constructivism. The simultaneous *presentation* and *representation* of identity involved in the enactment of legal norms, means that identity is the presupposition of European integration, which, to a certain extent, further constructs and transforms that identity.

The ethno-cultural view of demos is to be used in a relative sense and is incomplete. The European demos must after all be conceived of as a thin, civic demos, which does not stand in a conflictual relation with the thick, national demoi. The no demos thesis displays an unnecessary enslavement to the notion of state, erroneously conflating the concepts of state, constitution, demos and democracy. The problem the no demos thesis indicates is not that there is no European demos at present, but rather that there might be one in the future. The relation between the Member States and the EU legal order is sketched in zero-sum terms: the existence of a European demos and the creation of a European constitution would automatically entail the coming into being of a European state and consequently the replacement of the national demoi and states. This is the direct consequence of the fact that the criteria that are developed for the existence of a demos are too rigid and incomplete and fail to appreciate the civic character of a demos. It must instead be realised that the relation between the constitutional orders of the Member States, with their thick demoi, and the constitutional order of the European Union, with its thin, civic demos is not conflictual but complementary, cooperative and co-existent.

⁸⁶ Weiler (1995), p. 231-232.

⁸⁷ Walker (2002c), p. 352.

III THE CURRENT EU CONSTITUTION

*1 A gradualising approach towards constitutionalism*⁸⁸

The question of whether or not the EU can be conceived of as a constitutional legal order can not be deemed an empirical one. There is simply no set empirical closure against which one can conclusively determine whether or not there presently is a European constitution, as fierce debate on this matter shows.

Interesting is Joseph Raz's notion of 'thin' and 'thick' constitutions.⁸⁹ In a thin sense the term is simply the law that establishes and regulates the main organs of government, their constitution and powers. This thin sense of the term constitution is tautological, in that every legal system will have such rules. The thick sense of a constitution is less clear and Raz gives seven features which are important in this respect.⁹⁰ However, not only does such a characterisation of a constitution yield, as Raz notes, a vague concept, the seven features that are given are moreover only concerned with the nature of constitutions *in general*. Whereas some constitutions address all of the given features in great detail, others only do so to a limited degree. To make things worse, the inclusion of certain features in the list Raz gives is also normatively contestable.⁹¹ Thus, it is observed that a constitution is not a very precisely definable concept.

This opens up the way of perceiving differing *degrees* of constitutionalism. Concrete conceptualisations of a constitution strongly diverge and range from an approach of "trivial minimalism" – as adopted for example by Jack Straw who stated that even "Golf Clubs have constitutions"⁹² – to "extreme maximalism" – looking at constitutions with the presupposition of a thick demos and linking the concept inextricably to states. Trivial minimalism, however, may be too weak⁹³ and extreme maximalism, as already suggested above, too strong. Because of these diverging conceptions of constitutionalism, it is suggested that adhering to a single concept of constitutionalism is a false and unnecessarily dichotomising approach. Rather, we must adopt a gradualising approach towards constitutionalism. On this gliding scale of constitutionalism, there is a certain threshold beyond which it is appropriate to speak of a constitution.

In this context, it is often assumed that the European Union currently finds itself beyond this threshold, as it is often described in constitutional terms. As Bruno de Witte remarks:

"[T]he terms "European Constitution" and "European constitutional law" are often used, especially by the European legal community, to

⁸⁸ Constitutionalism can be defined as "the set of beliefs associated with constitutional government", Walker (1996), p. 267 or: "the normative discourse through which constitutions are justified, defended, criticised, denounced or otherwise engaged with", Walker (2002c), p. 318. See further also Shaw (1999), p. 582 *et seq.* and Craig (2001), pp. 127-128.

⁸⁹ Raz (1998), pp. 153-154.

⁹⁰ *Ibid.* The seven features he gives are that a constitution needs to be constitutive, stable, written, superior, justiciable, entrenched, and that it should express a common ideology.

⁹¹ Craig (2001), p. 127.

⁹² Straw (2002).

⁹³ Neil Walker ironically remarks on Straw's statement: "This attitude fails to acknowledge that the European Union, unlike any golf club with which I am acquainted, is an active geo-political player, implicated like all such active players in the competition for scarce symbolic resources.", Walker (2003b), at n. xii.

describe the current EU system. Many present and former members of the European Court of Justice (ECJ) have used these expressions in their scholarly writing. They are used in the titles of general textbooks, collected essays on EU law, and countless articles in law reviews. Entire monographs have been devoted to the systematic examination of the constitutional character of European law, and universities all over Europe offer courses on ‘the constitutional law of the European Union’.”⁹⁴

But how can this increasing “constitutional talk” with regard to the EU be explained? It is intended to show that, looking at the jurisprudence of the ECJ and the European Treaties, there is indeed a strong case for the description of the EU legal order in constitutional terms.

2 *The constitutionalisation thesis*

The ‘constitutionalisation’ or ‘transformation’ thesis holds that the EC/EU has developed from a creature of international law to a federal-type, constitutional legal order, conferring judicially enforceable rights and obligations on public as well as private parties.⁹⁵

The European Court of Justice’s famous doctrines and the specific language it used to describe the nature of the EU system have done most to fuel the constitutionalisation claim.⁹⁶ Most prominent are the ECJ’s notorious doctrines of direct effect⁹⁷ and supremacy,^{98,99} which have been *generally* accepted by the national courts.¹⁰⁰ Also

⁹⁴ De Witte (2001b), pp. 21-22.

⁹⁵ See *e.g.* Stein (1981), Piris (1999), pp. 559-565, Weiler (1999), Chapter 2 and Craig (2001), pp. 128-130.

⁹⁶ As Stein (1981), p. 1 put it: “Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.”

⁹⁷ This doctrine, which was first enunciated in Case 26/62, *Van Gend en Loos*, [1963] ECR 1, can be defined as “the obligation of a court or another authority to apply the relevant provision of Community law, either as a norm which governs the case or as a standard for legal review”, Prechal (1995), p. 276.

⁹⁸ Supremacy meaning that Community law can not be overridden by domestic legal provisions. This principle was constructed in Case 6/64, *Costa v. ENEL*, [1964] ECR 585. Later, the ECJ also firmly established that Community law cannot even be overridden by the basic constitutional law of a Member State in Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125.

⁹⁹ Jackson (1992), p. 330 notes that making international norms directly applicable and endow them with a higher status “means that the treaty norm has been “constitutionalized,” or given a sort of “constitutional status” almost equivalent to the nation’s own constitution”. See further generally on direct effect and supremacy Craig and De Búrca (1998), Chapters 4 and 6 and De Witte (1999).

¹⁰⁰ Whereas direct effect was rather easily accepted by the national courts, this was not the case for the reception of the supremacy principle, which proved a lot more difficult. Ordinary supremacy, *i.e.* supremacy of EC law over national legislation and lower national law, has by and large been accepted. But the same can certainly not be said about absolute supremacy, *i.e.* supremacy of Community law over provisions of the national constitutions. The probable reason for this is that the Member States’ supreme courts “recognize the privileged position of EC law, not by virtue of the inherent nature of that law, as the Court of Justice would have it, but by grace of their own constitutional system. This does not matter too much for the relation between Community law and ordinary legislation, because all national courts have found the legal resources to ensure, by and large, the supremacy of Community law in those cases. But when it becomes a matter of deciding a conflict between EC law and a norm of constitutional rank, the theoretical basis matters very much. If the courts (and other national authorities) think that Community law ultimately derives its validity in the domestic legal order from the authority

relevant to mention here are the doctrine of implied powers, pre-emption, and the ECJ's jurisprudence on fundamental rights.

Crucial have also been the specific *terms* in which the ECJ has described the Community system. In the *Van Gend en Loos* case, the ECJ held that:

“the Community constitutes *a new legal order of international law* for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals”.¹⁰¹

The explicit reference to ‘international law’ the ECJ made in *Van Gend* was dropped later on. Already shortly after, in the case of *Costa v. ENEL*, the Court stated that:

“*By contrast with ordinary international treaties*, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.”¹⁰²

In 1986 the Court went significantly further, emphasising:

“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*.”¹⁰³

The European Treaties display a minimal content of a constitution. They contain the foundational values of the EU polity, they refer to rights which are also found in many national constitutions¹⁰⁴ and they contain organisational provisions on the European institutions and the specific powers they have. It is evident that the Treaties which form the foundation of the Union “go far beyond classic international treaties, and they do indeed contain some important elements which are mentioned by law dictionaries as defining what a Constitution is”.¹⁰⁵ It should be pointed out that the European Court of Justice has so far only referred explicitly to the (E)EC Treaty as the Community's ‘constitutional charter’, leaving open whether the Maastricht Treaty on European Union merits the same qualification.¹⁰⁶ Even so, given the fact that the

of the constitution, then they are unlikely to recognize that Community law might simply prevail over the very foundation from which its legal force derives.”, De Witte (1999), pp. 201-201. Certain judgments of the national supreme courts, most notably in Italy and Germany (see *e.g. Brunner, supra* n. 27), show the difficulty those courts have in accepting the full and unconditional supremacy of Community law.

¹⁰¹ *Van Gend en Loos, supra* n. 97, p. 12. Emphasis added.

¹⁰² *Costa v. ENEL, supra* n. 98, p. 593. Emphasis added.

¹⁰³ Case 294/83, *Les Verts*, [1986] ECR 1339, para. 23. Emphasis added. See also Case C-2/88, *Zwartveld*, [1990] ECR I-3365, para. 16; *Opinion 1/91*, [1991] ECR I-6079, para. 1; and Case C-314/91, *Weber*, [1993] ECR I-1093, para. 8.

¹⁰⁴ *E.g.* the provisions on the prohibition of discrimination (Articles 12, 13 and 141 TEC) and the citizenship provisions of Articles 17-22 TEC. Also relevant to mention are Article 6, paras. (1) and (2) and Article 7 TEU.

¹⁰⁵ Piris (1999), p. 559.

¹⁰⁶ De Witte (2001b), p. 22, states that “There may be doubts, in fact, as to whether the EU Treaty, as adopted in Maastricht, deserves the qualification of a “constitutional charter””, in the context of which

EU must be seen as a single legal order,¹⁰⁷ it must be assumed that also the TEU qualifies as a constitutional document.¹⁰⁸ It should again be stressed that, even though the EU has a constitution, this is obviously not equivalent to using that term to mean a stately constitution. The fact that the European Union can be said to be endowed with a constitution, by no means entails that it *is* a state, nor that it is, or should be, in the process of *becoming* one.¹⁰⁹ As already indicated above, constitutions and states are strongly related, but far from being conflated. Constitutions may very well exist in post-state settings such as the European Union and this does not have any far-reaching ‘stately consequences’.

The European Union clearly can not be viewed anymore as a traditional international organisation. After all, it has strong supranational features, such as an independent Commission, a directly elected European Parliament, qualified majority voting in the Council and an independent Court with the power of binding decision making. The EU also unfolds its activities into a vast range of policy areas, which made Koen Lenaerts even conclude that “[t]here simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community”.¹¹⁰

The foregoing analysis supports the argument that the EC/EU, which started its life as a traditional international organisation, has subsequently transformed into an autonomous, supranational and constitutional legal order with state-like and federal characteristics.¹¹¹ Thus, the European Union, as a vastly integrated post-state polity

he points to the ‘constitutional chaos’ of pillars and opt-out protocols caused by the 1992 TEU and the lack of judicial review in the second pillar.

¹⁰⁷ See Von Bogdandy (1999), p. 887: “The terms ‘Communities’ and ‘pillars of the European Union’ do not demarcate different organizations but only different capacities with partially specific legal instruments and procedures. All the Treaties and the secondary law form a single legal order.” Confer also Art. 3 TEU: “The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.”

¹⁰⁸ Cf. also Lenaerts and Desomer (2002), pp. 1219-1220 (especially n. 13).

¹⁰⁹ Weatherill (2002), p. 5: “The discourse of constitutionalism has tended to induce the suspicion that the Community/ Union is en route to becoming a State in its own right. This is not at all a necessary logical progression, however, and it is at best superficial and, worse, misleading, both in a descriptive and a normative sense. Better, it is submitted, to treat the Community/Union as acquiring State-like functions. [...] So it is not a State but, more importantly, it is submitted that it should not be treated as aiming for that status, nor should it so aim. The Union is, in short, a response to the political and economic failings of States in Europe and it would sell its ambitions short, while simultaneously disregarding its history, if it were simply to attempt to re-establish the traditional State, albeit at pan-European level.” It can be stated that the idea of creating a single, centralised European state completely subsuming the European Nation States, is outdated and undesirable. Pleas for the creation of a European State are indeed rare. For an example of such a plea, however, see Mancini (1998) and the response to Mancini by Weiler (1998b).

¹¹⁰ Lenaerts (1990), p. 220. See, however, Walker (2002c), at n. 107.

¹¹¹ The European Community/Union has often been attributed federal-type qualities. See *e.g.* Steyger (1995), Chapter 1; Goudappel (1997), Chapter 6; Börzel and Risse (2000) and Börzel (2003). It is significant that Article 1 of an earlier Convention draft, CONV 528/03, stated that the EU “shall administer certain common competences on a federal basis”. However, the mentioning of the ‘f-word’ sparked much controversy, most notably in the UK “where its connotations are of the ‘superstate’ of Eurosceptic nightmares”: *Analysis: The document that will shape Europe’s future*, The Independent, 7 February 2003. This eventually led to the, by the UK warmly welcomed, removal of the term ‘federal’ from the Convention’s final Draft Constitution. See also *Hain claims victory on EU treaty*, The Guardian, 27 May 2003.

Also interesting in this respect is the debate on the apt terminology to describe the (present and future) EU system. Noteworthy are terms that reflect the federal characteristics of the EU, such as ‘supranational federation’ and ‘federation of States’ (which Bruno de Witte considers the best terms to

which exercises sovereign powers, finds itself past the aforementioned constitutionalism threshold, which makes it appropriate to speak of a constitutional European legal order, based on a constitution¹¹² that goes beyond any valid minimalist conception of a constitution.¹¹³ This assertion is, however, contested, as we will see now below.

3 Defensive internationalism

The constitutionalisation thesis is contested by a sizeable group of scholars who take the approach of ‘defensive internationalism’.¹¹⁴ This approach, “which, premised on the continuing integrity of state sovereignty, is the external complement and intellectual counterpart to internal state constitutionalism, seeks to grasp and contain all the transformations of authoritative structures and processes beyond the state within the traditional paradigm of international law”.¹¹⁵ The defensive internationalists thus depict the new legal order of the EU in terms of “a very old international law pedigree”.¹¹⁶

It is useful to briefly delve into the argument and I will take Jean Allain as an example here. He states that:

“Through the development of the doctrines of direct effect and supremacy the Court of Justice was able, by way of its case-law, which emphasized the States’ need to implement the spirit of Community treaties, to establish a ‘new legal order’. Yet, [...] this new order was based on a legal fiction which allowed for economic integration among all Community Members. The removal of this legal fiction reveals that the underlying basis of this ‘new’ Community legal order is none other than public international law.”¹¹⁷

Allain contends that the EC legal order remains an international one and that this is confirmed by the existence of direct effect and supremacy within the realm of public

describe the present European Union framework, De Witte (2000), p. 54). See further Brand (2002), pp. 108-111.

¹¹² A constitution that is to be found mainly in the form of the EU’s foundational treaties. Broadly speaking, the EU constitution also comprises the “complementary principles and rules developed by the Court of Justice” (Zuleeg (1997), p. 21) and the constitutions of the Member States (see Pernice (1999), p. 707: “The question “Does Europe need a Constitution” is not relevant, because Europe already has a “multilevel constitution”: a constitution made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties (*Verfassungsverbund*).” For the relation between Member States’ constitutions and the EU legal order, see Wouters (2000)).

¹¹³ See also Zuleeg (1997), p. 21: “If the minimal requirements are fulfilled, the entity in question has a constitution. The indispensable set of rules concerns the establishment of organisational structures which must have a certain stability. The rules determine, by whom and how, orders are given and such an organisational statute is to be found in the Foundation Treaties. The constitution of the European Community, however, is much richer than that minimum.”

¹¹⁴ See *e.g.* Wyatt (1982), Schilling (1996a), Schilling (1996b), Allain (1999) and Hartley (1999), Chapter 7.

¹¹⁵ Walker (2002c), p. 322.

¹¹⁶ *Ibid.*

¹¹⁷ Allain (1999), p. 261.

international law.¹¹⁸ These doctrines indeed exist within international law. As to direct effect, Allain points to the *Danzig* case, in which the Permanent Court of International Justice stated that “according to a well-established principle of international law” an international agreement:

“cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.”¹¹⁹

Also supremacy is not unique to EC law, as the International Court of Justice has observed that:

“[i]t would be sufficient to recall the fundamental principle of international law that international law prevails over *domestic law*. This principle was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since, for example in the case concerning the *Greco-Bulgarian “Communities”* in which the Permanent Court of International Justice laid it down that ‘it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty’.”¹²⁰

In other words, the supremacy principle of EC law “may well be unprecedented but it is not unrelated to the age-old rule *pacta sunt servanda*”.¹²¹

However, it is clear that there remains a big difference. Whereas in international law, judged against the intentions of the contracting parties, the direct effect of Treaty provisions certainly is *possible*, it is however *exceptional*, in contrast to the EC where direct effect is *presumptive*.¹²² A similar observation can be made with regard to

¹¹⁸ See also De Witte (1999), p. 210: “The principles of direct effect and supremacy, as presently formulated and accepted, continue to confirm the nature of EC law as that of a branch of international law, albeit a branch with some unusual, quasi-federal, blossoms.”

¹¹⁹ *Advisory Opinion on the Jurisdiction of the Courts of Danzig*, PCIJ Reports, 1928, ser. B, No. 15, p. 17.

¹²⁰ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ Reports, 1988, p. 12.

¹²¹ De Witte (1999), p. 209.

¹²² As Stein (1981), pp. 9-10 notes: “The majority of international law scholars read [the opinion in the *Danzig* case, *supra* n. 119] as creating a presumption against direct effect, to be rebutted only by explicit evidence of the intention of the parties to the contrary. If that is the correct interpretation of the Permanent Court’s view, the Court of Justice may be said to have taken a different position: because of the particular character of the Community Treaty, any presumption must be held to work in favor of, rather than against, direct effect.” See also Craig (2001), p. 131: “There are instances of international Treaties having direct effect. They are however relatively rare, and do not have the scope of application to be found in EC law.” Also Allain realises this, as he states that “[t]he notion of self-executing treaties is not foreign to the law of nations, however, as Pierre Pescatore rightly points out “the concept is nevertheless exceptional as far as international law is concerned”. This affirms the proposition that the Community law is not *qualitatively* different [from public international law], but given application

supremacy. In international law, the principle of supremacy applies, as the ICJ noted, to “the relations between powers”.¹²³ Applied to the Community context, this would mean that EC law prevails over national law only on the *inter-state* level, to be effectuated through the procedure of Articles 226 and 227 TEC. Supremacy as existing in Community law, however, reaches much further than that. It moves beyond internationalist supremacy, and instead amounts to *internal* supremacy of Community law, that is, the duty of *national* courts to enforce rules of Community law even when they are in conflict with national legal provisions.¹²⁴

It is clear that the existence within the EU legal order of the European Court of Justice, coupled with the important and innovative preliminary reference procedure of Article 234 TEC that allowed the Court to effectively penetrate the national legal orders and give instructions to national judges – both being elements themselves distinguishing the Community from international law – that opened up the way for the far-reaching effects of the doctrines of direct effect and supremacy. Under international law, it is certainly *possible* for international Treaty provisions to have direct effect and to be supreme. However, it normally are the *national* judges that get to determine whether this is the case or not. In the Community on the other hand, it was the *European Court of Justice*, backed up by the preliminary reference procedure, that elaborated the two doctrines in a generous and far-reaching way.¹²⁵ Of course, it is in the end up to the national judges whether they accept the vision put forward by the ECJ but, as noted before, they have generally done so.¹²⁶ We can thus conclude that the doctrines of direct effect and supremacy, although not unprecedented in international law terms, do have a deeper impact and a distinct, federal-like flavour in the Community context which sets the Community apart from traditional international law.

A further argument Allain makes is that the post-Maastricht era confirms the international character of the Union. He states:

“If the Court maintained a fairyland existence during its early years, allowing it to build a near self-encapsulated system of law which it considered to be based on a constitutional charter; the international character of European law was driven home with the conclusion of the Maastricht Treaty. Later confirmed at Amsterdam, the establishment of the European integration in the post-Maastricht era has taken on a decidedly public international law bent.”¹²⁷

in a *quantitatively* different manner.”, Allain (1999), p. 262 at n. 48 (Emphasis added). This latter argument, however, is not particularly strong. The very fact that direct effect *is* exceptional within international law and that there thus *is* a large (“quantitative”) difference does make Community law stand out from international law; that direct effect is “qualitatively” possible within international law does not, in my opinion, change this.

¹²³ *Supra* (text at) n. 120.

¹²⁴ As De Witte (1999), p. 183 notes: “Such a duty had never been considered to be part of international law, although the failure of the courts to enforce international treaty rules could, of course, be a contributory factor in the establishment of State responsibility under international law.”

¹²⁵ “It is indisputable that the EEC Treaty was a treaty with some strongly innovative features, and one of them was the preliminary reference mechanism which allowed the ECJ courageously to articulate a duty for national courts which may have been (and still is) implicitly contained in other international treaties as well – but there is no court for saying so.”, De Witte (1999), p. 209.

¹²⁶ *Supra* n. 100.

¹²⁷ Allain (1999), p. 264.

In this respect, Allain points to the limited jurisdiction given by the Maastricht Treaty to the ECJ under the intergovernmental second and third pillars. He also refers to variable geometry, or the “disintegration of the ideal of one Europe”,¹²⁸ as exemplified by the provisions of article VII TEU on closer cooperation and by the Schengen agreement and the EMU, in which not all Member States fully participate. Finally, Allain asserts that it is the *Member States* that retain ultimate control over the EU in their capacity of *Herren der Verträge*.¹²⁹ He states that Maastricht and Amsterdam ‘de-constitutionalised’ European integration¹³⁰ and ultimately confirmed the international law character of the EU.

It is of course true that the creation of the European Union significantly expanded the intergovernmental, international law features of the system. However, this has not affected the supranational character of the first EC pillar. The presence of intergovernmental elements within the EU structure does not refute the constitutionalisation thesis but rather points out the EU’s particular, *sui generis* character, in which supranational (federal) and intergovernmental (international) elements are combined. Moreover, Allain’s very observations should lead to the *opposite* conclusion than the one he arrives at. Maastricht significantly *extended* the process of European integration and the creation of the second and third pillar, be they largely intergovernmental, nevertheless at the same time signals a move *away* from international law. After all, they confer upon the Union competences in the important areas of Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal matters, policy areas which indicate more the existence of a constitutional legal order with state-like features than a normal international organisation under international law.

As has become clear from the preceding analysis, the position of defensive internationalism arguably can not undermine the cogent constitutionalisation thesis. Borrowing some useful metaphors, it can be said that to persist in describing the EU in purely internationalist terms is much like trying “to push the toothpaste back in tube”¹³¹ or “to force square pegs into round holes”.¹³²

Two final important points need to be made here. Firstly, it should be stressed that the answers to important questions like “[w]hether Community law should be supreme over national law, whether there should be any limits to this supremacy, and who should have the ultimate power to decide the boundaries of Community competence [...] do not inexorably follow from the choice between the competing visions of the Community legal order”.¹³³ It is observed that “[t]he internationalist perspective does not necessarily generate pro-state answers to these questions [...] [n]or does the constitutional perspective necessarily lead to pro-Community answers to these questions”.¹³⁴

¹²⁸ *Ibid.*, p. 267.

¹²⁹ As was stated by the Bundesverfassungsgericht in *Brunner*, *supra* n. 27, para. 55 (the English text reads ‘Masters of the Treaties’).

¹³⁰ Allain (1999), p. 271.

¹³¹ Weiler (1999), p. 298.

¹³² Walker (2002c), p. 337.

¹³³ Craig (2001), p. 134.

¹³⁴ *Ibid.*, pp. 134-135. For example, Weiler (1999), Chapter 9, has convincingly argued that adopting the internationalist approach gives force to the claim for the ECJ to possess judicial *Kompetenz-Kompetenz* (i.e. the competence to declare or to determine the limits of Community competence, which the ECJ reserved for itself in Case 314/85, *Foto-Frost*, [1987] ECR 4199), whereas it is ironically the constitutional approach which would be “more solicitous to an involvement of national jurisdictions in the determination of the jurisdictional limits of the Community legal order”, Weiler (1999), p. 291.

Secondly, defensive internationalism must primarily be understood as an argument that contests the assertion that the *present* European Union must be viewed as a constitutional legal order with its own constitution in the form of the Treaties preferring instead to describe the Union in internationalist terms. This does not mean, however, that defensive internationalism – though driven as the approach seems to be by a fear of post-state entities such as the EU eroding national sovereignty and transforming the traditional intergovernmental view of international law – also necessarily rejects the possibility or even the desirability of a *future* European constitution.¹³⁵

¹³⁵ See for example Schilling, who – even though he contests the constitutionalisation thesis by asserting that the European Treaties still are creatures of international law as the Member States have not been replaced as the source of treaty provisions by the European people exercising their constituent power (Schilling (1996a)) – nevertheless pleads for a European constitution to be adopted. He claims that the ECJ lacks interpretive autonomy and judicial *Kompetenz-Kompetenz*, which remains with the Member States and their courts and in Schilling (1996b), section VI, he states that “[t]o change this situation [*i.e.* ‘the ultimate pre-eminence of the national courts’], which is admittedly rather unsatisfactory from the viewpoint of European integration, I have been pleading - without seriously expecting short-term success - for a European constitution to be voted by the European people. From this angle, the whole analysis of the possible foundations of an autonomous Community legal order in my original article [Schilling (1996a)] should be read as an exhortation not to rely on the foundations that exist but to found the European Community on a constitution ordained by popular mandate. All efforts to found an autonomous legal order, *i.e.* an autonomous supremacy of Community law over national constitutions, including the pre-eminence of the ECJ over national courts, on any other basis, however sagaciously argued, are very much second best and, I submit, must ultimately founder”.

As argued above, I do not agree with Schilling’s view that there is currently no European constitution. Moreover, also his plea for a European constitution *to be adopted* raises questions. Firstly, it is unclear what Schilling means by having the constitution “ordained by popular mandate”. As we have seen earlier, the empirical and normative foundation for the claim that constitutions should go back to an act taken by or attributed to the people is not readily apparent, see *supra* n. 78. Also it is not clear how Schilling conceives of such a European people, whether it be in the ‘thick’ or the ‘thin’ sense. Next, it is not determined what the reason is for his scepticism as to the coming into being of a European constitution (“without seriously expecting short-term success”). In other words, it is not apparent what the specific requirements and consequences of such a future European constitution would be according to Schilling, but it seems that they are far-reaching considering his sceptical attitude. Also the reason Schilling gives for a European constitution to be created – namely the foundation of “autonomous supremacy of Community law over national constitutions, including the pre-eminence of the ECJ over national courts” – is a rather unusual and moreover flawed rationale, since the creation of a European constitution will not, unless when (undesirably) intended to found a European state, alter the constitutional pluralist pattern by relegating the national level to a sub-system of European law, which would then possess ultimate and uncontested legal and judicial supremacy. See further on this *infra*.

IV THE CASE AGAINST A EUROPEAN CONSTITUTION

Notwithstanding the fact that the “declining years of the 20th century have been described as [...] the global hour of the constitutional state”¹³⁶ and notwithstanding the increased interest in the constitutional status of the European Union and the explicit constitutional process that has been set in motion for this entity, it has been observed that the ideas of constitutionality and constitutionalism have been “subject to a perhaps unprecedented range and intensity of attack”.¹³⁷

Apart from the already sketched critical position of the no demos view, there are indeed quite some scholars who are opposed to the idea of creating a European constitution. In this chapter, I will take a closer look at three critical, interesting and related opinions that make the case against a further constitutionalisation of the Union.

*1 Joseph Weiler*¹³⁸

Weiler has asserted that, even though “the constitutional discipline which Europe demands of its constitutional actors [...] is in most respects indistinguishable from that which you would find in advanced federal states”, there still “remains one huge difference: Europe’s constitutional principles, even if materially similar, are rooted in a framework which is altogether different”.¹³⁹ The difference, according to Weiler, lies herein that “the institutions of a federal state are situated in a constitutional framework which presupposes the existence of a ‘constitutional demos’, a single *pouvoir constituant* made of the citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangement is rooted.”¹⁴⁰ In contrast, that presupposition does not exist in Europe, because:

“[s]imply put, Europe’s constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos and, hence, as a matter of both normative political principles and empirical social observation the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states where their federalism is rooted in a classic constitutional order. It is a constitution without some of the classic conditions of constitutionalism.”¹⁴¹

Weiler points out that Europe has rightfully rejected the federal state model and instead chose to preserve the distinct peoplehood of its component Member States, in contrast with federal states that predicate the existence of a single people. The current constitutional architecture of Europe encapsulates what Weiler calls “the Principle of Constitutional Tolerance” which is, according to him, “one of Europe’s most important constitutional innovations”.¹⁴² This principle means that we acknowledge

¹³⁶ Walker (2002c), p. 317, quoting Häberle.

¹³⁷ *Ibid.*, p. 318.

¹³⁸ See Weiler (2000a), Weiler (2000b) and Weiler (2002).

¹³⁹ Weiler (2000b).

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

and maintain the identity of the other (the alien), but at the same time, whilst preserving the boundaries, we reach *over* that boundary and accept the other as ourselves. The principle of constitutional tolerance then finds its basic expression in the words of the TEC's preamble: "Determined to lay the foundations of an ever closer union among the peoples of Europe".

These points are justified. As indicated earlier, the EU is not a state and also should not become one. Demos diversity in the EU is something to be preserved and the principle of constitutional tolerance indeed is an important principle in the European constitutional architecture. Weiler then, however, makes a distinction between the *current* constitution of the EU, and a "formal constitution". Weiler doubts whether "the constitutional discussion will actually result in the adoption of a formal constitution",¹⁴³ he doubts whether it is a useful response to concerns such as the issue of competences, and, importantly, he doubts whether it can still embody the principle of constitutional tolerance:

"Constitutionally, the Principle of Tolerance finds its expression in the very arrangement which has now come under discussion: a federal constitutional discipline which, however, is not rooted in a statist-type constitution."¹⁴⁴

Weiler fears that a "formal constitution" would violate the principle of constitutional tolerance by presupposing the existence of a single constitutional demos thus denying the distinct peoplehood of the EU Member States:

"Is it possible to adopt a formal constitution which would codify the principle of constitutional tolerance? I fear not. Tolerance is bred by the very fact that constitutional discipline is asked for, not demanded with the authority of a formal constitution backed up by a constitutional *demos*."¹⁴⁵

Thus, a "formal constitution" in Weiler's view would probably be a "statist-type constitution", such as it typically exists in federal states:

"Whether one could have a Europe which would respect the current constitutional *acquis*, would embed it in a formal constitution adopted through a European constituent power, but which would not, at the same time, become a federal state in all but name is very doubtful [...]. I think this view is a chimera".¹⁴⁶

Thus, when it comes down to it, Weiler also tends to conflate the concepts of constitution, people and state. He adheres to the constitutionalisation thesis and believes in the existence of a European constitution which is based on a thin, civic demos but nevertheless is against a "formal constitution" as this would, in all probability, contradict the principle of constitutional tolerance by suggesting demostatism rather than demos-diversity and post-statism.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ Weiler (2002), p. 569.

¹⁴⁶ Weiler (2000a), p. 238.

His argument, however, is rather weak. There is absolutely no reason to believe that a formal European constitution would *necessarily* violate the principle of constitutional tolerance. Just as much as the present constitution is based on this principle, also the future formal constitution could, and should, explicitly recognise the importance of the diversity of the European peoples.¹⁴⁷ Similarly, just like the present constitution does not entail the existence of a state, also a future formal constitution would not, and should not, signal the creation of a state. Weiler also realises himself that this objection could be made against his argument and he states:

“To extol the extant constitutional arrangement of Europe is not to suggest that many of its specifics cannot be vastly improved. The Treaty can be paired down considerably, competences can be better protected, and vast changes can be introduced into its institutional arrangements. But when it is objected that there is nothing to prevent a European constitution from being drafted in a way which would fully recognize the very concepts and principles I have articulated, my answer is simple: Europe has now such a constitution. Europe has charted its own brand of constitutional federalism. It works. Why fix it?”¹⁴⁸

Thus, even though he realises that there is room for a vast improvement of the current constitutional arrangement, and even though he could imagine the objection that a European constitution could be drafted in a way that would fully recognise the principle of constitutional tolerance (something he, however, fears is not possible), his final argument is that there is no need for such a constitution because the extant constitutional architecture of Europe works sufficiently well enough: something that is not broken does not need repairing.

At the end of the day, it seems that the only conceivable formal constitution in Weiler’s view would be a statist-type constitution and in this respect he wrongly tends to an approach of “extreme maximalism”. Such a revolutionary constitutional rupture is of course rejected by Weiler, and rightly so. However, he does not on the other hand see the need for creating a non-revolutionary constitution, if possible at all, based on the extant constitutional structure, because the EU already has such a constitution, which works sufficiently.

In my opinion however, it is certainly possible, and we should also strive to create, the non-revolutionary constitution that Weiler thinks is unnecessary. Already from a pragmatic point of view, the substantive changes that are needed within the framework of the European Union, and Weiler already mentions some of them, will lead to the creation of a document that can properly be called a constitution. Such a constitution should not signal a constitutional rupture but should instead be based on the current constitutional arrangement, thus respecting the principle of constitutional tolerance and affirming the character of the Union as a non-state polity based on a diversity of demoi united in a single civic demos. Also from a normative and

¹⁴⁷ Also Føllesdal (2002), p. 8: “Regarding Weiler’s concern: leaving aside the issues concerning what form of non-ethnic sense of people-hood one might want in Europe, and what kind of tolerance is best suited, a European constitution could still include in its preamble precisely what Weiler seeks, namely expressions to the effect that the political order was one of peoples rather than one of the *people* of Europe.”

¹⁴⁸ Weiler (2000b).

symbolic point of view, it is useful to create a document that is explicitly labelled a constitution. I will further elaborate this argument in Chapter VI.

2 Ian Ward¹⁴⁹

Ward states that:

“Within the context of an intensely legalistic vision of European integration, it is easy to see why so many commentators are so readily tempted by the allure of constitutionalism; to seek the retrospective legitimization of juristic power by establishing a putatively authoritative constitutional ‘discourse’. It is the legalistic equivalent to the politicians’ particular fancy for more and more treaties. And it attaches to the notion that a treaty framework, which might pass for a constitution, can somehow encapsulate and articulate an appropriate public philosophy. [...] But it is here that the danger lies – in the assumption that the future of Europe depends upon the integrity of its political, economic, or even constitutional order, that its legitimacy can be secured by the right phraseology in the right treaty articles. Public philosophies are not found in treaty articles, and neither are constitutions. Still less are they found in vague phrases and wistful aspirations. A public philosophy is a state of mind, something refined by the political imagination. It is, ultimately, a matter of belief. If Europe has a future, it must be something that Europeans believe in, not something the legitimacy of which is assigned merely by treaties and courts of law.”¹⁵⁰

Ward’s argument is that “the ‘new’ Europe has been too easily distracted by the temptations of constitutionalism”,¹⁵¹ as it “chooses to press on, from Treaty to Treaty, Directive to Directive, immersed in a legalistic twilight that means nothing to the overwhelming majority of its alienated citizenry”.¹⁵² Europe has a legalistic obsession, putting too much faith in constitutionalism. Instead, Ward claims that we need to think *beyond* constitutionalism and that “what Europe really needs is a ‘universal’ public philosophy”,¹⁵³ for which Ward seeks inspiration mainly in Leibniz’s universal jurisprudence.¹⁵⁴ Such a public philosophy is a “state of mind” and thus cannot be found in just another Treaty article, another directive, or even a constitution.¹⁵⁵ Ward at one point even indicates that constitutionalism can go *against* a European public philosophy: “For the temptations of constitutionalism do not necessarily serve the

¹⁴⁹ Ward (2001).

¹⁵⁰ *Ibid.*, p. 25.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, p. 39.

¹⁵³ *Ibid.*, p. 26.

¹⁵⁴ *Ibid.*, p. 32 *et seq.*

¹⁵⁵ “Like Weiler, Siedentop is critically aware that law itself will not suffice. A constitution, or at least a legitimate one, needs deeper foundations. There is always, he rightly notes, a ‘cynical view’ abroad that perceives law as being ‘the self-interested plaything of elites’. It is an apposite conclusion, and one which speaks volumes to a legal elite that has far too readily basked in the illusion that the great strength of European integration lies in its much vaunted process of constitutionalisation. It does not. European integration is not strong, and without the kind of ‘moral consensus’ that can fuel a substantive political philosophy, it will not strengthen.” *Ibid.*, p. 29

interests of a European public philosophy. Indeed, it can be argued that the very opposite is true.”¹⁵⁶

Ward’s argument certainly has some force. However, the concept of a European public philosophy remains rather vague, as it is unclear how it could be brought about, what it concretely means and what, if any, positive consequences it would have. Even so, Ward’s critique of “constitutional fetishism”¹⁵⁷ is in any case useful in the sense that it points out that we should not expect too much of European constitutionalism. Ward makes clear that there are certain intrinsic limits to constitutionalism. Indeed, it is wrong to assert that a European constitution would be the magic solution to all Europe’s problems. Of course it cannot be. However, although we should surely not expect wonders from a possible European constitution, it does have a significant value, in the first place because of the substantive changes it will address. Moreover, I do not believe that creating a European constitution would go against the European public philosophy, as Ward has it. A European constitution does not destroy Europe’s spirit, but rather is a useful means to build on and give further content to that spirit.

3 Ulrich Haltern¹⁵⁸

Ulrich Haltern points to the social legitimacy deficit in the European Union and states that this problem “deserves attention from the perspective of the law”.¹⁵⁹ He asserts that law is “not just a body of rules”, but that it is “a social practice”, a “system of beliefs” and a “structure of meaning”.¹⁶⁰

From this perspective of a cultural study of the law, it is observed that “national law has a richly textured fabric of cultural resources to rely on, which makes it ‘ours’”.¹⁶¹ This is not the case, however, for the European Union. Relying on Paul Kahn’s insight that the political “operates within a conceptual matrix made up by three elements of political psychology: reason, interest, and will”,¹⁶² Haltern states that “Union law lacks the erotic component so distinctive of the domain of will in Nation State politics”,¹⁶³ as Europe was not born from “belief, visionary revolution, shared sacrifices, emotions, or love” but instead is a “project of political order that was born from the spirit of rationality and enlightenment”.¹⁶⁴ Haltern observes that:

“The European Union’s problem of meaning is, of course, the problem that its citizens are completely indifferent towards it. [...] Union texts are not ‘ours’. They are just texts, empty shells with no roots. [...] There is nothing that could convey authenticity on EU texts under a perspective of the will. Ultimate meaning disappears behind the semantics of rationality. [...] In the Union, then, there is nothing to remember, and hence nothing to maintain. Union texts do not constitute a collective self; rather, they constitute a Common Market. [...] The Union’s legal texts are lacking in the way they look to the past, and

¹⁵⁶ *Ibid.*, p. 26.

¹⁵⁷ Walker (2002c), p. 324 *et seq.*

¹⁵⁸ Haltern (2001) and Haltern (2003).

¹⁵⁹ Haltern (2003), p. 17.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*, p. 14.

¹⁶² *Ibid.*, p. 20.

¹⁶³ *Ibid.*, p. 24-25.

¹⁶⁴ *Ibid.*, p. 25.

they are unable to stabilise anything deeper than the ever-changing fluid surface of trade, travel, and consumption. That is the reason why the EU, in the eye of the beholder, appears so breathless. As there is no memory to store meaning, meaning needs to be generated through political action, again and again and again. [...] There can be no stable meaning; there can be only frantic, restless and ceaseless production of ever-new meaning. Europe, in this sense, is truly revolutionary, because political action may never come to an end. [...] Europe is the never-ending project.”¹⁶⁵

This then is the reason for Europe’s social legitimacy deficit. Contrary to the Nation State, the Union lacks a politics of will and EU law merely “embodies the fluid surface of consumer identity”.¹⁶⁶ In the EU, “there has been no firm transition from political action to law, from future to past, from possibility to tradition, and from responsibility to loyalty”.¹⁶⁷ Instead of stability, Europe is in a constant flux, characterised by “ceaseless political action”.¹⁶⁸ the one Treaty has barely been signed and already we think about the next thing to do.

In a response to the fluidity of consumerism and the lack of social legitimacy, the Union has initiated “counter-measures” like the constitution-to-be and the Charter of Fundamental Rights,¹⁶⁹ which can best be understood “from the perspective of consumer aesthetics”.¹⁷⁰ Haltern notes that “[t]he Union suffers from its unrooted newness” and that “its insatiable surge forwards cuts it off from the past”.¹⁷¹ This is what provokes the citizens’ distrust. The Union tries to soothe this distrust by projects like the Charter and the constitution-to-be, which are meant to compensate for the lack of real European history, forming a vehicle to attain “quaintness in consumer aesthetics”.¹⁷² The Union in this sense tries to create pathos and patina¹⁷³ for itself. This is not necessarily a bad thing, but the problem is that the Union actually *believes* that a counter-measure like the Charter “really is a step towards shared European identity”.¹⁷⁴

Haltern then comes to a conclusion opposite to that of Ian Ward. Instead of wanting to awaken Europe’s political imagination like Ward argues, Haltern asserts that “Europe’s potential lies precisely in its superficiality, in its privileging of the commercial, in its shallowness and emptiness”.¹⁷⁵ He states that:

“The Euro-consumer can easily do without constitutional pathos. What she needs is the possibility of free movement of good, persons, and

¹⁶⁵ *Ibid.*, pp. 32-33.

¹⁶⁶ *Ibid.*, p. 14.

¹⁶⁷ *Ibid.*, p. 19.

¹⁶⁸ *Ibid.*, p. 18.

¹⁶⁹ On the Charter, see especially Haltern (2001).

¹⁷⁰ Haltern (2003), p. 33.

¹⁷¹ *Ibid.*, p. 35.

¹⁷² *Ibid.*, p. 34.

¹⁷³ “Patina is a physical property of material culture which consists in the small signs of age that accumulate on the surface of objects. The surface of objects, originally in pristine condition, takes on a surface of its own, being dented, chipped, oxidised, and worn away. This physical property is treated as symbolic property: it encodes a status message and is exploited to social purpose. That purpose is the legitimation, authentication, and verification of status claims.” *Ibid.*, p. 36.

¹⁷⁴ *Ibid.*, p. 38.

¹⁷⁵ *Ibid.*, p. 19.

capital, freedom of establishment and to provide services, and a good measure of consumer protection. Europe's identity is not on the same level as narratives of sacrifices, ideal meaning written into bodies and texts, or constitutional interpretation as memory. That is the world of the nation-state. The Union has no such myth. Those who aim at constructing foundation narratives of this kind will be prone to making a laughing stock of themselves rather than serving the Union's purposes."¹⁷⁶

Thus, "constitutional pathos" simply does not accord with the rational, consumerist project that European integration is. Instead, Europe "should consider confining itself to what is possible" and "[t]hat, of course, is the imagination of the political as consumption and market."¹⁷⁷ Whereas many mourn consumerism, complaining of a "Saatchi & Saatchi Europe" and a European "bread and circus democracy",¹⁷⁸ Haltern instead believes that this is a good thing and that Europe should embrace the ideology of liberal consumerism, giving up any efforts for further constitutionalisation:

"Europe's potential, it seems to me, lies elsewhere, namely in the move to do without a constitution and all attendant pathos and patina. The Union would overcome the gap between the projected nature of the European polity on the one hand, which has appropriated cherished symbols of statehood and which lays claim to its citizens' political loyalty, and the nature of the European citizens' experience of citizenship on the other hand, which is dominated by rituals of trade, travel and consumption. Perhaps, by giving up its implausible 'A Citizen's Europe' discourse, it would gain a more reliable foundation for its claim to legitimacy, and be finally as 'close to its citizens' as it strives to be."¹⁷⁹

Even though Haltern agrees with the argument made by the constitutionalisation thesis,¹⁸⁰ he believes that the drawing up of a constitution is unnecessary, as it would not be in conformity with the, in his view, justified current character of the EU structure that is dominated by "rituals of trade, travel and consumption".

But Haltern seems to go further, apparently advancing the opinion that adopting a European constitution is not only an unnecessary and undesirable exercise but moreover a dangerous one:

"It will be next to impossible to achieve a political perspective of the will for Europe. What is more, should we really try? The twentieth century bears witness of the fact that will-based political imagination has proved terrible and disastrous. The modern Nation State has been extremely successful in mobilising its population to make sacrifices in order to help sustain the state's continued historical existence. Having believed in the dawning age of post-politics, we stand helpless and dismayed before the tenacity of that kind of imagination when we look

¹⁷⁶ *Ibid.*, p. 43.

¹⁷⁷ *Ibid.*, p. 39.

¹⁷⁸ Weiler (1998a).

¹⁷⁹ Haltern (2003), p. 44.

¹⁸⁰ *Ibid.*, pp. 14-16.

to the former Yugoslavia and the Middle East. Do we really want to continue the politics of will in the Union? No doubt social meaning would deepen, the deficit in social legitimacy would disappear – but are we willing to take the risk?”¹⁸¹

Although Haltern does not tend to conflate, he certainly does make a strong link between an EU constitution and a state, as he seems to be of the opinion that drafting a European constitution would undesirably encourage further a politics of will so characteristic of the Nation State, with all attendant possible negative consequences. As discussed earlier, I do not agree with this specific linkage, as I do not believe that the EU, which has a constitution already, will be confronted with any negative stately phenomena by pursuing the project of adopting a constitution.

But this is not all that is problematic in Haltern’s argument. It is, in my opinion, ill-founded to view the present Union as merely constituting a common market. Whereas economic integration was one of the primary reasons for starting the integration process, this was obviously part of the broader agenda of achieving (internal and external) security and stability on the European continent, an agenda which is still relevant today – be it to a far more limited extent thanks to that very process of integration. Driven by the pressures of globalisation,¹⁸² European integration has moved beyond purely consumerist and economic forms of integration and has extended its policy activities into more political areas like a common foreign and security policy and justice and home affairs. Also other areas such as the environment, social policy and the protection of human rights (and, in this context, I also do not share Haltern’s sceptical view of the value of the Charter) have gained an important place in the European enterprise. European integration simply *is* more than just a common market and shallow consumerism, in the context of which the adoption of a European constitution, as a confirmation of the EU’s status as a constitutional polity, is a logical, acceptable and legitimate step. In this respect, also Haltern’s argument that the European citizens are merely consumers who are not interested in and in any case do not need the Union to move beyond the limited perspective he paints of the EU seems very much ill-founded. After all, this would not explain the observation that Europe’s citizens want the Union to tackle all kinds of transnational issues which cannot be dealt with sufficiently on the national level alone; that they want the Union to be actively involved on the world stage through more European involvement in the areas of foreign affairs and defence;¹⁸³ and finally and importantly, that they, as

¹⁸¹ *Ibid.*, p. 44.

¹⁸² Which “can be defined as a technologically and ideologically driven process in which geographic distance becomes irrelevant for socio-cultural, political and economic relations”, Lubbers and Koorevaar (1998).

¹⁸³ To quote the Laeken Declaration, *supra* n. 6: “The image of a democratic and globally engaged Europe admirably matches citizens’ wishes. There have been frequent public calls for a greater EU role in justice and security, action against cross-border crime, control of migration flows and reception of asylum seekers and refugees from far-flung war zones. Citizens also want results in the fields of employment and combating poverty and social exclusion, as well as in the field of economic and social cohesion. They want a common approach on environmental pollution, climate change and food safety, in short, all transnational issues which they instinctively sense can only be tackled by working together. Just as they also want to see Europe more involved in foreign affairs, security and defence, in other words, greater and better coordinated action to deal with trouble spots in and around Europe and in the rest of the world.”

eurobarometer polls indicate, support with a clear majority the adoption of the very European constitution that Haltern claims they do not need.¹⁸⁴

4 Conclusion

The three critiques analysed in this chapter are related in the sense that they all proceed from the assumption that there is some kind of problematic relation between the enactment of a constitution and the European identity/demos.

Weiler holds that the European order is made up of multiple *demos* which are united in a thin, civic *demos* and that this construct is held together by the principle of constitutional tolerance. A formal European constitution would upset this balance as it would substitute a voluntary constitutional discipline with an authoritative one. Such a constitution would supplant Europe's thin *demos* with a thicker form of *demos* going to the detriment of people diversity and the principle of constitutional tolerance, thus undesirably constructing a statist-type polity.

Ward's concern is another one. He thinks that a European constitution may actually do too little. He believes in the necessity of a strong European identity but asserts that a European constitution will fail to deliver any kind of useful political community. Instead, Europe needs a public philosophy that is defined as a state of mind, rather than some parchment constitutional declaration.

Haltern, finally, does not see an existing strong European political community. Europe is a pragmatic project aimed at establishing a common market and European citizens are driven by no more than shallow consumerism. The drawing up of a European constitution would signify such a disparity with the current state of affairs that it would be entirely illegitimate to pursue. In other words, such a constitution would, in Haltern's view, entail the illegitimate fabrication of a political community such as it traditionally exists within the state.

Neither of the three critiques, however, is particularly convincing in making the case against a European constitution. A European constitution must be seen as a confirmation of already acquired community, which goes beyond a minimalist consumerist identity, and moreover is a useful means of building on and strengthening that community. A European constitution will still protect the principle of constitutional tolerance and the diversity of *demos* in the Union. In general, drawing up a constitutional document for the European Union will not signal a constitutional rupture and will not mean a further undesirable move in a statist direction.

¹⁸⁴ From spring 2000 until autumn 2002, the question whether the European Union should have a constitution was put to the European public five times. The results were positive: around six to seven out of ten EU citizens supported the idea of a European constitution, around a quarter lacked an opinion and direct opposition to a constitution was very small: around ten percent. See Eurobarometer report no. 58 of March 2003 (accessible via <http://europa.eu.int/comm/public_opinion>), p. 105.

V EU CONSTITUTIONALISATION AS A DANGER-FREE EXERCISE

1 A European constitution will not have any inherent negative consequences

It is to be realised that, as has become clear in the previous chapters, there are no *inherent* grave dangers involved in creating a European constitution. Such a constitution will not be a useless tool in constructing European political community, nor will it, on the other hand, overstretch a mistakenly alleged weak and consumerist form of European identity. The mere enactment of a recognisable European constitution does not automatically lead to the presupposition of a thicker, single constitutional demos thereby threatening demos diversity and violating the principle of constitutional tolerance, nor less does it form a Trojan horse of European statehood. The European constitution will not and should not be a document that signals a constitutional rupture, an inescapable move away from the current constitutional architecture. Instead, it must be understood as a concretisation and amelioration of the extant constitutional structure, which is currently ‘buried’ and not clearly recognisable as such. The European constitution will thus not be a revolution, in the sense of a dramatic reshuffle of the relation between the European Union and its Member States. Another important concern that has been voiced with regard to the establishment of a European constitution is its potential realisation of “the finality of European integration”¹⁸⁵ – which is understood as the definitive settlement of certain core constitutional questions – thereby going to the detriment of required flexibility and openness in the European construct.¹⁸⁶ Neil Walker distinguishes between seven different ways in which one might conceive of finality, namely: territorial finality, political finality, institutional finality, finality of purpose, social finality, legal finality and constitutional finality.¹⁸⁷ It is indeed true that constitutional finality, *i.e.* the idea of a written constitutional settlement for the European Union, has a large potential for bringing about the further realisation of the first six forms of finality. However, Walker rightly observes that:

“Because of the degree and complexity of contestation over the issues which form the subject matter of the six other forms of finality, it would be both undesirable, and probably because of the continuing awareness and pursuit of such contestation, unfeasible to ‘freeze’ these other debates over finality in a settled constitutional form and encrusted with a particular and necessarily partial constitutional significance.”¹⁸⁸

Thus, the drafting of a European constitution as a means of pursuing the realisation of finality along one or more of its specific forms, is undesirable and probably unfeasible. Hence, the potential for finalisation involved in the constitutionalisation

¹⁸⁵ Which even was the, perhaps a bit unfortunately chosen, *leitmotiv* in Fischer’s Humboldt speech, Fischer (2000).

¹⁸⁶ See *e.g.* Weatherill (2002). He states that “the presentation of 2004 as a potential end-destination, at which core constitutional questions will be “settled”, is at odds with the historical evolution of the Union, neglectful of a network of complex but largely inter-related devices for meeting in more sophisticated fashion the perceived weaknesses of the Union than would be achieved through the adoption of a formal constitution and, ultimately, fundamentally incompatible with how it *should* be seen, as a non-State actor which causes profound adaptation in the structure of the States that are members of it.”, at p. 3.

¹⁸⁷ Walker (2002b).

¹⁸⁸ *Ibid.* Walker notes, however, that “the one partial exception to this may be social finality”.

process, even though it is considered a relatively minimal potential, must nevertheless be taken into account and constrained as far as possible. Turning to the Draft Constitution that is the outcome of the Convention's work, it is submitted that it does not form a true realisation of finality, considering both its substance and the revision procedure it puts forward.

To begin with the latter, it must be pointed out that the current treaty amendment procedure of Article 48 TEU is already one of the most rigid procedures conceivable.¹⁸⁹ Whereas in principle this procedure could have been made even more rigid, leading to a further entrenchment and finalisation of European primary law,¹⁹⁰ this has not happened nor has, on the other hand, a facilitation of the revision procedure been carried through.¹⁹¹

Also as far as substance is concerned, the Convention draft does not mark the finality or end-stage of the integration process by definitively setting in stone issues such as the division of competences between the EU and the Member States.¹⁹²

Thus, it is concluded that the dynamic nature of the Union, with its "semi-permanent Treaty revision process",¹⁹³ will not be undesirably and negatively affected by any

¹⁸⁹ As it requires an Intergovernmental Conference to determine "by common accord" the amendments to be made to the Treaties, which then have to be ratified by all Member States "in accordance with their respective constitutional requirements" (in practice involving the approval by national parliaments or the holding of a referendum).

¹⁹⁰ As Walker (2002b) points out, the amendment procedure of Article 48 TEU could have been further compounded (and indeed, there have been discussions in the Convention whether or not to do so) by adding more dimensions to it, for example by requiring the findings of the Convention to be ratified in a Europe-wide referendum or by turning the European Parliament into an additional voting, and thus vetoing, party.

¹⁹¹ The facilitation of the rigid amendment procedure (possibly – in the context of the drawing up of a constitution as a means of categorising European primary law by separating the constitutional provisions of European law from the "less important" policy provisions – with a differentiation of amendment procedures for these two categories of provisions) has been advocated frequently and convincingly: see e.g. *Reforming the Treaties' Amendment Procedures*, European University Institute, <http://www.iue.it/RSC/pdf/2ndrapport_UK.pdf>, Oliver (2002), pp. 13-14, De Witte (2003), pp. 213 *et seq.* and Albi (forthcoming). Despite these concerns, the Convention has not opted for a true facilitation of the amendment procedure (see Art. IV-7 of CONV 850/03) and it has left the double unanimity requirement of Article 48 TEU intact for the *whole* of the Draft Constitution. This is regrettable, but also understandable given the political contentiousness of this issue.

¹⁹² This is a specific "finality-concern" put forward by Weatherill (2002), who regards the "quest to devise a formula for dividing up State and Community competences [...] as one example of a wider alluring but mistaken attempt to "find answers".", at p. 3. However, the Convention rightly has not chosen for drawing up a presumably exhaustive, hard list of competences to be reserved to the Union and the Member States respectively. The Draft Constitution instead categorises the different types of competences and clarifies, without being exhaustive, the competence areas that fall under these different types: see title III of part I of the Constitution. Such an approach can hardly be called a finalisation of competences. In a later article, Weatherill (2003) takes a stance on this approach and states that he indeed supports the connection between an area of material competence and the nature of the competence. He argues that this is a matter better left for treatment in the policy part of the constitution and not, as the Convention has done, in the constitutional part one, for this would lead to "unhelpful controversy and unwelcome rigidity", Weatherill (2003), p. 55. However, his argument seems based on the assumption that the inclusion of this matter in the policy part would make it more susceptible to amendment than if it were included in part one of the constitution. The question of which part should address this issue has by now, however, been made more or less irrelevant, as the Convention has in the end not opted to impose any differentiation in amendment procedure between the different parts of the Constitution. The general argument of Weatherill (2002) against the finality potential of formal constitutionalisation, however, cuts deeper than the issue of competences: see further *infra*.

¹⁹³ De Witte (2002a).

imposed finality and rigidity through the promulgation of a European constitution.^{194,195}

2 *An approach of constitutional pluralism*

Following from all this, it can in general be stated that European constitutionalism must not be viewed as posing a threat to national constitutionalism. Instead of adhering to constitutional monism, which regards states as the only possible sites of constitutional authority, we must adopt an approach of constitutional pluralism, which recognises the European order as a constitutional setting alongside the national constitutional settings and characterises the relationship between those two levels as heterarchical rather than hierarchical. This means that “the doctrine of supremacy of Community law should by no means be confused with any kind of all-purpose subordination of member-state-law to Community law”.¹⁹⁶ In other words, a pluralistic conception entails that “[t]he legal systems of member-states and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over the other.”¹⁹⁷

¹⁹⁴ Cf. also De Witte (2003), p. 214: “The Constitutional Treaty may well mark an important new stage of the European integration process, but not its end-stage.”

¹⁹⁵ Some remarks need to be made here. Even though the current amendment procedure of double unanimity is rather rigid, this has not prevented the Member States from “constantly” tinkering with European primary law over the past 11 years since Maastricht. Whereas the Draft Constitution certainly should not finalise and set in stone the European integration process, it is on the other hand arguably healthy that it provide European law with more stability and legal certainty than has been the case to date (It should be noted that this need for more stability is not contradicted by the justified calls for a further *facilitation* of the amendment procedure, since it may very well be argued that the current rigid amendment procedure, which so far has not prevented frequent revisions, will however in the future lead to an almost complete paralysis of the entire integration process in a vastly enlarged and more heterogeneous Union). It is exactly the political call for a European constitution, with its attendant flavour of a legally more stable structure, that could be seen as a further insistence on tempering Europe’s legal breathlessness. In sum, the constitution needs to strike the right balance between stability on the one hand and popular responsiveness on the other. It is questionable, however, if the Draft Constitution truly adds any more stability than the current European Treaties, “[f]or beyond the somewhat pious hope that the new constitutional symbolism itself together with the transaction costs of assembling a new Convention will be enough to give our future leaders greater pause for thought, there is very little in the new design which suggest a more powerful brake on the impulse to change than that supplied by the increasingly ineffective IGC mechanism”, Walker (2003a). In this context, Walker, *ibid.*, suggests to have a reasonably lengthy period of 10 years for the *whole* constitutional package to be digested and evaluated, followed by a legal renewal by means of the Convention method, thus creating an order “that, as in all the best Constitutional settlements, would seek to temper passion and conviction with the discipline of public reason and to inaugurate a tradition in which the ‘constitutional’ in constitutional discourse would promise to be of more than merely nominal significance”.

¹⁹⁶ MacCormick (1999), p. 117.

¹⁹⁷ *Ibid.*, p. 118. Thus, the Bundesverfassungsgericht’s assertion in *Brunner*, *supra* n. 27 that it itself “will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them” (at para. 49), thereby explicitly contradicting the claim to judicial *Kompetenz-Kompetenz* made by the ECJ in *Foto-Frost*, *supra* n. 134, is very much explainable from the viewpoint of constitutional pluralism that presents both the European and the national level as distinct and partially independent systems, in which logically the respective highest decision-making authorities have ultimate interpretative power in their own system. The extant pluralist and non-hierarchical system that is characterised by the occurrence of contestation and the absence of an ultimate arbiter of constitutionality naturally begs the question how to settle the

There is, in my view, no reason to believe that the enactment of a European constitution and, more specifically, the explicit codification of the supremacy principle therein (see Article 10(1) of the Draft Constitution¹⁹⁸), would contradict, and be detrimental to, the idea of constitutional pluralism in the European context.¹⁹⁹ A constitution does not lead to the realisation of a European monist approach where the Member State level would be relegated to the mere status of a subordinate subsystem of the Union level. Even though it could perhaps be contended that the room for contestation from the part of the national legal orders will be slightly lessened by a European constitution that strengthens the constitutional claim made by the European legal order, the pluralist conception ultimately is not eradicated by further constitutionalisation since the European Union remains a bottom-up, interactive and heterarchical construct, not a top-down, hierarchical one. The dialogic nature of the pluralist system will not perish by a European constitution and the inclusion of the supremacy principle therein must “merely” be seen as a codification of already applying *acquis judiciaire*, not as giving the Union level an all-purpose legal and judicial superiority over the national level.²⁰⁰ After all, the European constitution will

boundaries between the distinct national and European orders and how to deal with, avoid, or minimise the possibility of, normative collisions between the two levels: see further MacCormick (1995); MacCormick (1999), Chapter 7; Weiler (1999), Chapter 9; Kumm (1999); and Tolias (2002). In practice, however, as this is logically in the interest of both parties, concrete collisions are avoided. Thus, contestation leads to conversation rather than collision. The existence of contestation within a pluralist framework is thus not a necessarily unhealthy thing, since it may positively contribute to the further development of the European legal order. In this context, one can point to the alleged link between the decision by the Bundesverfassungsgericht in the case of *Solange I*, [1974] 2 Common Market Law Reports 540 and the development by the ECJ of its human rights jurisprudence (a link that is often made. See, however, Zuleeg (1997), p. 24 who describes this as a myth) as well as to the alleged link between the Maastricht case of, again, the Bundesverfassungsgericht (*Brunner, supra n. 27*) and the ECJ’s *Tobacco Advertising* judgment (Case C-376/98, *Germany v. Parliament and Council*, [2000] ECR I-8419), which showed the ECJ taking more seriously its task of policing the limits of Community competence. Thus, whereas it may seem at first sight that supremacy is very much based on the assumption of an either/or logic, it must instead be stated that it is “because of the dependence of the Court on its national judges for the practical application of the law, a process that involves a greater degree of inter-court dialogue than one might expect”, Weatherill (2002), p. 13.

¹⁹⁸ Which reads: “The Constitution, and law adopted by the Union’s Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.”

¹⁹⁹ Thus, I do not agree with Weatherill (2002), who assumes exactly so. He argues that “the notion of elevating “constitutionalism” on to a (perceived) “higher” plane may imperil much of what has been achieved so far. Most of all it will be argued that the successes of the EU, at an economic and a political level, have been achieved largely because of the skilful manner in which games in which one party wins and so another is perceived to lose have been avoided. By contrast, the “constitution vision” is dangerous and divisive precisely because it threatens to insist on the triumph of one normative foundation over another. [...] And the suggestion that “finality” is or should be in sight is especially alarming in the light of its propensity to foreclose debates about a plurality of visions for “Europe”. Achieving finality suggests a process of picking winners and losers. This is unhealthy and destabilising.”, p. 3-4. In Weatherill’s view, a constitution could be a finality in the sense of providing the definitive solution to the question about the true site of political and legal authority in Europe and in this sense, it could remove the danger of normative collision within the pluralist framework, at the same time undesirably eradicating contestation and dialogue. This negative development would be achieved, in his view, by the inclusion of the supremacy principle in the European constitution: “[a] ‘final’ resolution could be achieved only by insisting that one legal order has supreme authority over another. But which, among the Member States, would agree to a Treaty provision asserting the primacy of EC law? [...] [s]upremacy and direct effect operate successfully precisely because they are outwith the formal text of the Treaty and they are instead subject to elaboration and application in an institutional system that cherishes dialogue”.

²⁰⁰ Cf. also Craig (2003), pp. 8-9.

not at all lead to an *overall* transfer of sovereignty from the national to the European level. The European framework in the post-constitution context retains its pluralist character, as the Union will remain to be heavily dependent on the national level for the implementation of, and the acceptance of the supremacy of, European law.²⁰¹

3 Conclusion

It is argued here that the drafting of a European constitution *as such* must essentially be seen as a danger-free exercise. Thus, it is concluded that the earlier mentioned critiques and concerns with regard to the drafting of a European constitution are not strong enough to convincingly refute the usefulness and desirability of the constitutionalisation process. However, it has to be admitted that the concerns that relate to the possible dangerous detracting from the principle of constitutional tolerance in a European constitution, the negative possibility of a constitution creating a European state more in general and the concerns with regard to the potential realisation of the finality of European integration, are valid in the sense that they portray a, in my view correct, normative vision of how the European framework *should* be structured. They are thus valid insofar as they attempt to steer the process of drafting a European constitution, as far as substance is concerned, in a certain positive direction. However, whereas the substance of any European constitution can obviously bring about these undesirable consequences, it is argued that it is false to assume that the constitutionalisation of Europe *an sich* will generate such negative consequences and to the extent that the mentioned critiques and concerns do assume so, they should be strongly resisted. It is moreover alleged that the substantive changes introduced by the Convention's Draft Constitution do not attend to any of the anxieties that have been expressed.

²⁰¹ It is noteworthy that the Draft Constitution provides a strong and more explicit affirmation of a pluralist conception, as it puts forward the prime importance and the distinct nature of the Member State level in the European construct by including a new provision that gives Member States the possibility of voluntary withdrawal from the Union: see Art. 59 of CONV 850/03.

VI THE CASE FOR A EUROPEAN CONSTITUTION

Above, it has been argued that the European Union has a constitution already, that the drafting of a more formal and explicit constitution as such must be seen as a danger-free exercise and that moreover the Draft Constitution that has been prepared by the Convention does not attend to any of the anxieties and concerns that have been expressed with regard to more formal constitutionalisation.

In this chapter, I will attempt to show that the constitutional label that has been put on the document drafted by the Convention is not only appropriate, but also that the creation of such a European constitution is desirable for a number of reasons.

1 A pragmatic argument of substance, form and process

On the basis of a pragmatic argument of substance, form and process, it is held that the text that has been produced by the Convention can appropriately be labelled a constitution. The agenda for reform, which was put forward by the Nice declaration on the future of Europe and subsequently elaborated by the Laeken declaration, is very much a constitutional agenda. Especially three of the issues that are mentioned by the Nice declaration are important in this respect, *i.e.* the delimitation of powers between the EU and the Member States; the status of the Charter of Fundamental Rights; and the simplification of the Treaties.²⁰² Even though the Nice declaration itself avoided referring to the drafting of a constitution, it is clear that that is exactly what the mentioned issues are about.²⁰³

The link between the reform agenda and the creation of a constitution is visible on the point of *substance*, since the division of competences between the different levels of governance is an issue that is normally addressed by a constitution and also fundamental rights usually take a prominent place within a constitution.²⁰⁴ But also, even though at first sight less clearly than with regard to the first two issues, the simplification of the Treaties in the sense of changing the *form* of primary law (a single document merging the European Treaties), is germane to the drafting of a constitution.²⁰⁵ Finally, the pragmatic argument is also one of *process*. The Draft Constitution has been drawn up by a Convention, which was characterised by a high degree of transparency and legitimacy. The new and revolutionary Convention

²⁰² The fourth Nice issue was the role of the national parliaments in the European architecture. This issue however, though very important, is not as closely connected to a constitution as the other three Nice issues.

²⁰³ Hirsch Ballin (2001), p. 331.

²⁰⁴ Lenaerts and De Smijter (2001), pp. 273-274 note that “a number of politicians and academics refer to the Charter as the true start of the constitutionalization of the EU, in short to the Charter as a prelude to a European constitution”. *Cf.* also Dorau and Jacobi (2000), p. 426: “Although this Charter – in the official wording – has nothing to do with a constitution, it will inevitably prepare the ground for one. The adoption of a justiciable Charter of Fundamental Rights marks at any rate an important step in the constitutional development and would create one part of an EU constitution.”

²⁰⁵ Walker (2002b): “[I]n some ways simplification and reorganisation may be seen as the precursor, or, if viewed more pejoratively, the Trojan Horse of *constitutional* finality. The simplification and consolidation project, with its themes of documentary consolidation and its language of ‘basic’ or ‘unified’ Treaties, has provided an apparently technical and uncontroversial vehicle for putting the idea of a written European Constitution on the political agenda.” *Emphasis in original.* The connection between simplification and the drawing up of a constitution is shown most clearly by the Laeken declaration, *supra* n. 6, which states: “The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union.”

method, which performs a supplementary role in the procedure for Treaty reform next to the old IGC method, signals an inclusionary and constitutional process.

The European Union has, as argued before, a constitution already. This constitution, however, is implicit and not clearly recognisable as such. This situation has now changed, since the constitutional reform process has brought to the fore the constitutional character of the EU. The document that is the outcome of the Convention on the future of Europe merges the European Treaties in a single text, incorporates the Charter of Fundamental Rights, addresses the issue of competence division and has been prepared by a novel procedure securing high input from various actors including the European people(s). How can such a document *not* appropriately be called a constitution?

Moreover, it is argued that the creation of Europe's first constitution is a useful and desirable development having regard to the mentioned substantive, procedural and form-related changes that have culminated into that constitution. Whereas space precludes a thorough discussion, some brief remarks can be made here. Firstly, the Draft Constitution's approach towards the division of competences, though obviously not in any way providing a definitive "solution" to the issue of competence division in a pluralist and multi-level governance system such as the EU, must be regarded as a further improvement of the current system. Without departing too much from the already applying situation, the Draft Constitution provides a useful clarification through its new categorisation and definition of the different types of competences.²⁰⁶ Also the *ex ante* and *ex post* monitoring of compliance with subsidiarity has been improved by giving national parliaments, as well as the Committee of the Regions, a role in this respect.^{207,208} Secondly, the incorporation of the Charter of Fundamental Rights in Part II of the Draft Constitution serves the Charter's goals of increasing legitimacy, visibility and legal certainty and accords with the widespread support for the Charter's incorporation.²⁰⁹ More generally, the Draft Constitution strikes the right tone as regards fundamental rights by stipulating in Article 7(2) that the EU "shall seek" accession to the ECHR²¹⁰ and by safeguarding the normatively open human rights *acquis* through retaining the wording of the present Article 6(2) TEU in Article 7(3) of the Draft.²¹¹ Thirdly, the single constitutional text simplifies, reorganises and replaces the previous European Treaties – which "have become indecipherable as a result of successive negotiations and the gradual accretion of common policies"²¹² – and abandons the awkward pillar structure leaving a single entity intact, called European Union, that is given legal personality.²¹³ This will increase transparency and

²⁰⁶ See Title III 'Union Competences' of Part I of the Draft Constitution.

²⁰⁷ See the 'Protocol on the application of the principles of subsidiarity and proportionality' that has been annexed to the Draft Constitution

²⁰⁸ For some alternative proposals advocating a specific institutional design for the monitoring of competence division, see Weiler (1997) (a European Constitutional Council), Blair (2000) (a second chamber of the EP composed of national MPs), Bribosia (2001) (a legislative branch of the Council, called "Senate" or "High Chamber", comprising members of national parliaments) and Pernice (2001) (a parliamentary subsidiarity committee composed of at least two representatives from each national parliament).

²⁰⁹ On the Charter, see further *e.g.* Brand (2003), De Búrca (2001), Haltern (2001), Hirsch Ballin (2001), Jacobs (2002), Lenaerts and De Smijter (2001), McCrudden (2001), Morijn (2002), Vitorino (2000), Walker (2002a), Wiener (2001), De Witte (2001a).

²¹⁰ See further *e.g.* Harmsen (2001).

²¹¹ See further De Búrca (2003), pp. 14-16 and Brand (2003), p. 399 *et seq.*

²¹² Jospin (2001).

²¹³ See Article 6 of the Draft Constitution.

may also strengthen popular support for the process of European integration.²¹⁴ Finally, the Convention process that led to the creation of the Draft Constitution, in contrast with the traditional IGC format, introduces a much wider participation in the Treaty revision process, has a higher degree of transparency, provides for more effectiveness and has a potential community-strengthening effect.²¹⁵ The Convention method has been formalised in paragraph two of the Draft Constitution's revision clause, Article IV-7.²¹⁶

It follows that the reform process of the post-Nice era is not primarily about the creation of a European constitution, rather it is about making the necessary and desirable changes with regard to substance, procedure and form that in effect make up such a constitution. But there must be more than that. It is one thing to pursue and give effect to a reform process that is in essence constitutional in nature, it is a whole different thing to also take the step to explicitly *label* the document that is the result of that reform process a constitution. Such a label may be, as argued, appropriate and logical, but what kind of impact does it have and is it also desirable given the present circumstances?

2 Adopting the language of constitutionalism

Føllesdal has argued that “the central issue is not whether the EU should have a constitution, because for most intents and purposes it already has one. Instead, the crucial issues concern the substantial content such a constitution should have, and how to best obtain it.”²¹⁷ He holds that any arguments pro and contra a European constitution are not very forceful, leading him to the conclusion that “[n]ormative considerations do not seem to require a constitution now -- nor does such a constitution appear illegitimate in principle.”²¹⁸ According to Føllesdal, it is thus not very relevant whether or not we should create a written European constitution, but what rather matters is the process and content of such a constitution.²¹⁹ Indeed, it has to be accepted that the process and substance of the future Treaty to be adopted are of primary importance. However, I do not believe that one should draw the conclusion that the question of terminology is not that relevant. The “constitutional question”

²¹⁴ As De Witte (2002b), p. 1265, remarks: “[I]t is now generally accepted that public disaffection with the European Union might be cured, in part at least, by drafting a new Treaty text that would be easier to understand and explain. A legible document, particularly if reduced in length, would arguably enhance the legitimacy of the European Union's operation in the eyes of its citizens. However, these are still unproved assumptions and a clearer Treaty text may well also provide a better focus for opposition to European integration.”

²¹⁵ For some critical notes on the Convention method, see Closa (2003), Jarlebring (2003), Scott (2002) and Shaw (2003).

²¹⁶ This provision does not make the Convention a *standard* component of Treaty revision (“The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene the Convention should this not be justified by the extent of the proposed amendments.”), which appears an advisable approach considering that the time and costs involved in convening a Convention make it an appropriate mechanism only for wide-scale constitutional revisions of European primary law.

²¹⁷ Føllesdal (2002), p. 1.

²¹⁸ *Ibid.*, p. 2.

²¹⁹ Cf. also Rau (2001): “Ich bin mir dessen bewusst, das die Begriffe „Verfassung“ und „Föderation“ manchem in Europa suspekt erscheinen. Ist das aber nicht oft nur ein Streit um Begriffe? Ich bin zuversichtlich, dass wir uns über die Substanz dessen, was gemeint ist, leichter werden verständigen können als über diese Begriffe. Dann müssen wir aber über Inhalte diskutieren, statt über Begriffe zu streiten.”

should not be treated, as Føllesdal does, with a large degree of indifference, since this question *does* matter very much. After all, even though “[t]he choice of words would not make a direct legal difference”, it has to be said that “the use of the word “constitutional” would arguably be meaningful in symbolic, political and therefore also indirectly in legal terms”.²²⁰ Indeed, the impact of the explicit adoption of the language of constitutionalism in the EU context must not be underestimated, as fierce resistance to the adoption of a European constitution serves to illustrate.

In my view, the use of the term constitution for the future Treaty is useful in several respects. First of all, it serves to *affirm* the fact that the European construct has developed from an internationalist and mainly economic framework into a constitutional architecture that stands in a heterarchical relation to the constitutional level of the Member States.

Secondly, the symbolic and powerful language of constitutionalism desirably increases the *normative force* of European law. European law has a tremendous impact on national legal systems and this makes it justifiable and useful to “back it up” with a constitutional language that underpins the concept of a limited and constitutional polity founded on the rule of law, democracy, fundamental rights and constitutional adjudication.

Thirdly, it can be argued that a European constitution also serves to *refine, improve* and “*mature*” European constitutionalism by adding and ameliorating constitutional elements within primary law, for example by incorporating the Charter of Fundamental Rights. This is, obviously, again an argument related more to substance. However, it should be pointed out that the adoption of constitutional language serves as a *vehicle* for making such substantive changes, which might otherwise not have been carried through.

Fourthly, and finally, a constitution has a certain *community-strengthening potential*. A constitution can bring Europe closer to its citizens and increase Europe’s legitimacy in that it can strengthen European political community and help further constructing the European demos. This is again strongly interwoven with the participatory, dialogic process of adopting a European constitution. However, even though the Convention could also have been used as a method to construct an “ordinary” Treaty, the community-strengthening effect of such a process is arguably higher when the process is explicitly framed in constitutional terms. A constitutional, rather than a non-constitutional, reform process “raises the stakes” and, because of the increased importance of the resultant text of such a constitutional process, it enhances contestation and dialogue within that process, making it a useful tool of strengthening European identity. As Habermas has termed it, the constitutionalisation process forms a “self-fulfilling prophecy” with regard to building a sense of political community.^{221,222} Also the *outcome* of that constitutional process – which must be seen not only as a more legitimate assertion of common European values given the participatory process that preceded it but also as a document that, framed in powerful constitutional terms, has a higher symbolic value and a stronger community-

²²⁰ De Witte (2002b), p. 1282.

²²¹ Habermas (2001).

²²² As Walker (2002b) aptly remarks: “[I]n order to generate the forms and levels of dialogic, solidary and infrastructural goods conducive to a legitimate conception of continental political community, however modestly or ambitiously defined, it is important for Europe to engage in the kind of inclusive political conversation which a constitutional process – and at this stage of *specific* development of the vast and heterogeneous Euro-polity and in this era of *general* disaffection with traditional political forms, perhaps *only* a constitutional process - can offer.” Emphasis in original.

constructivist effect than an ordinary Treaty – has a positive impact on European identity.

Two final points need to be made with regard to the community-enhancing function of a European constitution(al process). Firstly, it should be stressed that the community-strengthening effect of a constitution should not be *overestimated* since any results on this level will arguably be modest. A European constitution and the process that produces it will certainly contribute to enhancing European identity, but its limited effects make it unrealistic to assume that it will construct an advanced, mature form of political community that is capable of completely bridging the presumed social legitimacy gap. Secondly, it should be pointed out that the community-strengthening effect of European constitutionalisation will not go as far as generating a thicker, ethno-cultural form of European identity.²²³ As argued above, the European Union already is based on a thin, civic demos that is characterised by the existence of shared values. An inclusive constitutional process is an ideal way to articulate these shared values and to subsequently embed them in a normatively strong constitutional framework. This is aptly reflected by the Habermasian term “constitutional patriotism”.²²⁴ European constitutionalisation thus forms an ideal way to enhance Europe’s thin, civic demos rather than that it, conversely, will lead to any undesirable thickening of identity.

3 Conclusion

The document that has been produced by the Convention on the Future of Europe can appropriately be called a constitution on the basis of a pragmatic argument of substance, form and process. The changes made in the latter areas moreover signify a useful and desirable development within the integration process, making also the adoption of a constitution a legitimate exercise. However, even though the usefulness of the adoption of a European constitution is strongly interwoven with the need for the realisation of certain substantive, procedural and form-related changes, it would go too far as to completely conflate these two. There must thus be a justification for the

²²³ Cf. also Walker, *ibid.*: “[T]here are clear limits to any constitutionally-programmed community-building exercise, and so in this area any project of finality is bound to achieve at best only modest success. But the very modesty of the likely result, notwithstanding the ambitious community-building rhetoric of some, may be a blessing in disguise. For while there is a danger of a solution ‘frozen’ against legitimate opposition in terms of the various other forms of finality, there seems little or no danger at the present level of community self-consciousness of a ‘thick’ conception of continental community of an order similar to certain culturally or ethnically exclusionary or discriminatory conceptions of nationality being imposed on unwilling minorities (which is not to say, of course, that overlapping *national* prejudices towards migrants etc., cannot have some of the same effects at the continental level).” Emphasis in original.

²²⁴ See further Lacroix (2002).

use of the language of constitutionalism that cuts deeper. This question of terminology, contrary to how some might have it, indeed has a high degree of relevance.

It has been argued that the explicit adoption of the language of constitutionalism for the future Treaty to be adopted is useful in a number of respects, namely: it serves as a confirmation of already existing constitutionalism; it increases the normative force of European law; it serves to refine, improve and “mature” European constitutionalism; and it has a certain community-strengthening potential.

VII CONCLUDING REMARKS

1 Summary

In this paper it has been argued that the no demos thesis – which holds that the EU currently does not have a constitution and moreover should not, or is in principle not able to, have one – is an untenable position. Also the connected position of defensive internationalism, which denies Europe's constitutional format, is not a satisfactory approach. Finally, also the position of those scholars, who adhere to the constitutionalisation thesis but who nevertheless believe that the enactment of a European constitution is either a useless or a negative development, has been resisted. Instead, this paper advances the argument that the European Union has a constitution already and that it is useful and desirable to bring this better to the fore in a more explicit constitution. Such an explicit constitutionalisation will not bear any inherent negative (stately) consequences, as some might have it. The creation of an EU constitution is desirable on the basis of a pragmatic argument of substance (fundamental rights, competences), form (simplification: merger and reorganisation) and process (Convention), as well as for more symbolic and normative reasons.

The Constitution that has been drafted by the Convention on the Future of Europe must be seen as a logical and useful step in the Union's steady constitutional development. Thus, the Draft Constitution must be seen neither as the *foundation*,²²⁵ nor as the *completion or finalisation* of the European polity, but rather as its *maturation*.

2 The way forward

Even though the Draft Constitution must not be seen as a dramatic revolution in the sense of a constitutional rupture with the current state of affairs, it does however form an important and significant step in the integration process. Not only does the Union now embrace the symbolic and powerful language of constitutionalism in the most explicit way, also many significant substantive changes are introduced, which might not have been carried through with such swift determination by way of the ordinary IGC procedure. Political reactions serve to illustrate the great importance that is attached to the Draft Constitution. For example, in the Netherlands the Draft Constitution will be subjected to the first national (consultative) referendum ever held.²²⁶

²²⁵ Interesting to mention in this respect is the *refoundation* or *constitutional rupture* theory that has emerged on the scene (for discussion, see De Witte (2003), p. 208 *et seq.*). In this approach, the constitution is seen as a new beginning, a refoundation, rather than a continuation and revision of the Treaties. More specifically, this means that the *existing* revision rules of Article 48 TEU can be circumvented by posing that the European constitution will come into force *without* the unanimous backing of the Member States. This approach is taken for example in Article 77 of the Draft Constitution proposed by the European Policy Centre (<<http://www.theepc.net/Word/EUconst.doc>>) and by the Commission's Draft Constitution commonly known as 'Penelope', available at <http://europa.eu.int/futurm/documents/offtexts/const051202_en.pdf>. Such strategy is meant to secure the smooth entry into force of the constitution, or, more pejoratively, to "kick awkward members out of the European Union", see Charlemagne, *The Perils of Penelope*, The Economist, 14 December 2002. This constitutional rupture approach, however, is legally not acceptable: see De Witte (2003), pp. 211-212.

²²⁶ See *Referendum EU-grondwet gaat door nu VVD instemt*, de Volkskrant, 11 September 2003. For more information, see <<http://www.europeesreferendum.nl>>.

The Intergovernmental Conference that will determine the fate of the Convention's Draft Constitution started on 4 October 2003. Giscard d'Estaing emphasised that the Draft is "both an edifice and a balance" and he made a strong appeal to the European Council "to ensure that no disturbance of the balance, by calling its provisions into question, is allowed to jeopardise the solidity of the edifice!"²²⁷ His confident appeal is backed up by the fact that the Draft Constitution reached a broad consensus within the Convention,²²⁸ seemingly making it very hard for the IGC to reject, or perhaps even to partially amend, the text.

Nevertheless, no agreement has been reached so far, since the Brussels summit of 12 and 13 December failed miserably, mostly due to the Spanish and Polish refusal to accept the Draft's new voting mechanism that replaces the for those two countries more advantageous Nice regime. In the wake of the summit, there were even renewed calls for a European core or avant-garde of countries wanting to take the lead,²²⁹ indicating great discontent and disunity amongst the IGC participants. An agreement on the Draft Constitution thus seems far away²³⁰ and the risk remains that the Member States will take more and more bricks out of the edifice ultimately causing the unravelling of the constitution. Even when an agreement is reached, the Constitutional Treaty has to go through a tough ratification process in no less than 25 countries, sometimes involving referenda as well. The road to Europe's first constitution is long and full of risks, but it is to be hoped that we will get there in the end. Interesting times are ahead.

²²⁷ See Giscard d'Estaing (2003a), p. 19 and 21. See also CONV 851/03, p. 6 and Giscard d'Estaing (2003b), p. 5.

²²⁸ Whereas some Members of the Convention would have preferred an approach that went even further, there was also a group of four members and four alternate members who, though not seeking to block consensus, were unable to give their support to the Draft Constitution: see their alternative report *The Europe of democracies*, annexed to CONV 851/03, pp. 21-24.

²²⁹ See *Brüsseler Verhandlungsfiasco: Schröder droht den EU-Abweichlern*, Der Spiegel, 13 December 2003 and *Chirac für engere Zusammenarbeit Kerneuropas*, Frankfurter Allgemeine Zeitung, 15 December 2003.

²³⁰ See *EU constitution row could last until 2005, Irish PM says*, The Independent, 29 December 2003.

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