

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

EUI Working Paper **LAW** No. 2005/04

**The Migration of Constitutional Ideas and the
Migration of the Constitutional Idea: the Case of the EU**

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Published in Italy in April 2005
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Neil Walker

1. Introduction: Beyond Inter-State Migration

How, if at all, do two increasingly topical debates – one concerned with the ‘migration’ of constitutional ideas and the other with the constitutionalization of supranational entities such as the EU - connect? This is no simple question. Even if restricted to the traditional domain of inter-state movement, the debate on the migration of constitutional ideas is a complex and contentious one, both in empirical and in normative terms. It is empirically complex because the sources of the migrating constitutional ideas tend to be diffuse, hidden or rhetorically overstated, and their reception will always be mediated by and their meaning more or less subtly adjusted within the recipient legal system both at the initial point of political and judicial interpellation and in their subsequent legal-cultural re-embedding. It is normatively contentious because there are such strong and well-rehearsed *prima facie* arguments both for and against migration – most of which, moreover, seem resistant to conclusive empirical proof or refutation - and, therefore, much disagreement about the circumstances and conditions, if at all, under which migration is acceptable or desirable.

The migration of constitutional ideas may be a ‘good thing’ to the extent that it counters parochial tendencies within national constitutional law, providing alternative models of constitutional virtue against which the domestic model can be evaluated, or, even if the most basic norms and ends of the recipient order are not challenged, supplying a broader range of constitutional techniques in the search for the optimal means towards the realizations of these norms or ends.¹ Furthermore, to the extent that a universalist system of political morality is subscribed to, migration may be seen not just as an attractive option, but as a necessary path to convergence of national systems if universal constitutional justice is to be universally achieved.² But the migration of constitutional ideas may also be a ‘bad thing.’ In its deference to expertise or wisdom located in or articulated through external juristic sources, it may pay insufficient respect to the democratic sovereignty of the receiving system. That danger is exacerbated if migration operates through the indirect channel of ‘undemocratic’ judges, providing them with an arsenal of interpretive aids and justificatory arguments for creative interpretation of vague or ambiguous constitutional texts, rather than through the direct channel of the texts themselves and the legislative assemblies or Constitutional Conventions who are their collective authors.³ Relatedly, migration may be undesirable to the extent that is insensitive to national cultural particularity - to the specific legal doctrines, instruments,

¹ B. Freedman and C. Saunders, “Symposium: Constitutional Borrowing; Editors Introduction” (2003)1 *International Journal of Constitutional Law* 177-80.

² TRS Allen, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: OUP, 2001).

³ See e.g. J. Goldsworthy, present volume, and “Homogenizing Constitutions” (2003) 23 *OJLS* , 483-505; C. Harlow, “Voices of Difference in a Plural Community” in P. Beaumont, C. Lyons and N. Walker (eds) *Convergence and Divergence in European Public Law*(Oxford: Hart, 2002) 199-24.

practices and assumptions which have evolved or have been crafted to fit particular national circumstances, and which may be peculiarly appropriate to these circumstances⁴

When transposed to the supranational context, and to the EU in particular, this empirical and normative complexity is compounded, but the questions which emerge from that complexity remain interesting ones. To recall the question posed in the opening sentence, it is here claimed that there *is* an intelligible connection between the migration debate and the European constitutional debate. Indeed, the main thrust of the present essay is to argue that the change of site from the state to the EU level alters the register and balance of arguments for and against migration in significant ways, and, if anything, that the migration metaphor and the trends to which it refers pose an even more urgent challenge to received understandings of supranational constitutionalism than to received understandings of state constitutionalism. Before we can pursue that hypothesis in detail, however, we must deal with a preliminary objection which would dispute the basic premise of ‘connectedness’ and so render inquiry void *ab initio*. That objection holds that so profoundly distinctive is the transnational system that we are making a category mistake even to pose the question of migration in such an unfamiliar setting – that the EU is simply not the type of entity to which or from which we can meaningfully conceive of the migration of constitutional ideas taking place.

As supranational systems such as the EU are historically derived from, and on one view still owe their legal pedigree and *pouvoir constituant* to these national systems,⁵ then, it may be contended, there is a sense in which *nothing* is truly indigenous to the supranational – that all sources have ‘migrated’ from elsewhere. Far more so than national constitutional systems, the EU order is constitutionally Janus-faced. Like all national systems, it is, at least in principle, susceptible to external influence – to migration from other constitutional orders, although until now its underdeveloped constitutional self-understanding has restricted such influence.⁶ Unlike most national systems, however, it is also deeply susceptible to internal influence, to the reception of constitutional ideas from the already constituted sovereign states which make up the European Union. And even if we reject the extreme position which would continue to view the EU as a purely ‘inter-national’ construct, the objection of lack of settled domicile still holds. For if we concede the evolved autonomy of its now ‘*supra*-national’ legal order, this remains only a ‘relative autonomy’ from national origins and from the constitutional sensibilities located at these national origins.

Accordingly, the literature on the nature of the European supranational order is replete with references to the way in which it overlaps or interlocks with national systems,⁷ and so remains an inherently partial and “relational”⁸ system. For a mix of mutually reinforcing authoritative, functional, cultural and institutional reasons, the EU’s legal order, unlike that of the classic Westphalian state, simply cannot be conceived of, even in ideal typical terms, as an isolated, self-sufficient monad, whether in unitary or federal mode. In terms of authority, it is a key feature of the new European legal space that neither the EU nor the states possess

⁴ P. Legrand, “Public Law, Europeanization and Convergence: Can Comparativists Contribute?” in Beaumont, Lyons and Walker (eds) n3 above, 225-256.

⁵ See e.g. T. Schilling, “The Autonomy of the Community Legal Order – An Analysis of Possible Foundations” (1996) 37 *Harvard International Law Journal* 389

⁶ See e.g. C.N. Kakouris, “Use of the Comparative Method by the Court of Justice of the European Communities, (1994) 6 *Pace International Law Review*, 282.

⁷ For a strong doctrine-based analysis, see K. Lenaerts, “Interlocking Legal Orders in the European Union and Comparative Law” (2003) *ICLQ* 873. At a more theoretical level, this insight is common both to the constitutional pluralist literature (see e.g. N. MacCormick, *Questioning Sovereignty* (Oxford: OUP, 1999)) and the multi-level constitutionalism literature (see e.g. I. Pernice, “Multilevel Constitutionalism in the EU” (2002) 27 *European Law Review* 511) on the EU.

⁸ N. Walker, “Postnational Constitutionalism and the Problem of Translation” in Weiler and Wind (eds) *European Constitutionalism Beyond the State* (Cambridge: CUP, 2003) 27-54.

uncontested final authority, or *Kompetenz-kompetenz*, for all the matters with which they are concerned, nor, crucially, is there a single point or procedure of uncontested final authority situated outside and overarching both state and supranational orders and able to resolve the competing claims of both levels. Rather, supremacy or sovereignty over matters of legal notice in the territories of the EU is split, sometimes co-operatively and sometimes competitively, between the EU and national levels.⁹ A closely related point is that, functionally, the reach of the EU remains limited. It may have advanced far from its origins as a Customs Union flanked by certain limited and closely specified additional areas of economic integration to become a polity of “open and undetermined legal goals.”¹⁰ However, unlike the states, in the face of the rival credentials of the other level or site of authority, it does not even make the claim to be a comprehensive polity, one which is concerned at least in principle and in the final analysis with *all* the collective affairs of its citizens to the exclusion or marginalisation of other political structures. Rather, even on its own terms, it is a textually created and so textually limited entity, and so must share the plenitude of legal authority over its territory with national sites, (and, increasingly, other supranational or international sites). Moreover, it must do so not in accordance with a mutually exclusive apportionment of capacity but in a complex pattern of functional interdependence.¹¹

Culturally, too, the EU does not purport to exhaust the political identities, allegiances and aspirations, of its members, which also continue to sound at national and other levels. And institutionally, these other relational dimensions are reflected and reinforced through a thick pattern of “bridging mechanisms”¹² linking the legal and political organs, tasks and methodologies of the supranational site to other sites, again predominantly but by no means exclusively national sites. In many ways, these bridging mechanisms resemble the interdependent and integrative structures of modern co-operative federalism - with the crucial difference of the absence of an uncontested final authority. So, in addition to most sectors of competence being shared rather than within the exclusive remit of national or supranational authorities, we find, for example; that in the absence of a system analogous to Federal District Courts national courts remain responsible for much of the interpretation and enforcement of European law; that with the European Commission continuing to look more like an administrative college than a traditional state executive, national governments and administrations remain responsible for much of the application and execution of supranational law; and that amidst resilient concern and controversy over the extent of the legitimate mandate of the directly-elected European Parliament, national Parliamentarians, increasingly,¹³ are involved in monitoring the quality and competence of European legislation.¹⁴

Now if we pause for a moment to examine the meaning of the term ‘migration,’ we can see that this empirical difficulty in mapping movement in constitutional ideas to and from a clearly delimited supranational sphere is grounded in a conceptual difficulty. Migration, according to the Oxford English Dictionary, refers to the process of movement “from one habitat to another” This is undoubtedly a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas. Unlike other terms current in the comparativist

⁹ See e.g., N. Walker “Late Sovereignty in the European Union,” in N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003) 3-32.

¹⁰ M. P. Maduro, “Where to Look For Legitimacy?” in E.O. Eriksen, J.E. Fossum and A. J. Menendez (eds) *Constitution Making and Democratic Legitimacy* (Oslo, Arena: 2002) 81-110, at 82.

¹¹ On the overlapping and interdependent nature of competences under the present Treaty Framework, see G. de Burca and B. de Witte “The Delimitation of Powers Between the EU and its Member States” in A. Arnulf and D. Wincott (eds) *Accountability and Legitimacy in the European Union* (Oxford: OUP, 2002) 201-222.

¹² S. Weatherill, *Law and Integration in the European Union* (Oxford: OUP, 1995) chs. 4 ad 5.

¹³ See n77 below.

¹⁴ For a good overview of these institutional features in the immediate pre-Constitutional Treaty phase, see S. Weatherill, *Cases and Materials on EU Law* (Oxford: OUP, 2003, 6th edn.) Part I.

literature such as ‘borrowing’ or ‘transplant’ or “cross-fertilization”,¹⁵ it does not presume anything about the attitudes of the giver or of the recipient or about the fate or properties of the legal objects transferred. Rather, as we shall develop in due course, it can refer to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by the giver or the receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or with some more abstract or intangible constitutional sensibility or ethos. However, what the term migration *does* presume is the existence of discrete sites and of boundaries between these discrete sites, with legal space mapped onto territorial space. There must, in other words be a sense of a ‘here’ and a ‘there’ between which movement takes place. The idea of a legal system all of whose concepts are ‘immigrants’(even if some are by now long-term immigrants and fully domiciled) , whose ‘habitat’ is ill-defined and whose relational boundaries are not marginal but central to its *raison d’être*, sits awkwardly with the migration metaphor.

Nevertheless, this is not enough to endorse the claim that the migration metaphor is categorically inappropriate. Rather, precisely *because* it has to be stretched in new ways, the migration metaphor remains useful in highlighting the nature and extent of the differences between national and supranational systems as regards the movement of constitutional ideas. In particular, while the empirical complexities introduced by the supranational dimension inevitably also affects the normative issues at stake in the movement of constitutional ideas, they do so in ways which the migration metaphor can help place in sharp relief. As we shall see in the sections that follow, the two main challenges to the legitimacy of the migration of constitutional ideas - the question of democratic legitimacy and the question of cultural specificity – do not fail to signify, but rather take on a very different significance in the EU context, especially in the light of the emergence of an (as yet unratified)¹⁶ first Constitutional Treaty for the EU in the Autumn of 2004.¹⁷

Two arguments are developed in order to tease out that different significance. First, the challenge of democratic legitimacy, although on the face of it even more profound in the EU context than in the national context, is on deeper reflection on no account decisive against the legitimacy of migration. Secondly, and in reverse, the question of the specificity of the EU legal culture, though superficially *less* of a problem than in the traditional inter-state context, suggests on closer consideration a more fundamental and resilient set of problems which challenge the very idea of European constitutionalism and whose resolution remains a matter of profound and long-term uncertainty.

2. Democracy and Constitutional Migration in the EU

Why should the argument from democracy seem to pose such a vigorous challenge to the migration of constitutional ideas in the context of the EU? The answer has to do with the already weak democratic credentials of the EU. The sheer scale of the EU, the legislative and executive power invested in an unelected college (the Commission), the prevalence of a technocratic and output-orientated conception of governance in the historical roots of the common market project and carried over in the design and working culture of the Commission and in and around other key organs and institutions, the complexity and illegibility of the overall institutional complex, the low salience of many EU issues in national settings, the modest public profile of the Parliament, the lack of robust pan-European political parties, and –

¹⁵ P. Birkinshaw, *European Public Law* (London: Butterworths, 2003) , ch.1.

¹⁶ As of February 2005, three of the twenty five Member States had ratified. The Constitutional Treaty provides for its entry into force no earlier than 1 November 2006, in the event of the deposit of instruments of ratification by all 25 Member States; see Art.IV-447 CT.

¹⁷ Treaty Establishing a Constitution for Europe, CIG 87/2/04 Rev 2 Brussels 29 October 2004 (hereinafter “CT”).

connected in complex chains of cause and effect to all of these – the lack of, or weakness of a European *demos* self-understood as a political community of common attachment and engagement, all contribute to this.¹⁸ For some too, the unelected ECJ judges play by no means an insignificant part in further exacerbating this problem. The ECJ has been an important supplementary architect in the making of the supranational system, designating to itself a key role in defining the remit of the EU broadly and expansively¹⁹ through its key jurisprudence on sovereignty, direct effect, implied powers etc.,²⁰

On this view, a licentious approach to the migration of constitutional ideas from other systems to the EU, particularly if mediated through the already powerful ECJ, might, crudely speaking, simply make a bad situation worse. There are at least four reasons, however, why we should not rush to such a conclusion. On account of the quasi-federal mediating role of the ECJ, the relative openness of the new Constitution-making process, its emphasis upon relatively context-independent measures of institutional design, and the necessarily different articulation of democracy as a principle at the supranational level, the democratic dangers of the migration of constitutional ideas may in the final analysis be less pressing than at the national level.

In the first place, if we look at the actual long-term dynamics of constitutional migration to the EU level through the judicial medium, in many ways it has been sensitive to key democratic concerns about the composition and powers of the EU. As already noted, reflecting its origins as a classic international treaty, the EU has been historically inward looking. From the outset, its Janus-faced quality may have been technically evident, as it has always been prepared to draw in some measure from the principles of third country legal orders,²¹ and even from the international legal order,²² but far more significant has been its dependence on national sources. So much so, indeed, that according to one former President of the Court of Justice, recourse to the comparative law of the Member States has not simply been drawn upon as an occasional aid to interpretation but internalized as a normal method of interpretation of Community law.²³

Perhaps the best known example of this has been in the development of an explicit doctrine of reliance on national constitutional traditions in developing human rights protection at the European level.²⁴ In response to German concerns expressed in a number of early cases that nationally guaranteed rights in matters such as legal certainty, due process, and economic freedom were in danger of being eclipsed by Community rules,²⁵ the ECJ, first, in *Stauder*²⁶ and then, more explicitly, in *Internationale Handelsgesellschaft*,²⁷ argued that the general principles which underpinned Community law included respect for fundamental rights as inspired by the constitutional traditions held in common by the Member States. The message conveyed by the ECJ was that the national courts should have no reason to fear a system of

¹⁸ See e.g. J.H.H Weiler, *The Constitution of Europe* (Cambridge: CUP) 1999) ch. 8.

¹⁹ See e.g. Harlow, n3 above.

²⁰ For a good overview of these developments, see P. Craig and G. De Burca *EU Law: Text, Cases and Materials* (Oxford: OUP, 3rd ed. 2003) chs. 7 ad 8.

²¹ See e.g. M. Hilf, “The role of comparative law in the jurisprudence of the Court of Justice of the European Communities,” in *The Limitation of Human Rights in Comparative Constitutional Law* (Cowansville, Yvon Blais, 1986).

²² See e.g. P. Pescatore, “International Law and Community Law – A Comparative Analysis,” (1969) 6 *Common Market Law Review* 177.

²³ J Mertens de Wilmars, “Le droit comparé dans la jurisprudence de la Cour de justice des Communautés européennes,” (1991) *Journal des Tribunaux* 37

²⁴ See Craig and De Burca, above n20, ch.8.

²⁵ See e.g., *Stork v. High Authority* [1959] ECR 17; *Geitling v. High Authority* [1960] ECR 423.

²⁶ *Stauder v. City of Ulm* [1969] ECR 419.

²⁷ *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125; see also *Nold v. Commission* [1974] ECR 491.

supranational rule committed to the very same substantive principles as the national courts. While this was met with initial scepticism by the Federal Constitutional Court,²⁸ in due course it came to accept the presumptively sound and thus authoritative nature of the ECJ's commitment to fundamental rights.²⁹

The idea of recourse to national constitutional traditions as a basis for respect of fundamental rights and other general principles of EC law has gradually become embedded both in the case-law³⁰ and in the Treaties themselves,³¹ and through this and similar devices we can observe many other instances of the ECJ using 'internal comparativism' as a mediating device. To take but three examples amongst many,³² we see this in a cautious and incremental approach to the imposition of non-contractual liability on the public authorities of the Member States for breaches or non-implementation of EU law,³³ in an attitude to non-discrimination on the basis of gender which accords with the limits set by the less expansive of the national formulae,³⁴ and in an approach to the legal privilege of documents and to the doctrine of confidentiality in EU judicial and quasi-judicial proceedings which respects the common floor of existing national solutions.³⁵

This is not to suggest, of course, that the ECJ has somehow discovered the golden mean in its efforts to draw upon diverse national constitutional traditions. The epistemological basis of such a conclusion, which is hinted at in some of the more expansive rhetoric of the Court's supporters,³⁶ remains obscure and wishful. Rather, it is accept the more balanced view of one (then Advocate-General) current judge of the ECJ that the use of the comparative approach by the Court has to be understood at least in some part as an exercise in "psycho-diplomacy,"³⁷ which seeks to address and manage the perennial tension between "the concern 'not to give up' when confronting national divergences and that of respecting, in the interests of the 'acceptability' of Community law in the domestic legal orders, the national sensitivities and the differences which exist in the legal conceptions and constitutional traditions of the Member States." If much of the concern about the democratic deficit of the EU is precisely the danger that the plural democratic traditions of the Member States may be eroded by a gradually homogenizing centre, then the legitimacy sensitivities and sensibilities of the supranational judiciary, and their relative openness to national ideas, must in some measure be seen as a counterweight to this.³⁸ In this regard, moreover, we can hardly accuse the judges of acting beyond their proper remit. In terms of the relations between the central and the local, the EU exhibits at least some of the tendencies of a federal order, and the judges thus have no choice but to act, as do their counterparts in national systems, as federal umpires attempting to find compromise solutions to what is a perennial tension between the two levels. The fact that they draw on *constitutional* materials in so doing, is merely indicative of the resilience of the

²⁸ *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratstelle für Getreide und Futtermittel* [1972] CMLR 177

²⁹ *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225.

³⁰ See e.g. *Brasserie du Pêcheur and Factortame* [1996] ECR-I 1029.

³¹ See in particular Arts 6(2) and 46 TEU.

³² For detailed analysis, see Lenaerts, n7 above.

³³ *Francovich and Others* [1991] ECR I-5357; *HNL and others v Council and Commission* [1978] ECR 1209.

³⁴ *Grant v. South West Trains Ltd.* [1998] ECR I-621.

³⁵ *AM and S v. Commission* [1982] ECR 1575.

³⁶ See e.g. Hilf n21 above.

³⁷ K. Lenaerts, n7 above, at 906.

³⁸ Of course migration is not always one way. To take one well-known example, the doctrine of 'proportionality' with strong origins in German law, was first adopted by the ECJ, and then in a further phase of migration, 'received back' from the EU (and also from the Council of Europe's European Court of Human Rights) by other national systems such as the English system. This of course also raises questions of democratic legitimacy for the *state* (see e.g. Harlow, n3 above), but is not the immediate concern of this essay.

autonomous constitutional pedigree of the ‘lower level’ in a unique supranational configuration.

In the second place, with the advent of the (Constitutional) Convention on the Future of Europe in 2002³⁹ and the conclusion, after some delay, of the Constitutional Treaty in 2004, the EU constitutional debate became more inclusive, the opportunities to draw upon national constitutional traditions more explicit, the context within which they were drawn upon more holistic – as materials in the reconsideration of the EU system as a whole rather than, as previously, mere incremental building-blocks towards or accretions upon a system with unforeseeable or uncontrollable consequences for the whole. The representation for the first time of both national (56) and European (16) parliamentarians, alongside national executive (28) and European Commission (2) representatives, together with the consultation of civil society and the adoption of a more open method of deliberation than the traditional Treaty-revising Intergovernmental Conference, helped both to broaden the decision-making base and to ensure a stronger national voice in proceedings. It followed that within the Convention, unlike the traditional Intergovernmental Conference mechanism (which, in the present process, lost its initiative role but retained the power of final decision)⁴⁰ where the drafting was very much the work of the Council’s secretariat and the national offices of the Presidency of the Council – and so largely dominated by EC law experts, the natural reference point of debate was *national* constitutional traditions.⁴¹

Many examples could be given of this national influence – sometimes explicitly stated and at other times implicit in the constitutional mind-set and in the sense of constitutional permissibility of the delegates.⁴² In some cases, the national template or templates were drawn upon to argue successfully for a new departure, as with the specification of a catalogue of different categories of competences as between Union and Member States, including a long list of shared or concurrent competences,⁴³ which draws strongly on the German tradition, or as in the broadening and strengthening of the European Parliament’s role in the legislative procedure,⁴⁴ which reflects a more general European constitutional tradition in which the default position is full parliamentary involvement in all species of law-making. In other cases, national traditions helped argue for the consolidation of the existing constitutional settlement, as with the decision to endorse and give full legal status to the EU’s declaratory Charter of Fundamental Rights of 2000,⁴⁵ itself explicitly drawn both from individual national traditions and the collective European tradition of the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms, and the “Social Charters”⁴⁶ adopted by the Council of Europe and the Union respectively. In other cases still, one constitutional model evident in some national constitutional traditions was preferred to an alternative evident in other national traditions. For example, the Convention rejected the pure Kelsenian idea, known in many continental traditions, of the legal system as a single hierarchy of norms, with all rules deriving their validity from higher rules in a single chain of authority. Instead, reflecting the way in which different institutions reflect the sometimes rival claims of different “estates”⁴⁷

³⁹ For the Convention Draft Treaty, which was subsequently amended by the IGC, see OJC 189, 18 July 2003

⁴⁰ As indeed was required under the existing Treaty amendment formula; Art. 48 TEU

⁴¹ J Ziller, “The Role of Member States’ Concepts in the New Constitution for Europe” 1(2) *European Constitutional Law Review* (2005) (forthcoming).

⁴² For extensive discussion, see Ziller, *ibid.*

⁴³ Art. I-14 CT.

⁴⁴ Arts I-20, I-34 and III- 396 CT.

⁴⁵ [2000] OJ C364/1

⁴⁶ Part II, Preamble, CT.

⁴⁷ See G. Majone, “Delegation of Regulatory Powers in a Mixed Polity” (2002) 8 ELJ, 319. According to the author, a distinctive feature of the EU constitutional order is the extent to which the different institutions do not represent different government functions, as in the classic separation of powers model of modern state

within the European legal order, a variation of the model of incomplete hierarchy familiar to the UK and French systems is retained, with “non-legislative acts”,⁴⁸ namely regulations, decisions or recommendations, sometimes deriving their authority directly from specific institutions, most prominently the European Council and the Council, rather than as strictly delegated or implementing measures flowing from primary “legislative acts”⁴⁹ made under the combined deliberation and authority of the Commission, Council and European Parliament.

Clearly, the EU Constitutional Convention, no more than any of its national predecessors, should not be mistaken for an exercise in ideal participatory democracy.⁵⁰ Yet the fact remains that it afforded a serious opportunity for the consideration of the lessons of diverse constitutional traditions in a context which sought to be reasonably inclusive of and responsive to the diversity of European constituencies, such that, in formal terms at least, its democratic and deliberative credentials as a Constitutional Convention were at least *no worse* than many national predecessors. What is more, built into the final clauses in Part IV of the Constitution is provision for use of the inclusive Convention method for future amendments,⁵¹ so avoiding the entrenchment of current conventional wisdom against the possibility of democratic reconsideration in the future.

It might be argued, nevertheless, that to affirm the Convention’s democratic status on these grounds is to confuse form with substance, and that the Convention’s relatively open and deliberative procedure and style, although apparently subjecting national constitutional solutions to rational inquiry and selective adaptation, in fact provided no proof against the weight of national constitutional traditions and their capacity to insinuate themselves inappropriately into the supranational settlement. On this view, the debate was skewed from the outset, the constitutional legacy providing a foundational bias – a pre-democratic closure or narrowing of deliberative possibilities – which the Convention and the resulting Constitution could not overcome.

Yet this deeper objection may be answered by our third argument, according to which the democratic credentials of the new Constitutional Treaty are reinforced by the nature of its focal concerns. The primary emphasis within the Constitutional Treaty – with the notable exception of the Charter of Fundamental Rights in Part II – as with most documentary Constitutions, was on general institutional design rather than the detailed elaboration of substantive constitutional doctrine. General institutional design is the theme of Part I of the Constitution – its leading part and, aside from Part II and the brief Part IV (General and Final Provisions), the only part to be subject to detailed overall⁵² consideration in the Convention,

constitutionalism, but rather, as in the mediaeval model of the mixed polity, different estates or constituencies – with the Commission representing the pan-European interest, the Parliament the interests of the European people(s) and the Council (comprising ministerial level representatives of Member States) and the European Council (comprising Heads of State or Government) the interests of the Member States. The argument may exaggerate both the distinctiveness of these institutional identities in the EU context on the one hand, and the extent to which national constitutional schemes follow a strictly functional model of differentiation on the other hand, but inasmuch as it captures something of the pronounced institutional pluralism of the EU and the resilient tensions as to its underlying purpose and driving force which that pluralism reflects, it helps to explain why the development of a single hierarchy of norms has proved so elusive.

⁴⁸ Art. I-35 CT.

⁴⁹ Art. I-34 CT.

⁵⁰ For a good overview of the Convention process, see C. Closa and J.E. Fossum (eds) *Deliberative Constitutional Politics in the EU*, (Oslo: Arena) 5/04.

⁵¹ Art. IV-443 CT. Although a simplified revision procedure without resort to the Convention mechanism is also provided for in limited circumstances under Arts. IV-444 and IV-445 CT.

⁵² Part III on the Policies and Functioning of the Union is by far the longest Part – covering 322 of the 447 Articles and dealing with most of the substantive doctrine traditionally included in the Treaties. But with some important exceptions in areas such as freedom, security and justice and common foreign and security policy, this

and, indeed, *the* only part to be subject to significant innovation by the Convention and the subsequent IGC.

Now, institutional design provisions arguably have a peculiarly disembedded quality which allows them a distinctive role in the transfer of constitutional ideas. They have a predominantly functional significance – they are a means to an end, a framing mechanism and architecture for the legal and political system as a whole. Unlike substantive juridical concepts in human rights, review of administrative action, public liability etc., whose meaning and implications are always and immediately contingent on their deep interpretive fit with other substantive concepts of the legal system in question and always and immediately expressive of the quality of that fit, with institutional design measures it is easier for the constitutional engineer to draw a conceptual bright line between the rule and its application. That is to say, institutional measures, while clearly not value-neutral in their implications,⁵³ are primarily value-instrumental rather than value-expressive.⁵⁴ And particularly where the institutional design system as whole is under review rather than just its discrete parts, the instruments can be considered, in particular combinations and configurations, as mechanisms towards the realization of certain distinctive values rather than as fated to carry the meaning-freight of an already existing structure of values.

So, for example, to return to some of the measures discussed above, the discussion of the value of a competence catalogue, or a strengthened Parliament, or a new hierarchy of legal instruments – could be conducted, and for the most part was conducted, with a view not to the meaning which each of these measures had for the political value system or systems in which such mechanisms were already found, but to their constitutive (together with other parts of the revised institutional architecture) meaning in the quite different context of the European legal order. In other words, just because of their independent instrumental significance, these and other institutional design proposals could be treated as functional tool-box for the redesign of a separate system and the furtherance of the values associated with that system, rather than concepts whose meaning at the point of arrival would be remain heavily dependent upon a deeper context of application at the point of departure..

Accordingly, and not just because of the inclusiveness of the Convention and the vigilance of representatives of different national traditions in ensuring against the emergence of any dominant tendency,⁵⁵ it is difficult to conceive of the process of institutional innovation as being illegitimately mortgaged to any particular national tradition, or indeed to any particular cluster or mix of national constitutional traditions. This is not, of course, to be complacent about the migration of institutional measures in general. In the post Second World War decolonization context and, to a lesser extent, in the post Cold War context of the 1990s, there are many examples of knowing or unknowing constitutional imperialism, of the suggestion or actual transfer of particular instruments or of an institutional framework lock, stock and barrel from one context to another without regard or with ill-regard to the recipient context – where the instruments singly or as a package are reified as the ‘one best way’ rather than examined for their variable contribution to different conceptions of constitutional value and political

body of doctrine remained largely unaltered by the drafters, and indeed much of it was not even referred to in the Convention debate.

⁵³ *Pace* some version of process-based constitutional theory. See, e.g. J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980). For critique, see e.g. J. Waldron *Law and Disagreement* (Oxford: OUP, 1999) ch.13.

⁵⁴ Although institutional terms, and the provisions which bear these terms, can clearly also have a metonymic quality, symbolizing larger systems of government and the constitutional ethos supposedly underpinning such systems of government – as in the idea of *parliamentary* or *presidential* government.

⁵⁵ See Ziller, n41 above.

community.⁵⁶ However, the crucial point is that this need not be the case, and in the context of a reasonably inclusive, ecumenical and destination-orientated rather than source-orientated debate between diverse constitutional traditions, has not been the case in the current EU debate.

Fourth and finally, a more general conceptual point can be made about the migration of constitutional ideas to the supranational domain which reinforces the sense that this process need not carry a democratic danger.⁵⁷ Even at the state level, that democracy be accepted as a key value of political community has no necessary implications for its optimal form of constitutional articulation within any particular state. The meaning of democracy – to what extent it is more or less concerned with underlying virtues of autonomy, dignity, participation, responsiveness, fairness, equal respect and concern, collective belonging, optimal interest-aggregating collective decision-making and so on – is contested, and different conceptions of the optimal balance of these virtues may well have different constitutional consequences, without the disfavoured solutions deserving to be branded as ‘undemocratic’. At the supranational level, the institutional ramifications of the democratic commitment are even more intricate. Here it is not only a matter of reasonable disagreement over what democracy means in the light of the even more fundamental political values to which it is instrumental, and of diverse calculations as to how this meaning and these more fundamental political values should best be translated into a single, exhaustive constitutional frame. The fact that the EU is, as already noted, an incomplete and relational polity, that it is a means of treating collective action problems in the economic and social domain which increasingly escape the control of individual democratic states but that it nevertheless continues to operate alongside states and to affect and be affected by their capacity to act, entails that its constitutional articulation of the value of democratic primacy will necessarily be a more open-ended and multi-faceted exercise. More specifically, its commitment to democratic primacy must be qualified in two ways to take account of its two special situational attributes. First, the fact that its functional role is more partial and speaks to a secondary form of loyalty and identity means that both the supply and the demand for the sociological sense of political community – of a demos capable of supporting direct democratic forms and common projects – will be more restricted at the EU level than in the classic Westphalian state, and even the contemporary post-Westphalian state. Secondly, such political capacity as it does possess should be exercised in a way which is not detrimental to, and if possible enhances, the continuing democratic credentials of the states with which the supranational polity is so intimately related.

One finds, indeed, that an influential range of European constitutional theory *does* argue that democracy primacy should be a more or at least differently qualified virtue in the supranational theatre than in its traditional statist habitat, even if all but the most committed Eurosceptics would deny that the current absence of strong preconditions of democratic will formation in the European context requires us to rewind to some "golden age" of nation state democracy. In some cases, an urgent institutional priority is accorded to finding new and imaginative forms of democratic voice rather than simply seeking to recreate the institutional forms of state democracy at the supranational level. From this perspective, there is less concentration⁵⁸ on the search for general and holistic solutions in the name of the collective

⁵⁶ See e.g. R. Elgie and J. Zielonka, “Constitutions and Constitution-Building: A Comparative Perspective” in J. Zielonka (ed) *Democratic Consolidation in Eastern Europe Vol. 1 Institutional Engineering* (Oxford: OUP, 2001) 25-47.

⁵⁷ See N. Walker, “Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism” in Beaumont, Lyons and Walker (eds) *n3* above, 257-272.

⁵⁸ Less concentration, but by no means complete indifference, in that the solution to Europe’s collective action problems does require *some* common sense of a European public good, and the degree of mutual sympathy and trust required to commit to put things in common to the extent necessary to achieve that public good. See e.g. N. Walker “The EU as a Constitutional Project” Federal Trust Online Papers 2004/18. These holistic democratic requirements, therefore, continue to exist *alongside* the requirement for adequate voice and participation in

demos (in recognition that both the supply of and demand for this is restricted) and more upon participative and deliberative structures within particular transnational communities of interest or attachment addressing the variety of particular policy issues with which the EU is concerned.⁵⁹ In turn, this shades into another approach, exemplified in different ways by prominent commentators such as Weiler, MacCormick and Scharpf, who, while also confirming the continuing importance of democracy as a value and as a guiding principle of institutional design at the European level, suggest that in the absence of a thick nation state-style *demos* at the European level and a comprehensive political project to which it is directed, we should place more emphasis upon other fundamental virtues of governance. These may be defined in terms of expertise, negotiated consensus⁶⁰ and other "output-oriented"⁶¹ and effectiveness-centred values, or even, to turn the absence of a strong *demos* into an explicit virtue, in terms of supranationalism's structural opportunity to curb the nationalist or majoritarian excesses of state democracy through the cultivation of transnational tolerance and mutual recognition.⁶²

The instant point is not to choose between these theoretical perspectives. It is, rather, to caution that the constitutional design implications of a democratic commitment at supranational level might look rather different, and less directly committed to classic representative forms, than at national level. And it follows from this that, insofar as the migration of democracy-conditioning or democracy-constraining, and at any rate democracy *qualifying*⁶³ constitutional instruments is seen to carry a presumptively anti-democratic tariff at the national level, it need not attract the same tariff at the supranational level, where there may be arguments additional to those which can be mobilised at the national level in favour of the contemplation and adaptation of such instruments.⁶⁴

3. Constitutional Culture and Constitutional Migration in the EU

As noted earlier, first impressions suggest that the cultural argument against the migration of constitutional ideas in the context of the EU would be less compelling than the democratic argument. This is so for the simple reason that the EU is often viewed as a kind of cultural *tabula rasa* – or, to repeat a phrase used earlier, as a legal and political space all of whose sources have 'migrated' from elsewhere. If this were the case, there would be no

particular policy domains – a point which some of the literature on the diversity of the EU's democratic requirements tends to ignore or underplay (see n59 below).

⁵⁹ See e.g., see O. Gerstenberg and C.F. Sabel "Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?" in C. Joerges and R. Dehousse (eds) *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002); E O Eriksen and J E Fossum (eds.), *Democracy in the European Union- Integration Through Deliberation?* (London: Routledge, 2000); P C Schmitter, *How to Democratize the European Union. . . And Why Bother?* (Maryland: Rowman and Littlefield, 2000); R Bellamy and D Castiglione, "Legitimizing the Euro-polity and its regime: The Normative Turn in European Studies" (2003) 2 *European Journal of Political Theory* 1-34.; see also, and relatedly, the 'comitology' and 'new governance' literature, in particular C Joerges and E Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999); J. Scott and D. Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union" (2003) 8 *European Law Journal* 1.

⁶⁰ MacCormick, n7 above.

⁶¹ F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: OUP, 1999).

⁶² Weiler, n18 above, chs. 7 and 10.

⁶³ One manifestation of the lively debate in constitutional theory over the institutional articulation of democracy and its underlying values is enduring disagreement over what constitutes a limitation upon democracy and what, instead, is merely a constituent premise or precondition of democracy. See e.g. Waldron, n53 above, ch.13.

⁶⁴ One can imagine, for example, that if one were to endorse Weiler's championing of the importance of a strong rights regime to curb nationalist and majoritarian excesses in the Member States, (see text to n62) this could provide a strong argument in favour of looking to norms and interpretive practices drawn from non-European rights regimes to supplement the EU Charter of Fundamental Rights in Part II of the CT and the European Convention of Human Rights,

indigenous culture to disturb, betray or misrecognize. If all is immigration, then any new wave or trickle of migrant ideas would simply go into the melting pot and add to the multicultural mix.

However, such a view is at best an exaggeration. It is one thing to agree that the EU lacks the deep-layered cultural formations of the typical nation state. It is quite another to assert that it lacks anything by way of culture – in the sense of a distinctive set of practices and attitudes which themselves form an organic whole (however loosely and open-endedly conceived) whose specificity and integrity has to be taken into account when new ideas and practices are introduced. So it has been persuasively argued that the EU already does possess a distinctive legal and political culture of sorts,⁶⁵ made up of the institutional forms and judicial, political and administrative attitudes which structure the operation of its political system. One indirect indication of this distinctiveness, indeed, is the extent to which the ECJ has moved away from its early practice of making overt use of comparative law sources drawn from the Member States, preferring now to view, and to be seen to view, these sources as aids to the further development of an autonomous legal culture rather than as the constituents of a hybrid legal culture.⁶⁶ Neither should we be surprised that a distinctive supranational legal and political culture has emerged. The history of national politics and nationalism is one of complex mutual causation and reinforcement of shared, practices, loyalties and world-views on the one hand and established institutional forms on the other. Culture, then, is never ontologically prior, but always as much constructed as constructive. And after 50 years of institutional development in the EU, there is inevitably a level of constructed culture – a set of ways of thinking about, practicing and presenting politics and the regulation of the political sphere which are adapted to the specific demand and aspirations associated with the EU polity - even if this legal and political culture is largely limited to institutional and interest elites and does not penetrate deeply into the fabric of European society (ies).

What we are alluding to here, indeed, in positing a separate legal and political culture for the EU, is no more than we would expect to follow in terms of institutional and attitudinal identity from the specificity of the European polity as a partial and relational polity. In the previous section, it was argued that these distinctive features of the Europolity challenge the conceptual foundation of the democratic critique of the migration of constitutional ideas. In the present section, we seek to turn the implications of polity distinctiveness on its head, arguing that it is precisely the *sui genericity* of the Europolity which sharpens the cultural argument for viewing the migration of constitutional ideas to the EU with caution.

⁶⁵ Although this has been a “relatively neglected” (F. Snyder, “The Unfinished Constitution of the European Union: Principles, Processes and Culture” in J.H.H. Weiler and M. Wind (eds) n8 above) field to date, recent studies have begun to examine the ways in which European judges, lawyers, clerks and officials and transnational law firms operating within the institutional and juridical environment of the EU are forging a distinctive set of attitudes and practices; see e.g. Snyder above; A. Von Bogdandy, “A Bird’s Eye View on the Science of European Law: Structures, Debates and Development. Prospects of Basic Research on the Law of the European Union in a German Perspective,” (2000) 6 *European Law Journal* pp.208-238; H. Schepel and R. Wesseling, “The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe,” (1997) 3 *European Law Journal* pp. 165-188.

⁶⁶ Lenaerts, n7 above. 874-6. It is clear that comparative sources do continue to be of significance, as can be seen by the regularity with which they are cited in the Opinions of the Advocates-General, and, indeed, as is institutionalized in the working practices of the Court’s research and documentation service. The key point, however, is that there has been a gradual shift in the self-understanding and self-presentation of these sources as clearly *external* sources. It is also noteworthy that even at the high water mark of explicit internal comparativism, the ECJ itself was careful never to defer to the constitutional authority of any particular national system, and unlike the Advocates-General, rarely made explicit reference to particular national judgments or doctrines as opposed to general reference to common constitutional traditions; see B. de Witte, “The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process,” in Beaumont, Lyons and Walker (eds) n3 above, 39-58, at 39-42.

However, we have to be careful to specify the limits within which this critique can be made. As argued in the previous section, cultural distinctiveness and the attendant possibility of the illicit migration of constitutional ideas and the pre-emption of supranational democratic deliberation is not really an issue at the level of institutional design. Particular institutional mechanisms have an instrumental or functional versatility which allows them in propitious circumstances to be reflexively adapted to quite different and novel ends, and in the particular context of the EU, the palpably distinct design needs of a supranational polity, the competitive balance of national traditions and, more recently, the opportunity for holistic deliberation supplied by the Constitutional Convention, has indeed provided suitably propitious circumstances for such adaptation.

Cultural distinctiveness becomes an issue if we turn away from the institutional rules through which a machinery of government is constructed⁶⁷ and concentrate instead on certain aspects of the “expressive”⁶⁸ dimension of constitutionalism. By this we mean the way in which constitutions provide *models* of political community, in the double sense of seeking to provide a representation of the type of community to which they refer, and a standard by which that community should judge itself.⁶⁹ Constitutions thus always offer the “people a way of understanding themselves as political beings,”⁷⁰ which is in part depiction and in part benchmark and aspiration. So, to take an elementary example, the republican form of the French or the US Constitution both reminds and persuades the peoples of these countries of the distinctive character of their political community. Or, at a more detailed level, the commitment of the post-apartheid South African Constitution to a framework of justiciable rights both in the classic ‘first generation’ negative civil and political freedoms and in ‘second generation’ positive welfare claims signifies the co-equal importance of liberty and equality in the new order – both as initial commitment and ongoing project.⁷¹

Now clearly, to the extent that the text and associated doctrine of a Constitution may impact directly upon and help shape and refine a people’s self-understanding as a political community, in addition to providing a background instrumental resource in constructing a suitably ‘customized’ system of government, then the source of the devices through which this expressive constitutional capacity is articulated becomes very important. If these expressive devices are simply transferred from one constitutional context to another, without proper consideration of the distinctiveness of the kind of political community they seek to express, then the danger exists that a mode of self-understanding appropriate to one political community is sought to be imposed on a quite different type of political community – regardless of the fact that it neither plausibly depicts the kind of self-understanding present in the recipient community nor is capable of articulating the kind of aspirations appropriate to that community. In such a scenario, migration can give rise to perverse consequences, with the alien graft of constitutional self-understanding either failing to take in the new environment, or doing so in a way which shapes the native political culture in unintended ways and threatens to bring a new form of constitutional self-understanding inappropriate to native circumstances.⁷²

⁶⁷ Which is not to say that these institutions themselves cannot have an expressive function (see n54 above), but only that their main function is instrumental - in contributing to the overall machinery of government and the political values that overall machinery is apt to serve.

⁶⁸ M. Tushnet, “The Possibilities of Comparative Constitutional Law” (1999) 108 *Yale Law Journal* 1225

⁶⁹ See Walker, n58 above.

⁷⁰ Tushnet n66 above, 1228.

⁷¹ See e.g. S. Chambers, “Democracy, Popular Sovereignty, and Constitutional Legitimacy,” (2004) 11 *Constellations*, 153.

⁷² For example, the American formal separation of powers doctrine, resonant of its traditional self-understanding as a state vigilant against the dangers of tyranny and faction, was arguably a significant factor when exported to Latin American countries in the transformation of liberal constitutional forms into sovereign dictatorships; see B. Ackerman, “the New Separation of Powers”(1999-2000) 113 *Harvard Law Review* 633.

The expressive function of constitutions can operate at the level of the constitution as a whole or in particular provisions. Now, in the context of the EU, it is arguable that the aspect of constitutional migration which is most vulnerable to the charge of cultural inappropriateness, is that which operates on the most abstract level of all – namely the *very idea of the European Union as a fully constitutional entity*. That is to say, it is the forms of self-understanding implicit in the very notion of an entity being of the sort which is appropriately conceived of as fully documentalized constitutional entity, and the migration of *that* idea to the EU, which most threaten the cultural integrity of the EU as a *sui generis* configuration.

This might seem to be a counter-intuitive hypothesis. After all, it is precisely the move from the implicit constitutionalism of the early years of the EU to the project of explicit documentary constitutionalism we have seen in the Constitutional Convention and its aftermath that has allowed a candid root-and-branch self-assessment rather than the kind of incremental, *ad hoc* and low profile migratory drift which might threaten to transform the recipient constitutional culture without adequately holistic reflection or justification. Yet for all its potential to stimulate reflection, and, relatedly, to mobilize a deeper sense of community,⁷³ the current constitutional moment in the European Union contains other and more disquieting possibilities.⁷⁴ For when borrowing and adapting the concept of documentary constitutionalism, the EU is doing more than drawing upon a tool-kit of design concepts, and a procedure for stimulating internal reflection upon and engagement with the polity. It is also assuming for itself a particular trope of political community, one with strong statist connotations, suggestive of an exhaustive rather than a partial polity, and a unitary and self-contained rather than a relational structure of authority.

It could be argued, of course, that even the most resilient figurative meanings can change, and in assuming the discourse of constitutionalism, the EU need not acquire any of its statist trappings. Indeed, it could be pressed, it was precisely the purpose of the relatively open and deliberative method drawn from the tradition of documentary constitutional *process* to guard against the statist ambition drawn from the tradition of constitutional *substance*. And, moreover, if we look at the finished text, this purpose has arguably been largely achieved, with a retention of many of the relational features of the EU order and - through an explicit acknowledgement of respect for the national identities and fundamental political and constitutional structures of the Member States,⁷⁵ strong affirmation of the principle of (textually) conferred powers as the sole basis of the EU's jurisdiction,⁷⁶ a more precise specification of competences, a Charter of Rights duly circumscribed to guard against indirect 'competence creep', a fuller operationalization of the concept of subsidiarity through the early involvement and new monitoring function of national Parliaments in the legislative procedure,⁷⁷ a first granting of a right of withdrawal on the part of the Member States⁷⁸ etc., - the provision of a more institutionally secure sense of the partial nature of the EU constitution.

Yet the idea of constitutionalism considered figuratively, as a master trope of political community – runs deeper than any balance sheet of the immediate text, its implications for the political culture of the EU arguably both more subtly penetrative and with longer-term

⁷³ Or rather, to *initiate* a process of mobilization of a deeper sense of community. See Walker, n58 above; and "Europe's Constitutional Momentum and the Idea of Polity Legitimacy" NYU Jean Monnet Web Papers, 2004/05.

⁷⁴ See JHH Weiler, "In Defence of the *Status Quo*: Europe's Constitutional *Sonderweg*" in Weiler and Wind (ed) above n8, 7-26.

⁷⁵ Art. I-5(1) CT.

⁷⁶ Art I-11 CT.

⁷⁷ Art. I-11(3) CT; see also Protocols 1 (on the role of national parliaments in the European Union) and 2. (on the application of the principles of subsidiarity and proportionality) annexed to the CT.

⁷⁸ Art. I-60 CT

ramifications than be gauged by a mere freeze-frame of the documentary settlement. For all that many of the detailed arguments in the constitutional debate were premised upon the continuing integrity of national constitutional orders and the need to avoid the move to a state-like European Union, much of its powerful imagery and rhetoric, particularly the regular invocation by leading players in the Convention of the idea that this was Europe's very own 'Philadelphian moment'⁷⁹ – a founding event for the continental polity to match *the* founding moment of modern national constitutionalism over 200 years previously – explicitly draws upon the state analogy. And this is but the surface of a deeper 'figurative logic', or epistemic sense, associated with constitutionalism, an extended set of significations which are built into the very grammar of constitutional thought and which cannot easily be avoided however forcefully the novelty of context and needs is pleaded and however vigilantly it is guarded. By way of illustration, let us look at two aspects of the new figurative logic ushered in alongside the basic idea of documentary constitutionalism, and at how these should at least give us pause for thought before we accept that the specificity of the EU as a partial and relational polity is not endangered by the immigration of the language of constitutionalism.

In the first place, it is arguable that the idea of documentary constitutionalism has encouraged a sense of comprehensiveness of design which was not present in the earlier implicit constitutionalism of the EU. Just as state constitutions provide a final point of reference for the regulation of all public authority within the territorial domain of the signified polity, the newly documented EU constitutional order, despite its stress on the continuing sphere of autonomy of the states, shows some tendencies to assume a similar ordering power for the whole of the EU territory. To take two examples already mentioned, both the empowerment of national Parliaments in the application of subsidiarity and the granting of a right of withdrawal to individual Member States involve a deep presupposition that, just as with classic federal state polities, it is within the gift of the overall constitutional order to lay down normative rules for institutions of locally autonomous constitutional orders (national Parliaments) or to decide upon a right (withdrawal) which had previously arguably been implicit in that local autonomy. So, although on the face of it these are normative provisions respectful of local autonomy, their very inclusion in the constitutional settlement provides an implicitly centralizing answer to the question *on whose authority* this local autonomy is respected.

The tension between formal supranational constitutional authority and state-empowering substantive conditions is particularly acute in the case of withdrawal. One early proposal in the Convention proceedings from a statist perspective, indeed, claimed that as it was a sovereign right retained by the Member States, the right to withdrawal, if its inclusion within the Constitutional Treaty was at all appropriate, must be absolute, immediate and unilateral.⁸⁰ Tellingly, however, under the pressure of negotiation in the name of the constitutional collective, the measure finally approved was not so uncompromising. Instead, while it provides a mechanism by which the Member States retain a unilateral right to withdraw, this is subject to a suspension of at least two years during which a negotiated settlement must be sought between the withdrawing state and the European Council. It is in effect a "hybrid"⁸¹ measure, situated somewhere between a state primacy model and the

⁷⁹ The President of the Convention, Valéry Giscard D'Estaing, led the way in a number of public pronouncements. For a detailed version of his thoughts on the Philadelphian analogy, see his Henry Kissinger lecture in Washington February 11 2003, available at <http://ue.eu.int/pressdata/EN/conveur/74464.PDF>

⁸⁰ Draft Constitution proposed by Professor Dashwood of Cambridge University, submitted by Peter Hain, then Minister for Europe of the United Kingdom; see <http://register.consilium.eu.int/pdf/en/02/cv00/00345en2.pdf>.

⁸¹ R.J. Friel, "Providing a Constitutional Framework for Withdrawal From the EU: Article 59 of the Draft European Constitution," (2004) 53 *International and Comparative Law Quarterly* 407, at 424.

federal control model more typical of *secession* from a constitutional state than withdrawal from a mere international organisation.⁸²

To take a final example of the infiltration of a logic of comprehensive design, the new constitutional order introduces a much denser set of rules for the regulation of the key ‘intergovernmental’ player in the new order, namely the European Council,⁸³ than had previously been the case, including the introduction of a long-term Presidency of that institution.⁸⁴ Now, arguably, the European Council, unlike the more venerable Council (of ministers), has until now been no more than a lightly institutionalized version of the EU’s diverse constituent power base in the Member States. The European Council largely stood *outside* the institutional order because it was in effect the informal quotidian version of the formal IGC – the Member State governments conceived of as ultimate regulators and authors of the EU.⁸⁵ Now, though again it is clear that if we concentrate on the substance of the measures the European Council is quite significantly empowered relative to the other institutions in the new settlement – the Commission in particular – it is finally, like the other institutions, very much *inside* the constitutional order, a constituted rather than a constituting authority. As in the other two examples, the Constitutional Treaty, though in substance respectful of local autonomy, in form draws upon a wider and state-based tradition of constitutional capacity to arrogate to itself an increasing authority to regulate power within the European constitutional configuration – a formal presumption which may pave the way for different substantive outcomes in the subsequent development of the constitutional *acquis*.

In the second place, and in some respects underpinning the first tendency, the adoption of the language of constitutionalism promises to substantiate what was previously a largely abstract and unrealized feature of the European proto-constitutional order, namely its Janus-faced quality. As noted earlier, in its earlier stage of implicit constitutionalism, the constitutional gaze of the EU tended to face inwards, towards the Member States, rather than outwards towards other constitutional orders, as is the normal external reference point of states. Again, the deep figurative logic of documentary constitutionalism has changed this, and has made the European constitutional order genuinely Janus-faced.

A fascinating tale can be told of how the geopolitical events which unfolded alongside the drafting of the European Constitution, in particular the post 9/11 assertion of American military power culminating in the invasion of Iraq without UN approval, affected the thinking of the drafters and caused them to concentrate more on the assertion of Europe’s external authority. Yet while these events were doubtless important, arguably the very figurative logic of constitutionalism, its Westphalian legacy as a form of power which establishes the polity as a player in the international arena as much as it configures it internally, was the *sine qua non* of this new external concern.⁸⁶ Again, there are important textual indicators of this tendency; for example, in the express conferral of a single legal personality on the Union;⁸⁷ in the creation of a Union Minister for Foreign Affairs assisted by a diplomatic service;⁸⁸ and in the

⁸² *Ibid.* 422-28. This is not to suggest that the model of federal-level control is uncontested in all federal states. On this, with particular reference to the example of Canada, and the issue of the secession of Quebec, see S. Choudhry and R. Howse, “Constitutional Theory and The *Quebec Secession Reference*,” (2000) 13 *The Canadian Journal of Law & Jurisprudence* 143.

⁸³ Arts. I- 21 and 22 CT.

⁸⁴ Art. I-22(1) CT.

⁸⁵ Indeed, although European Council meetings took place regularly from 1974 onwards, the institution as such was not acknowledged within the Treaty framework until the Single European Act of 1987.

⁸⁶ G, De Burca, “The Drafting of a Constitution for the European Union: Europe’s Madisonian Moment or a Moment of Madness?” (2004) 61 *Washington and Lee Law Review* 555-83.

⁸⁷ Art. I-7 CT.

⁸⁸ Art. I-28 CT

introduction of a ‘solidarity’ clause⁸⁹ which “clearly carries with it the implication of internal cohesiveness against external threats,”⁹⁰ – an initiative which echoes and may reinforce the EU’s growing preoccupation with enacting wide-ranging security measures in its own name against global terrorist threats.⁹¹ Again, however, the more significant implications may be long-term. Clearly, as many local units of federal states have discovered,⁹² the need to conduct external transactions on a more extensive basis and to strengthen external authority can lead to a secular consolidation of power in the centre and a greater pressure to regulate the polity as an integrated whole – a trend towards which these measures, and indeed the measure discussed above under the rubric of a more comprehensive regulation of the internal sphere, can be seen as an early contribution.

4. Conclusion

One other possible implication of the new Janus-faced constitutionalism is worth mentioning. The migration of the very idea of documentary constitutionalism means that the European Court, as it gradually alters its self-perception from that of manager of a shifting and precarious *modus vivendi* between the supranational and the constituent national legal orders to that of a fully-fledged Constitutional Court, *may* on account of that new self-categorization, and also of the more specific cues provided by the Constitutional Treaty’s novel embrace of familiar constitutional forms such as a Bill of Rights and a competence catalogue, become more likely to consider the detailed jurisprudence of other non-EU constitutional courts as relevant to its own detailed jurisprudence in these areas. In turn, if and when it comes to behave more in accordance to the pattern of a state Constitutional Court, the more regular democratic and cultural concerns familiar to the inter-state level concerning the translatability of particular substantive doctrines honed in ‘foreign’ rather than ‘local’ cultural soil will begin to assume a direct relevance. Again, we can only speculate what the long-term results of this may be. What we can be sure of, and what this last possibility reflects in microcosm, is that the migration of the constitutional idea *tout court* to the European level has profoundly ambivalent and uncertain implications for the capacity of the European order to respond to the collective aspirations of the European people(s). On the one hand, formal constitutionalization offers a new platform for collective reflection and engagement, and for the contextually appropriate exploitation of the rich tradition of constitutionalism.⁹³ On the other hand, this rich tradition contains a legacy which remains subtly but dangerously inimical to the peculiar requirements of a partial and relational legal and political order. Unless all key institutions and constituencies remain alive to these subtle dangers, the state of EU constitutionalism may yet drift towards that of a constitutional State.

⁸⁹ Art.I-43 CT.

⁹⁰ De Burca, n86 above, 579.

⁹¹ See D. Chalmers, “Constitutional Reason in an Age of Terror” NYU Global Law Working Papers 06/04.

⁹² Indeed, it was precisely this fear of ‘federal creep,’ and of its exacerbation in the context of an EU which remains largely blind to the distribution of power within Member States and tends to treat all areas of overlapping competence as the ‘foreign affairs’ -and so federal-level - responsibility of Member States, that led the German Länder to argue in the Constitutional Convention for a strict competence catalogue as a way of recovering or consolidating Land-level powers.

⁹³ On how this might be beneficial in the particular context of fundamental rights, see, for example, n62 above.