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State Constitutional Tradition

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## **ABSTRACT**

This paper sets out to examine whether and on what basis it is possible to 'carry over' the state constitutional tradition to the European Union context. It makes a case for a context-transcending five-dimensional conception of constitutionalism, embracing legal order, political system, self-authorization, societal integration and political reflexivity. It argues that the EU presently possesses a truncated constitutionalism in which only the first two dimensions are well-developed, and that its long-term legitimacy depends upon the fuller development of the last three dimensions- whether or not in the form of a documentary Constitution.

## **KEYWORDS**

constitution building: constitutional change: Europeanization: polity building: European law



# EU Constitutionalism in the State Constitutional Tradition

Neil Walker

## 1. Introduction: The Shadow of the State

Since the idea of the European supranational structure as a constitutional entity began to attract serious consideration in academic and political circles in the early 1990s, the vexed question of its relationship to the tradition of state constitutionalism that provides the topic of the present essay has never been far from the surface.<sup>1</sup> The reason is obvious. Although the term constitution, like much of our contemporary political vocabulary - including democracy, republicanism, federation and citizenship - predates the modern state, its mature conventional meaning has emerged from the social and political context of the modern state and bears its imprint. Accordingly, we should not be surprised that the question of the nature and viability of EU constitutionalism - and, in particular, in the current critical “moment”<sup>2</sup> of “big-C”<sup>3</sup> Constitutionalism, of the viability of a first *documentary* Constitution for the EU - is tied up with the question of its ‘translatability’ from the state tradition.<sup>4</sup>

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<sup>1</sup> See e.g. J.H.H. Weiler, *The Constitution of Europe* (Cambridge: CUP, 1999) ch.6; N. Walker, “Legal Theory and the European Union: A 25<sup>th</sup> Anniversary Essay” (2005) 25 OJLS 581-601

<sup>2</sup> See N. Walker “The Legacy of Europe’s Constitutional Moment” (2004) 11 *Constellations* 368-392.

<sup>3</sup> See N. Walker, “Big ‘C’ or small ‘c’?” (2006) 12 ELJ 12-14.

<sup>4</sup> See Weiler, above n1, 270; N. Walker, “Postnational Constitutionalism and the Problem of Translation” in J.H.H. Weiler and M. Wind, *European Constitutionalism Beyond The State* (Cambridge: CUP, 2003) 27.

This is no mere scholastic dispute. The fate of European constitutionalism cannot be reduced to an exercise in political epistemology concerning whether and under what conditions the delivery of the idea of constitutionalism from the state into the supranational context is or might become a meaningful object of knowledge. Both proponents and critics of the idea of a EU Constitution are typically motivated by considerations that are both more basic and more practically consequential. Yet political epistemology remains important in two senses. First, political epistemology does indeed constitute an important boundary consideration when weighing up different positions, for what is possible and desirable depends upon a threshold test of what can be meaningfully imagined. Secondly, in keeping with the high degree of symbolic power invested in the idea of constitutionalism,<sup>5</sup> many key protagonists in the current debate over the ratification of the 2004 EU Constitutional Treaty (CT) remain attracted to the kind of rhetorical flourish that certain uncompromising judgments in political epistemology allow – that permit us to say that the idea of an EU Constitution is simply beyond contemplation, and so an absurd thought-object, or, alternatively, to declare or just assume that it is an entirely comprehensible successor to (or even within) the national constitutional tradition.

Clearly, then, the question of the EU's fit with a state dominated constitutional tradition is an important one in both theoretical and practical-political terms, and indeed as regards the relationship between theory and practice. Let us begin to sharpen our appreciation of what is at stake by teasing out the range of different and mutually contested meta-theoretical perspectives that it is possible to adopt on the relationship between state, constitution and EU.

First, then, there is the *miscategorization perspective*. According to this, EU constitutionalism cannot operate within the state constitutional tradition, and since the state tradition is the only viable constitutional tradition, this means there is no viable basis for European constitutionalism. The idea of European constitutionalism is simply a “category error”,<sup>6</sup> and to the extent that we nonetheless continue to apply the label, it is a pseudo-constitutionalism or a diminished constitutionalism of which we speak. European constitutionalism is either a nonsense – there is no adequate political epistemology to account for it and render it meaningful – or a pale imitation. It simply does not and cannot possess that attribute or combination of attributes without which the adequate realization of the distinctive normative potential proper to constitutionalism is deemed inconceivable.<sup>7</sup>

A second position, by contrast, sees no such difficulties. According to the *continuity perspective*, EU constitutionalism can operate within the state constitutional tradition with little or no adjustment. The EU polity is sufficiently ‘state-like’ that a form of normative discourse evolved in the context of the state can apply equally to it. Such a position, it must be emphasized, *need* not imply that the EU is already approximate to or is likely to become some kind of European superstate, though

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<sup>5</sup> See e.g. S. S. Wolin, “Collective Identity and Constitutional Power” in his *The Presence of the Past: essays on the State and the Citizen* (Baltimore: John Hopkins, 1989); R. Cotterrell, “Some Aspects of the Communication of Constitutional Authority” in D. Nelken (ed) *Law as Communication* (Dartmouth, Aldershot, 1995) 129.

<sup>6</sup> G. Majone, “The Dilemmas of European Integration” (Oxford: OUP, 2005) 20; A. Moravcsik, “A Category Error” *Prospect*, July 2006, 22-26.

<sup>7</sup> See e.g. D. Grimm, “The Constitution in the Process of Denationalization” (2005) 12 *Constellations* 447-463.

sometimes it will imply this,<sup>8</sup> and even where it does not it may well be caricatured by its opponents as so doing.<sup>9</sup> What it does presuppose, however, is that in respect of those aspects of political organisation that constitutional discourse considers relevant – whether (and in whatever combination) the claim to and legal consolidation of sovereign authority, the rights of the citizen against government, the separation or balance of institutional capacities, the authority of the executive, the forms of legislation and the internal hierarchy of law-making, the power of judicial review or the mechanisms of popular accountability – the EU bears enough of a family resemblance to the state to be susceptible to the same kind of constitutional treatment as the state.

A third perspective likewise sees supranationalism as offering no fundamental challenge to the idea of constitutionalism, but for a quite different reason. On this view, it is a matter of indifference whether EU constitutionalism fits within the state tradition, since constitutionalism can mean whatever we want it to mean within the very broad framework of whatever may be considered desirable by way of the regulation of political authority. The *nominalist perspective*, then, enlarges the domain of applicability of constitutionalism not by emphasizing the resemblance between state and non-state sites, but by insisting that there is no canonical set of problems or solutions to which constitutionalism must be faithful, and so no scope for the special privileging of the state and of the ‘problem-solutions’ appropriate to its context in the first place.<sup>10</sup>

A fourth and final position we may term the *adaptation perspective*. This holds, with the miscategorization and the continuity perspectives and against the nominalist perspective, that the state constitutional tradition cannot be discounted as it remains the key contemporary frame of reference for meaningful discussion of constitutionalism. Yet, unlike the miscategorization perspective, it maintains that the limits imposed by this frame are not rigid, and that it is instead possible to imagine other types of polity, including post-state polities such as the EU, becoming successfully constitutionalized, even if that requires a level of adjustment not contemplated under the continuity perspective.

As already indicated, insofar as they supply the Manichean terms of much of the politico-rhetorical struggle over the CT, the first two positions are undoubtedly politically important. Theoretically, however, they provide unpromisingly partial understandings and accounts of the nature of constitutionalism. By denying that the move from the state to the supranational level is even possible in the one instance, or at all problematic in the other, each remains entirely under the shadow of the state, and neither, it follows, is prepared to pursue the possibility of an innovative understanding of constitutionalism appropriate to the supranational domain. The nominalist perspective, too, is conceptually unambitious. If constitutionalism can mean whatever we say it means, if it is a mere solipsistic indulgence or ideological headline-grabber, then why bother with it at all? Its currency or otherwise cannot explain anything, cannot make any difference other than in terms of the diverse other concepts through

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<sup>8</sup> See e.g. . Mancini, “Europe: The Case for Statehood,” (1998) 4 *European Law Journal* 29-43.

<sup>9</sup> See Walker n4 above, 27-31.

<sup>10</sup> For discussion see N. Walker “EU Constitutionalism and New Governance” in G. De Burca and J. Scott (eds) “Constitutionalism and New Governance in Europe and United States” (Oxford: Hart, 2006) 15-36. Many examples of nominalism are collected under the label of non-constituent constitutionalism in Section 3(a)(ii) below. See also n75 below.



which it is explicated. On this view, the ideological struggle may present itself as one about ownership of the Constitutional image but the real battle of ideas is elsewhere – in what we mean by justice, democracy, rule of law or whatever, and constitutionalism is reduced to no more than an attractive veneer for our pet ideas.<sup>11</sup>

The fourth perspective is the most promising in terms of an genuine extension of the “discourse of conceptualization and imagination”<sup>12</sup> associated with the state constitutional tradition. It is the only one sufficiently grounded in conventional understandings yet also sufficiently flexible to hold out the prospect of providing us with explanatory purchase – and beyond that political purchase – on what is at stake in and beyond the current ‘ratification crisis’ of a new supranational species of the familiar genus of written Constitutions. More specifically, the potential of the adaptation perspective lies in its sensitivity to opposing considerations concerning the social grounding of political concepts. On the one hand, it acknowledges the undeniable weight and path-dependency of conceptual and ideological history in human affairs, and of the material structures that lie behind these concepts and ideologies. This is particularly so in respect of an idea such as constitutionalism which has long had a double resonance – as both a meta-concept which seeks to explain and to evaluate affairs from an external vantage point and an object-concept which itself has significant discursive currency within the quotidian social and political world of entrenched interests and competing preferences and is regularly invoked as a form of practical reason that seeks to make a difference to how issues within that everyday world are addressed. On the other hand, the adaptation perspective does not thereby conclude that nothing can change and we are fated merely to repeat the ideas and structures of the past; for it also acknowledges that just because of its significance as a politically resonant and practically consequential “speech act,”<sup>13</sup> constitutionalism remains a deeply contested concept, one whose meaning is inherently volatile and subject to persuasive redefinition.

In taking the state tradition seriously without being paralysed by its legacy, therefore, the adaptation perspective is most in line with what the study of the history of ideas suggests about both the scope and the limits of the transformability of historically embedded political concepts.<sup>14</sup> Ironically, however, the very practical contestability that underlies the plausibility of the adaptation approach also points us towards the resilience of the other perspectives discussed above. For precisely because so much is at stake ideologically, we will find that the meta-theoretical assumptions these other perspectives embrace with regard to the relationship between state, polity and constitution may likewise be carried over and woven into constitutional argumentation in a self-fulfilling manner. So even if one can demonstrate that the meta-theoretical assumptions and insights about the nature of constitutionalism associated with one perspective are more compelling than those associated with other perspectives – more acute in their analysis of the social and historical conditions and limits of transformation of the constitutional idea – it does not follow that this position

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<sup>11</sup> See e.g. N. Walker, “The Idea of Constitutional Pluralism” (2002) 59 *MLR* 517-559, 531-33.

<sup>12</sup> J.H.H. Weiler, n1 above, 223

<sup>13</sup> On the application of speech act theory to transnational politics, see W.G. Werner and J. De Wilde, “The Endurance of Sovereignty” (2001) 7 *European Journal of International Relations* 283-313.

<sup>14</sup> See e.g. J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: CUP, 1995) esp. 34-43.

will in practice prevail against those other perspectives and against the structures of interests and preferences that sustain and are sustained by these assumptions.

All of this suggests that there are formidable burdens both of a theoretical and practical nature to discharge if the state constitutional tradition is to be successfully adapted to the supranational situation of the EU. It is one thing to proceed through a series of negative inferences to the point of intimation of a new and attractive sense of theoretical and practical possibility, and quite another to explore and exploit that new possibility. Too often, the discussion of the ‘tradition-framed novelty’ of European constitutionalism, as indeed of the alternative claims as to its impossibility or seamless continuity or radical discontinuity, simply gets stuck at the declaration stage – in the awkwardly ‘in-between’ announcement that we must and can escape the shadow of the state while not dismissing its normative message.<sup>15</sup> The aim of this article is to go further, and to provide a theoretical framework within which the question of the adaptability of the state constitutional tradition to the supranational site can be challengingly posed and an answer sought that is persuasive both in specifying the difficulties and optimal conditions of normative order in a post-state context and in its engagement with the rival conceptions of constitutionalism set out above. Its first priority lies with addressing the question of the in-principle mobility of the constitutional template in a manner that takes us beyond declarations of faith and prejudice, and so the main emphasis will be on the sketching of the theoretical framework itself, both in the abstract and in the context of the evolving structure of the EU. But in closing the article also engages in some preliminary analysis of how that framework illuminates the current predicament of EU documentary constitutionalism, and in particular of how meta-theoretical disagreement on the proper conception of the relationship between state, polity and constitution percolates through to and must be addressed in the real world of constitutional politics.

## **2. The Adaptation Perspective**

In methodological terms, an adequate examination of the adaptation perspective requires us to move through the four stages of *disaggregation*, *abstraction*, *modulation* and *reintegration*. We must begin by challenging the common assumption that constitutionalism, if not a one dimensional matter, is a matter in which one or some dimensions are more important than and so can encapsulate or dominate the others, for it is precisely the selective narrowing of horizons entailed by this essentializing assumption that allows both adherents of the miscategorization perspective so readily to dismiss postnational constitutionalism and adherents of the continuity perspective so readily to accept it<sup>16</sup> Rather, we should acknowledge and separate out the various dimensional prerequisites of the state constitutional tradition, , *without* making any

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<sup>15</sup> See e.g. A. Verhoeven, “The European Union in Search of a Democratic and Constitutional Theory” (Dordrecht: Kluwer, 2002) Parts I-III.

<sup>16</sup> For example, as explained in Section 3 below, those for whom the ‘legal order’ dimension dominates find it easy to adhere to the continuity perspective with regard to the EU, whereas those for whom the ‘constituent power’ dimension dominates, unless they are prepared seriously to contemplate its adaptation to the supranational level, are apt to fall back on the miscategorization perspectives or to turn to the nominalist perspective..

prior assumptions of their relative importance or optimal combination. Secondly, we should seek to conceptualize these disaggregated dimensions and draw conclusions about their character at a level of abstraction that is not necessarily confined to the state, such that we are in a position to ask whether we can imagine constitutional arrangements for the EU performing a similar set of functions.

Thirdly, in posing that question and in seeking to resituate constitutionalism within the EU, we should be prepared to contemplate a modulated version of constitutionalism - in two sense of that term. On the one hand, there will be a change of key. In the sequence of abstraction and recontextualization there will inevitably be some shift in the quality of our understanding of the various dimensions of constitutionalism, and perhaps of the balance between them, but in the absence of an essentializing approach that would concentrate exclusively or primarily on one dimension of constitutionalism, such modulation is less likely to be fatal to the very idea of transferability of meaning from the state to the postnational domain. On the other hand, there may also be modulation in the sense of a tempering or 'toning down' of what we mean by constitutionalism in some of its dimensions, without this inviting the conclusion of the proponents of the miscategorization perspective that supranational constitutionalism is thereby falsified or categorically reduced. This second sense of modulation, which again is made easier to contemplate by an approach that does not privilege any particular dimension(s) of constitutionalism as essential or as of presumptively highest importance, is especially crucial to the development of the adaptation perspective in the context of the unfinished process of European integration. For unless we can contemplate constitutionalism as something of which there may be more or less, then not only are we unable as a matter of conceptual fiat to conceive of constitutionalism in a manner that is alert to the uneven strength and variable composition of its parts, but we also lose any sense of how to think about constitutionalism in a diachronic sense - of constitutionalism in transition and so in various provisional stages of transformation.<sup>17</sup>

Fourthly, and finally, however, we must rejoin the constitutional dots. We must acknowledge that it is one thing to be sceptical about constitutional dogmatism in any form - whether the idea of a narrow category of constitutional essentials or priority attributes, or of there being some kind of absolute threshold of constitutional status, or as to the existence of a single acceptable pattern of composition of its various parts - but quite another to think of the constitutional quality of a particular entity simply as the formless aggregation or accumulation of these various parts. The point of the initial disaggregation is to highlight the variety of dimensions of constitutionalism that are interlocked in the state tradition and to ensure that we are as open as possible to the ways in which these may be (re)combined, *not* to deny the necessity and significance of any such combination. The different dimensions of constitutionalism are not separate items in a check-list, but aspects that are as deeply as they are variably connected. And in tracking the practical integration of these various dimensions of constitutionalism at postnational sites, we have to ask a key counterfactual question; whether, in the absence, diminished presence or qualitative transformation of some of the dimensions recognised under the statist template, the new constitutional whole would be other than, and perhaps less than the sum of its various parts. As we shall see, it is at this vital final stage that the basic viability of the adaptation approach is most sharply challenged,

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<sup>17</sup> See e.g. Walker n11 above, 339-354.

and the very coherence of the idea of supranational constitutionalism put most directly in question.

### **3. Disaggregating The State Tradition**

Following this methodological scheme, we can begin by identifying and abstracting from five dimensions of state constitutionalism. These are legal order, the institutionalization of a specialized political system, self-authorization, societal integration and reflexivity. Let us say something about each of these disaggregated dimensions of state constitutionalism in turn, in so doing seeking a level of conceptualization which stands above the state setting.

#### *(a) Legal order*

Legal order or legal system(ization) is both the most obvious and least remarked dimension of state constitutionalism. Every state has its own distinctive legal order or orders, and we often refer to as constitutional these features which we understand to be constitutive and definitive of the legal order *qua* legal order.<sup>18</sup> While the basic idea of legal order as a bedrock component of state constitutionalism is uncontroversial, what precisely this entails is by no means settled, with positivists (pedigree rules), realists (behaviour) and natural lawyers (ideal norms) having their different views of the cornerstones of legal order. Nevertheless, certain general features are commonly agreed or assumed. Most abstractly, a legal order or system is normally deemed deserving of being so characterized to the extent that its own normative resources are sufficient both to its distinctive identity, or integrity (considered synchronically) and to its continuity (considered diachronically)<sup>19</sup> Typically, too, the resilient distinctiveness of any such entity is broadly understood as being tied up with the notion of normative self-containment or completeness. In turn, the measure of this tends to be taken by reference to more specific attributes such as autonomy, comprehensiveness, self-definition and self-enforcement.

By autonomy we mean the normative independence of the order from any other normative order. Legal sovereignty or supreme normative authority is deemed by the key legal actors of the order to be located within the legal order itself, and insofar as other legal orders are recognized, such recognition does not compromise the supreme normative authority of the legal order itself. Comprehensiveness is the internal corollary of autonomy. For the systemic identity of the legal order depends not only on the authoritative foundations prevailing over external challenges, but also on these highest-order norms controlling the operation of the system generally. Two mechanisms of control are engaged here.<sup>20</sup> In the first place, provision should be made for the generation of norms such that there is no area within the self-defined ambit of the legal order that its normative authority is incapable of reaching. Secondly, higher-

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<sup>18</sup> See e.g. J. Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries" in L. Alexander (eds) *Constitutionalism: Philosophical Foundations*(Cambridge: CUP, 1998) 152, 153.

<sup>19</sup> See e.g. J. Raz, *The Concept of a Legal System: An Introduction to the theory of a Legal System* (Oxford: OUP, 2<sup>nd</sup> ed., 1980) esp. chs.8-9.

<sup>20</sup> See e.g. N. Walker, "Fundamental law" in *The Laws of Scotland: Stair Memorial Encyclopaedia* (Edinburgh: Butterworths, 2<sup>nd</sup> ed, 2002) para. 48.

order norms should trump norms recognized as lower within the internal hierarchy in cases of potential conflict.

For its part, self-definition covers a number of different features of the “momentary”<sup>21</sup> and dynamic authority of legal orders. In the first place, the legal order is the master of its own jurisdiction or ambit. Or in the language of German federal theory, it has *Kompetenz-Kompetenz*. This means not only the absence of dependence upon another system for the specification of the boundaries of the system, a facet of self-containment or completeness already covered by autonomy, but also the absence of a strict framework of autolimitation, or system rigidity. That is to say the system should not be committed to stasis; rather, there should be mechanisms of definition and redefinition located within the system itself. In turn these typically takes two forms, both of which are capable of embracing not only redefinition of boundaries but also changes which do not bear upon boundary questions. In the first place, there is the “interpretive autonomy”<sup>22</sup> of the legal order - the location within the legal order of a judiciary or other category(ies) of privileged interpreters with the last word in deciding the meaning of the system’s norms. In the second place, there is the power of self-amendment, the availability within the terms of the system itself of a procedure for changing the higher-order rules of the system.

Self-enforcement is a final feature of a self-contained system. Again we see external and internal dimensions in play. Externally, there should be no outside agency involved in its enforcement. Rather, all mechanisms and institutions involved in ensuing the application and vindication of the norms of the legal order should be authorised under the legal order itself. Internally, it implies that these internally authorised norms should be adequate to ensure that all forms of power enabled under the order, which importantly includes such power as accrues to those institutions created by the order as components of the government of that order, are also subject to the rule of (its) law.<sup>23</sup>

*(b) specialized political system*

Whereas the first building block of modern constitutionalism can be traced back to the Roman roots of civilian law, by contrast the second feature was one of the distinctively novel features of the modern state that emerged as a new form of political domination in continental Europe in response to the confessional civil wars of the sixteenth and seventeenth centuries.<sup>24</sup> What we are here concerned with is the establishment and maintenance of a system of specialized political rule, a development which achieved an early stylistic maturity in the form of the documentary Constitutions of the late 18<sup>th</sup> century. A system of specialized political rule is a decisional framework that is autonomous rather than heteronomous. Neither its title to rule nor its ongoing purpose flows from prior and fixed economic or status attributes or concerns or from some notion of traditional or divine order external to the system itself, as in pre-modern constellations of political power. Instead, authority rests upon the very idea of a

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<sup>21</sup> Raz, above n19, ch.8.

<sup>22</sup> T.Schilling, “The Autonomy of the Community Legal Order: An Analysis of Possible Foundations,”(1996) 17 *Harvard International Law Journal*, 389, 389-90.

<sup>23</sup> On the resilient centrality of the idea of “government limited by law” to the modern idea of the rule of law, see B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: CUP, 2004) ch.9.

<sup>24</sup> See e.g. Grimm n7 above, 449.

dedicated political domain, one that develops its own authoritative yardsticks for conflict-resolution and its own mechanism for collective decision making.<sup>25</sup>

This development speaks, therefore, to a new stage in the differentiation of social forms, one in which there is constituted for the first time a separate sphere of the public and political that in its operative logic is distinctive from the society over which it rules. Such a specialized system has the dual attributes of immanence and self-limitation. On the one hand, it purports to be self-legitimizing, in that what justifies the continuing claim to authority of the autonomous political domain and the higher order rules through which that authority is inscribed is nothing more or less than the operation of the political domain itself. On the other hand, and as the flip-side of this, there emerges a general sphere of purely private action and freedom that lies beyond either the specialist sphere of politics or the now redundant special mixed regimes of public and private right and obligation based upon prior forms of privilege or advantage.<sup>26</sup>

The regulatory structures of the new specialist political order echo its distinctive attributes. Positively, and reflecting the quality of immanence, they take the form of third order institutional rules for making (legislature), administering (executive) and adjudicating (judiciary) the second-order 'legal system' norms through which the co-ordination of first-order action or the resolution of first-order disagreement within a population is secured. Negatively, and reflecting the quality of self-limitation, they take the form of formal or informal catalogues of rights aimed at demarcating and respecting a separate sphere of private individual or group freedom, one safe from incursions at the third order level of public authority or infraction at the second order level of the substantive norms of the legal system.

*(c) self-authorization*

The institutionalization of a normatively separate and specialist sphere of political contestation and decision as a defining feature of a polity does not necessarily imply democratic operating procedures, still less a democratic founding or a continuing democratic warrant. The operational autonomy and specialist nature of the political sphere may be consistent with a set of arrangements in which the original authorization comes from beyond the system, as in many subaltern constitutions,<sup>27</sup> or where the original authority is located within the system but is presented as monarchical or aristocratic rather than popular. That is to say, the autonomy of the political need not imply that all those affected by the operation of the system participate or be represented in its institution or even its subsequent homologation. It need imply merely that a logic of political action should prevail, whether this be presented in terms of *raison d'état* or *salus populi* or some other version of the public good, that is adequate to its claim and character as a special sphere of political action - one where there is no transcendental or otherwise overriding external justification, freedom from special interests, and generality of scope.

Arguably, however, the autonomy of the political is a precarious achievement and one of obscure virtue unless and until it is joined by a claim of self-authorisation. Within constitutional thought, such self-authorship is typically conceived in terms of

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<sup>25</sup> See e.g. M. Loughlin, *The Idea of Public Law* (Oxford:OUP, 2003) ch.3

<sup>26</sup> See e.g. Grimm, n7 above, 452-3; see also J. Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles" (2001) 28 *Political Theory* 766-781.

<sup>27</sup> See e.g. K.C. Wheare *The Constitutional Structure of the Commonwealth* (Oxford: OUP, 1960).

the idea of constituent power, or the ultimate sovereignty of the people.<sup>28</sup> Again, the documentary form that centres modern state constitutionalism engages this dimension, with such texts typically claiming to be not only *for* the people but also *of* the people, and their drafting procedures - in particular through the involvement of constituent assemblies and popular conventions - dramatizing a commitment to substantiate that claim of popular authorship.<sup>29</sup> So prevalent, indeed, is the ethic of democratic pedigree in modern state constitutionalism - of democracy as a meta-value in terms of which other governance values are understood and articulated<sup>30</sup> - that debate tends to centre not on the question of its appropriateness but only on the adequacy of its instantiation. This may manifest itself in the critique of those constitutional settlements that lack a founding documentary episode, or at least a plausible narrative of subsequent popular homologation,<sup>31</sup> or in the claim that the constitution has betrayed its popular foundations, or in the criticism that for all its derivative concern with democracy at the level of the everyday framework of government, the constitution is not autochthonous, but instead remains dependent upon the 'constituted' power of another polity or polities.<sup>32</sup>

(d) *Societal Integration*

Modern state constitutionalism is not only about the generation through an act and continuing promise of democratic self-authorization of the normative wherewithal for the operation of a self-sufficient legal order underpinned by its own institutional framework of political rule. Alongside these normative or juridical products, the state constitution typically also both presupposes and promises a degree of integration on the part of the social constituency in whose name it is promulgated and to whom it is directed.<sup>33</sup>

There is a close link between the normative and the integrative register, for the successful implementation of the normative products of the constitution requires that we step outside the hermeneutic circle of pure normativity and consider the question of social supports. Unless there is already in place some sense of common cause sufficient; first, to endorse those interests or ideals that the constitutional text has identified as being well served by being put in common; secondly, to affirm and so vindicate the capability and appropriateness of the institutional means that the constitution deems instrumental to the pursuit of these common interests or ideals and to the generation and pursuit of other common ends; and thirdly, to assent to the constitution's normative expectation that such common ends be pursued and such common means be adopted in *this* rather than any other community, then the constitution is fated to remain a dead letter.

What this prior propensity to put things in common or basic sense of political community amounts to is of course an issue of much controversy, and in any event is

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<sup>28</sup> On the history of the concept of constituent power, see e.g., see A. Kalyvas, "Popular Sovereignty, Democracy and the Constituent Power," (2005) 12 *Constellations* 223-244.

<sup>29</sup> See e.g. A. Arato, *Civil Society, Constitution ad Legitimacy* (Lanham: Rowman and Littlefield, 2000) ch.7.

<sup>30</sup> See e.g. J. Dunn, *Setting the People Free: the story of democracy* (London: Atlantic, 2005).

<sup>31</sup> In the British context, see A Tomkins, *Our Republican Constitution* (Oxford: Hart, 2005)

<sup>32</sup> See e.g. N. Walker, "Europe's Constitutional Momentum and the Search for Polity Legitimacy" (2005) 3 *I\*CON*, 211-238,213-222.

<sup>33</sup> See e.g. D.Grimm, "Integration by Constitution" (2005) 3 *I\*CON* 191-210.

something that is better conceived of as a matter of degree than in all-or-nothing terms. As a basic minimum, however, we are talking about a sense of common attachment or common predicament within the putative demos sufficient to manifest itself in three interrelated forms. First, it should be sufficient to ensure that each is prepared to trust the others to participate in the common business of dispute-resolution, decision-making and rule-following on fair and equal terms. Secondly, it should be sufficient to ensure that each demonstrates the minimum level of sustained mutual concern or solidarity required to reach and respect collective outcomes which may work against their immediate interests in terms of the distribution of resources and risks. Thirdly, it should be sufficient to support a basic common idiom or political vernacular through which the diversity of individuals and groups can find the means to resolve some of their differences and make common sense of and accept those that remain.<sup>34</sup>

Yet it would be wrong to suggest that just because it cannot supply the necessary social supports of trust, solidarity and common political vernacular merely through normative enunciation, the constitution cannot do anything to influence the degree of social integration necessary to its effective application and must merely passively presuppose its prior existence. To begin with, its normative framework of political rule seeks to provide a settled template for living together in circumstances free from despotism or intractable conflict, and to that extent offers an incentive to all who are attracted by such a template to secure such a floor of common commitment as is necessary for its effective implementation. Secondly, the act of making the constitution may have a mobilization dividend that goes beyond agreement on the particular text in question. The value of the process is not exhausted by its textual product,<sup>35</sup> but may extend to the generation or bolstering of just these forms of political identity necessary to the successful implementation of the textual product. Thirdly, just because constitutions in the modern age are typically viewed as the expression and vindication of the constituent power of a 'people', the successful making of a constitution has come to assume a special symbolic significance as a totem of peoplehood. There may, of course, be a rational foundation to this conviction inasmuch as the very fact of a common accord affords some prior evidence of both the capacity and the motivation to put things in common. However, the extent to which and the manifold circumstances under which possession of a constitution is treated as a symbolic shorthand of peoplehood outstrip that rational foundation. So powerful is the chain of signification developed under the modern banner of popular, nation state constitutionalism, that regardless of how it came into existence, the very fact that a constitution exists is typically understood and widely portrayed as testimony to the achievement of political community. Fourthly, insofar as the constitution crystallizes such general common ends or values as are the subject of deliberation in the constitution-making moment and as may also be already present in the pre-constitutional ethical life of the relevant social constituency, it may have a "double institutionalization"<sup>36</sup> effect. That is to say, the addition of the constitutional imprimatur

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<sup>34</sup> See e.g. M. Canovan, *Nationhood and Political Theory*, (Cheltenham, Edward Elgar: 1996); D. Miller, *On Nationality* (Oxford, OUP: 1995).

<sup>35</sup> See e.g. W. Sadurski, "Conclusions: On the Relevance of Institutions and the Centrality of Constitutions in Post-Communist Transitions" I.J. Zielonka (ed) *Democratic Consolidation in Eastern Europe, Vol 1 – Institutional Engineering* (Oxford: OUP, 2001) 455, 466-72.

<sup>36</sup> P. Bohannon "The Differing Realms of the Law", in P. Bohannon (ed), *Law and Warfare: Studies in the Anthropology of Conflict* (1967) 43–56 at 45.



may amplify the importance of and the extent of common subscription to these common values and ends, and in so framing or reinforcing a common political vernacular, strengthen the supportive relationship between common political vernacular, trust and solidarity through which political community is forged.

If these factors all speak to the importance of the constitutional event and its textual fruit, we may, fifthly and finally, also look beyond the founding moment of the constitution to see how it can become an ongoing source of intensification of the social foundations necessary to its effective implementation. This operates in at least two ways. First, the constitution may function as a reminder of community. Insofar as common political identity often develops alongside and feeds off the collective memorialization of claimed common events, achievements and experiences, constitutional history provides one such stream of sanctified tradition. The constitution, in other words, may write itself into collective history.<sup>37</sup> Secondly, the constitution may provide a resilient but flexible structure for political-ethical debate, an anchor for a continuing conversation about the meaning of political community which operate in a Janis-faced manner to strengthen that political community. Looking back, it is a token not only of the supposed depth and extension of common experience, but also of the weight of accumulated collective wisdom. Looking forward, the constitution may be sufficiently open-ended and sufficiently understood as a work of trans-generational authorship for its structures and values to be capable of being inflected in ways which retain the symbolic gravitas of accumulated wisdom yet are more suited to contemporary forms of political vernacular and contemporary understandings of the basis of trust and solidarity. In other words, the constitution may provide both a repository for and corroboration of the settled ethical basis of political community as well as a vehicle for its continuous adaptation.<sup>38</sup>

(e) *reflexivity*

For something to be reflexive means that it is capable of bending or turning back on itself. In the case of a political institution *tout court*, reflexivity refers to the capacity of any communal contrivance for addressing collective problems to make normative demands of itself, and in the particular case of the ethically self-inscribed political institution of indeterminate duration and broad societal scope that is the documentary constitution, it speaks to the general commitment of a political community to the idea of responsible self-government on an ongoing and self-adjusting basis.<sup>39</sup> Accordingly, the idea of reflexivity captures the essential novelty of the species of constitutionalism that accompanied the emergence of the modern state.<sup>40</sup> Whereas the ancient constitution purported to be at one and the same time a description of social and political reality and a confirmation of the proper order of things,<sup>41</sup> the modern constitution, through the vehicle of the state, adds a dimension of normative aspiration. In so doing, it posits a

<sup>37</sup> See e.g. A. Margalit, *The Ethics of Memory* (Cambridge Mass.: Harvard University Press, 2002) 12.

<sup>38</sup> See e.g. J. Habermas, "On Law and Disagreement: Some Comments on "Interpretative Pluralism" " (2003) 16 *Ratio Juris* 187.

<sup>39</sup> See e.g. J. Bast, "The Constitutional Treaty as a Reflexive Constitution" (2005) 6 *German Law Journal* 1433-1452, esp. at 1448-51

<sup>40</sup> See e.g. Grimm n7 above, 452. On reflexive modernization more generally, see U. Beck, W. Bonss and C. Lau, "The Theory of Reflexive Modernization: Problematic, Hypotheses and Research Programme" (2003) 20 *Theory, Culture and Society* 1-33.

<sup>41</sup> See e.g. Tully above n 14, 40-2; C. McIlwain, *Constitutionalism: ancient and modern* (Ithaca: Cornell University Press, revd. ed., 1947).

gap between facts and norms. If a constitution is well described as a “model”<sup>42</sup> of political community, it adds a second sense of model *qua* ideal and projected type to the old sense of model *qua* miniature representation of existing structure.

Crucially, reflexivity can be viewed as the glue that binds the other disaggregated features of modern constitutionalism; or more dynamically, as a characteristic that both depends on and reinforces these other features. In order for reflexivity to ‘get going,’ we need; first, an idea of a collective self; secondly, a capacity on the part of that collective self to distance itself from how it is presently constituted and so articulate demands of itself; and thirdly, an ability to take measures that plausibly seek to meet these demands. The basic idea of the collective self is supplied by the third feature set out above, namely self-authorship. The articulation of demands is met through the second feature, namely the institutional norms of the specialized political system. And the capacity to take effective measures depends both on the organised authority of the formal legal order, as captured in the first feature, and the “battery”<sup>43</sup> of social power and ‘compliance’ provided through societal integration, as captured in the fourth feature. In turn, successful reflexivity underscores each of these features. It may vindicate the idea of formal order as a basic template of collective organisation, sustain the special authority of the political domain as grounded in an immanent rationality, and transform self-authorship from a event into a sustained process. Moreover, in providing the very idea of the self-institution, adaptable self-maintenance and open-ended normative unity of a collectivity, one whose efficacy depends upon the bonding properties of trust, solidarity and common vernacular, it may reinforce these same social bonds.

*(f) abstracting from state constitutionalism*

Before turning to the constitutional credentials of the EU, we can draw a number of general and closely related inferences from the above analysis. In the first place, it is not meaningful to talk of the final authority or the dominance of either the legal or the political when considering the deep structure of constitutionalism. Rather, the legal and the political are mutually constitutive or symbiotic.<sup>44</sup> The political requires a legal frame, most evidently in the case of the basic underlying legal order itself but also in the normative articulation of the specialized system of political rule and in the recognition and channelling of constituent power. But the legal also requires political imagination – the very idea of reflexivity of political community, as well as political will – punctual or retrospective popular support or initiative.

In the second place, and related to this symbiotic character, constitutionalism has to be considered in significant part if by no means exclusively in constructivist terms. That is to say, constitutional norms, whether the thin constitutional precepts of legal order or the framework rules of the political system, and whether or not contained in a written constitution with its self-inscription of constituent power, constitute many of the conditions of their own efficacy. In significant respects, the connection is a direct one, with many of the norms of the constitutional order themselves directed toward its operationalization. And crucially, even the final stage of constitutional efficacy, understood as the social basis of mobilization and

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<sup>42</sup> Walker, above n1, 600.

<sup>43</sup> Canovan, above n34, 80.

<sup>44</sup> See e.g., B Van Roermund, “Sovereignty: Unpopular and Popular” in N. Walker (ed) *Sovereignty in Transition* (Oxford: hart, 2003) 33.

implementation, is in some measure and through a complex of interlocking mechanisms susceptible to the indirect influence of constitutional norms in encouraging the requisite degree and forms of social integration.

In the third place, while modern constitutionalism, in identifying the key constituency and institutional and substantive norms in whose terms the polity should be framed, is by implication committed to the indefinite extension and stability of that frame, it is also committed to transformation *through* that frame. For as we have seen, modern constitutionalism differs from ancient constitutionalism not in discarding the latter's representational conception of a 'model', but in adding to that older descriptive register a new and aspirational register. The point of the constructive work of the constitution, therefore, is foundational, rather than conservative. It is not to freeze-frame and sustain a timeless ideal of social and political order, but to posit and pursue a secular ideal of social and political order.

In the fourth place, it is this element of projection that explains the importance of reflexivity, and the centrality of reflexivity in turn accounts for the holistic element of constitutionalism – the sense in which the whole must necessarily be seen as greater than the sum of its parts. The legal order and political systemic elements cannot operate in a fully reflexive manner without the constituent power of self-authorship, but, equally, the collective author requires the instruments of self-expression supplied by the legal order and the political system. Finally, to complete the web of supportive relations, the entire political imaginary by which the collective author is connected to the means of self-expression is meaningless without the fourth dimension – the affirmation of collective identity and plausible capacity for will-formation and implementation supplied by a measure of societal integration.

#### 4. EU Constitutionalism

Against the statist backdrop of the five key constitutional dimensions and in light of the horizontal characteristics of legal-political symbiosis, constructivism, projection and holism, how do we take the measure of EU constitutionalism? We should begin by acknowledging the simple but crucial point that EU constitutionalism is much stronger in the first two dimensions – distinctive legal order and specialist system of political rule – than in the other three – self-authorship, societal integration and reflexivity. From the treaty foundations and early development of judicial and political institutions, Europe's supranational community has been marked by a highly elaborated framework of legal order and a well developed regime of political decision-making.<sup>45</sup> Yet prior to the current documentary constitutional process, there had been no serious political initiative to affirm a distinctive constituent power for the EU. Even more crucially, and recalling our argument that widespread practical affirmation of any underlying constitutional perspective can lend a self-fulfilling force to its meta-theoretical assumptions,<sup>46</sup> the frequency and insistence with which it has been asserted from the sceptical perspective that the EU has 'no demos' distinct from the *demos* of its constituent member states,<sup>47</sup> poses a serious question and introduces a significant doubt

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<sup>45</sup> See e.g. Weiler n1 above.

<sup>46</sup> See Section 1 above

<sup>47</sup> See e.g. D. Grimm, "Does Europe Need a Constitution?" (1995) 1 *European Law Journal* 282

as to whether the EU's existing level and quality of preparedness to put things in common is indeed adequate to support such a claim to constituent power, both at the initiative stage of constitution-making and in terms of any longer term trajectory of integration and deepening of political community which might flow from that initiative. And, finally, in the absence of an explicit framework of self-authorship and the social supports necessary to the formation and implementation of collective political will, the EU patently lacks the means towards a developed political reflexivity.

But, how, then, should we assess those two dimensions which have had to bear the entire developmental burden of EU constitutionalism? If the EU's constitutionalism is significantly truncated or short-circuited in comparison to its statist predecessors then, given the horizontal consideration of holism, it would seem that this cannot but affect and threaten to compromise its operation in those areas where it does possess constitutional pedigree. Is the EU's truncated constitutionalism nevertheless adequate to its appropriately modulated normative task? And to the extent that it is not, does the present documentary constitutional process, *pace* the sceptical perspective, hold out short-term or long-term prospects for a more adequate constitutional framing? Let us examine the first of these questions and then, by way of conclusion, introduce the second.

(a) *a truncated constitutionalism*

Let us begin with the modulating influences. The distinctiveness of the twin planks of the EU's early constitutional register of debate and understanding - its legal order and its specialist system of political rule - rests on the interaction of two trends and of the structural tendencies that those trends produce. Each of these trends and tendencies is bound up with the emerging situation of the EU within a plural or compound global order, although in keeping with the fluctuating and unsettled quality of that emergent order, they pull in quite different directions. A first trend stresses the heterarchical dimension of the new order. In the novel plural or compound configuration where states exist alongside a range of emergent post-state political sites of which the EU is only the most powerful,<sup>48</sup> unlike the simple or one-dimensional Westphalian configuration, the relevant 'units' are no longer mutually exclusive territories with mutually exclusive jurisdictions and citizenries. Rather, the new species of post-state polity in general, with the EU in the vanguard, increasingly overlaps the states in terms of geographical reach, competence and the political identity of its citizens. It follows that the relationship between these different orders of polity is best conceived of as "osmotic,"<sup>49</sup> - as a generalised process of mutual infiltration - rather than as the negotiation and maintenance of clear boundaries as in the case of traditional inter-state relations. This first *relational* structural tendency, in turn, has implications both for how we understand and for how we assess the EU. In terms of understanding, it means that the orientation of the EU towards other polity sites is a key rather than a derivative characteristic - it becomes 'central at the margins'.<sup>50</sup> In terms of assessment, it means that in these new domains of overlap we cannot evaluate and assess any of the important measures of political 'health' - whether the adequacy of certain functional governance projects or the level of citizenship engagement or rights protection - except

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<sup>48</sup> Alongside other regional organisations such as NAFTA and global organisations such as the WTO.

<sup>49</sup> U. Preuss, "The Constitution of a European Democracy and the Role of the Nation State" (1999) 12 *Ratio Juris* 417-428.

<sup>50</sup> See Walker, n4 above, 54.

in terms of the overall relations between the implicated polities, and that in so doing we have to judge the contribution of the EU as only one part of a wider picture.

A second trend, by contrast, stresses the residue of state-centred hierarchy in the new global order. It reminds us of the ways in which we still must understand the EU in structural terms as a *secondary* polity, one that emerged from the Westphalian order and continues in significant measure to be defined and challenged by its conditions of emergence. Again this has both explanatory and evaluative implications. It explains why the EU, as a still relatively recent addition to the scene, continues both to be a “polity-in-the-making,”<sup>51</sup> and one whose evolution takes place in a political environment in which its state creators still wield considerable material and symbolic power. In turn, that material and symbolic power threatens to create an evaluative double-bind. On the one hand, we simply cannot understand either the truncated constitutional condition of the EU – its lack of constituent power, its fragile social bonds, and its limited reflexivity, or, as we shall see, many of the distinctive pressures that affect those two dimensions in which it has managed to develop a constitutional profile, other than in terms of its role as a secondary player in a struggle for political resources. On the other hand, the EU is nonetheless still prone to be judged by these very competitive state interests in accordance with the received constitutional standards of statehood – so alerting us to the fact that the resilience of the statist constitutional tradition has both ideational and ideological implications, speaking not only to the enduring relevance of these standards but also to the ability of entrenched interests to control the strategic terms of debate.

If we consider the relational and secondary tendencies together, we can begin to locate the points of tension within the EU’s current truncated constitutional domain. The relational tendency means that the EU operates within a complex of closely interlocking normativity with state polities, while its secondary status means that in the negotiation and application of the terms of its relations with these state polities it is both subject to their competitive challenge and in some respects dependent upon and vulnerable to their resilient sources of power. Equally, the relational tendency means that in some measure we should assess the EU framework in partial terms, as a contribution to a broader set of governance projects, while its secondary status reminds us both of the ideological pressure and the genuine ideational challenge to continue to take seriously the totality of the constitutional terms of reference evolved under the Westphalian order. The first opposition, between interlocking normativity and boundary competition, is arguably the key distinguishing tension of the first dimension of EU constitutionalism – the legal order, while the second opposition between a partial institutional framework which complements a broader governance heterarchy and one that is subject to universal constitutional standards is arguably the key distinguishing tension of its second dimension – the system of political rule. In turn, as we shall see, in a manner that dramatises the difficulties of finding a *via media* between a constitutional sensibility that is bound by existing statist understandings and one which is entirely dismissive of them, these tensions threaten to encourage somewhat skewed responses within the two domains of the fledgling EU constitutional order. In the one case, that response is in danger of being unduly in thrall to the state tradition,

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<sup>51</sup> J. Shaw, ‘The Problem of Membership in European Union Citizenship,’ in Z. Bankowski and A. Scott (eds) *The European Union and its Order: the Legal Theory of European Integration*, (Oxford: Blackwell, 2000).

while in the other it may attend too little to that tradition – and in so doing eloquently expose the limits of a truncated constitutionalism.

(i) The EU legal order

Let us take, first, the question of legal order, for the idea of European supranationalism as comprising a new and distinctive legal order is perhaps *the* central facet of conventional wisdom amongst its legal practitioners and commentators. The founding pillars of that conventional wisdom can be found in the seminal early case-law of the Court of Justice on direct effect<sup>52</sup> and supremacy.<sup>53</sup> Beyond these classics, however, within the EU legal community broadly defined<sup>54</sup> and the vast primary and secondary literature that community has produced, it is striking how closely the intensification of an explicitly constitutional register of debate and the influence of a certain type of assertive constitutional self-understanding is bound up with the coming-of-age and sustained maturity of the EU legal order.<sup>55</sup> It is also telling, however, if we recall and briefly elaborate on the four sub-themes of legal order considered above – autonomy, comprehensiveness, self-definition and self-enforcement – to what extent understandings of the maturity of the EU legal order both require to be moderated in the light of considerations of interlocking normatively and remain subject to competitive challenge from national legal orders.

As regards autonomy, we observe two powerful claims made on behalf of the supranational legal order, but in each case with externally contested boundaries. Both the extent to which the EU is a normative order whose authority is not (or, at least, no longer) exhausted by its conditions of origin, and has achieved independence from the ultimate sovereignty of its constituent member states,<sup>56</sup> and, relatedly, the extent to which it can be considered as a “self-contained regime”<sup>57</sup> that excludes the operation of the secondary rules of general international law are issues where claims or assumptions

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<sup>52</sup> *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1.

<sup>53</sup> *Costa v. ENEL* [1964] ECR 585

<sup>54</sup> See e.g. H. Schepel and W. Wesseling, “The Legal Community: Lawyers, Officials and Clerks in the Writing of Europe”, (1997) 2 *European Law Journal* 165.

<sup>55</sup> For the ECJ’s own modest ventures into *explicitly* constitutional terrain, see, *Parti ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339; *Opinion 1/91*; *Re Draft Agreement on a European Economic Area* [1991] ECR 6102. On the more general dominant narrative linking legal order maturity with constitutionalization, see e.g. Weiler n1 above, ch.6; B. De Witte, “Direct Effect, Supremacy and the Nature of the Legal Order,” in P. Craig and G de Burca (eds) *The Evolution of EU Law* (Oxford: OUP, 1999); P. Craig, “Constitutions, Constitutionalism, and the European Union” (2001) 7 *European Law Journal*, 125-150; S. Douglas-Scott *Constitutional law of the European Union* (London: Pearson, 2002) esp. ch.15.

<sup>56</sup> On the question of overlapping sovereignty claims and potential constitutional collision between the EU and member states, see e.g. N. MacCormick, *Questioning Sovereignty: Law, State and Practical Reason* (Oxford: OUP, 1999); C. Richmond, “Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law,” (1997) 16 *Law and Philosophy* 377-420; M. Kumm, “Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice,” (1999) 36 *CMLR*, 351-386.; N. Walker, “Late Sovereignty in the European Union.” H Lindahl, “Sovereignty and Representation in the European Union” and M Maduro “Contrapunctual Law: Europe’s Constitutional Pluralism in Action” in N. Walker (ed) Walker (ed) *Sovereignty in Transition* (2003), at 3-32, 87-114 and 501-538 respectively.

<sup>57</sup> See e.g., *Amministrazione delle Finanze Dello Stato v. Essevi* [1981] ECR 1413; for a recent overview, see G. Conway, “Breaches of EC Law and the International Responsibility of Member States” (2002) 13 *EJIL* 679-695.

internal to the system are subject to vigorous external challenge. As regards comprehensiveness of reach, whereas the norm-generative capacity of the EU legal order through the range of norm-making instruments available to it is wide-ranging,<sup>58</sup> the question whether such normative authority can or should be directly applicable in all national contexts and should trump conflicting national provisions depends on the fine detail of the direct effect and supremacy, or primacy,<sup>59</sup> doctrines respectively; and despite their venerable status, the scope of these doctrines, whose most basic remit is to penetrate the normative space of national legal orders, remains importantly restrained at the margins.<sup>60</sup>

As regards self-definition, while they are extremely potent devices, neither separately nor in combination do interpretive autonomy and the power of self-amendment of the EU provide unrestricted routes to full *kompetenz-kompetenz*. The interpretive autonomy of the EU is well established in the form of the ECJ's own bootstrapping labours of self-authorization,<sup>61</sup> but this remains a power of interpretation of a particular text which in the last analysis, and even allowing for the development of a generous doctrine of implied powers,<sup>62</sup> is bound by the competence limits set out in that text and by its failure to allocate the plenitude of political authority. And the power to amend that text through treaty amendment, while formally internal to the normative order, in substance is subject to the veto power of any one of the member states whose authority may be threatened by any extension of supranational competence.<sup>63</sup>

Finally, self-enforcement, too, is subject to certain significant limits and areas of tension both as regards its freedom from external independence and its scope of internal coverage. Externally, while the EU has developed a powerful doctrine of state liability for breach of its provisions,<sup>64</sup> this stands out as an exceptional mode of intervention against a backdrop of continuing procedural autonomy on the part of the member states.<sup>65</sup> Indeed, here more than anywhere else, the conflict between self-sufficiency and effectiveness seems sharpest, underlined by the fact that for all the

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<sup>58</sup> Art. 249 EC

<sup>59</sup> The term preferred by the CT (2204 OJ C310), Art I-6

<sup>60</sup> In the case of direct effect, there are a number of contexts, perhaps most notably that of the horizontal direct effect of directives, where the scope of the doctrine remains unresolved and subject to oscillation; see e.g. Case C-144/04, *Werner Mangold v Rudiger Helm*. Judgment of 22 November 2005; discussed I (2206) 43 CMLR 1-8. In the case of supremacy, the main qualification is that EU law is treated as leading to the disapplication (in the particular case) rather than the (general) invalidation of inconsistent national law; see e.g. *Simmmenthal SpA v Commission* [1979] ECR 777. These limitations clearly speak to a measure of acknowledgment of the inherently relational nature of the EU order and the need to find solutions other than those based on the simple principle of hierarchy. Perhaps one of the most insightful recent discussions of these aspects of the EU legal order from a relational perspective, however, comes not from the ECJ but from the Spanish Constitutional court in its Opinion 1/2004 of 13 December 2004 on the Treaty establishing a Constitution for Europe. The Spanish court makes much of the turn in the CT to the language of "primacy" and away from that of "supremacy" as a switch from an inappropriately and unnecessarily hierarchical language towards a more contingent sense of priority; see comment by F.C. de la Torre (2005) 42 CMLR 1171.

<sup>61</sup> See De Witte n55 above.

<sup>62</sup> See e.g. *Germany v Commission* [1987] ECR 3203.; *Germany v. European Parliament and Council* [2000] ECR I-8419.

<sup>63</sup> Art. 48 TEU

<sup>64</sup> *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

<sup>65</sup> See e.g. *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Lndwirtschaftskammer für das Saarland* [1976] ECR 1989; *Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel* [1981] ECR 1805

development of new competences in matters of internal and external security,<sup>66</sup> the EU lacks the basic control of the means of violence which has provided the traditional longstop guarantee of the legal enforcement powers of states. Internally, too, developments such as the Charter of Fundamental Rights, and ongoing debate and contestation over its status and effects, underlines the extent to which in an area of complex interpenetration of national, international and the EU supranational jurisdiction, the scope and effectiveness of application of the fundamental principles of the legal order to the institutions of the legal order itself remains incomplete and unresolved.<sup>67</sup>

In summary, the ‘constitutional’ maturity of the EU legal order is complexly qualified with regard to two quite different sets of factors. On the one hand, a key aspect of the traditional statist idea of legal order maturity, namely normative completeness or self-containment, simply does not and cannot apply in the same pure form in the context of complexly interlocked normativity. In some aspects, as in the question of comprehensiveness of normative reach, the EU system inevitably overlaps and ‘colonises’ its national counterparts, while in other aspects, notably procedural effectiveness, it must remain dependent upon them. Accordingly, relational adequacy demands an awareness and openness to interdependence, and an appreciation that the mutual articulation of heterarchically aligned legal orders is more conducive to their respective purposes than their monadic self-sufficiency. On the other hand, and recalling the secondary status of the EU legal order, some of the claims to systemic reach made on its behalf are subject to powerful national objection, resistance and qualification, notably as regards the basic autonomy or ‘sovereignty’ of the EU legal order and as regards its powers of self-amendment. If we put these two sets of factors together, however, the danger arises that the logic of hierarchy and opposition may marginalize the logic of heterarchy and mutual co-ordination. Just because of and in response to the competitive dimension, there is a tendency for the attraction of the traditional state understanding of system maturity *qua* normative completeness as an appropriate model for the EU to be reinforced, and for imitation to be practised as the best form of defence and self-assertion.<sup>68</sup>

(ii) The EU’s specialized system of political rule

If we turn to the second dimension of EU constitutionalism, here the truncation of the EU constitutional domain poses a more direct challenge. Whereas the legal order is one of pure, self-referential normativity, and as such its adequacy is only tested externally and indirectly in the form of the boundary challenges posed by other legal orders, the political system is subject to tests of adequacy in terms of empirically

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<sup>66</sup> See Titles V and VI TEU, and Title IV, EC.

<sup>67</sup> For a recent discussion, see *Human rights proofing EU legislation: report with evidence* 16th report of session 2005-06, House of Lords papers 67 2005-06.

<sup>68</sup> On the temptation for the ECJ in the context of strategic interaction with national political players to seek to enhance its legitimacy by emphasising its technocratic credentials and its distinctly legal pedigree, and therefore to draw upon familiar conceptions of legal order, see variously J.H.H. Weiler, “The Community System: The Dual Character of Supranationalism” (1981) *Yearbook of European Law* 267 and n1 above, ch.2; A. Burley and W. Mattli, “Europe Before the Court: a political theory of European Integration” (1993) 47 *International Organization* 41; W. Mattli and A. Slaughter, “Revisiting the European Court of Justice (1998) 52 *International Organisation* 177. For a recent overview of the Court literature, see A. Stone Sweet *The Judicial Construction of Europe* (Oxford:OUP, 2004).



sensitive standards of political morality. It is, therefore, vulnerable to whatever deficiencies are exposed in these terms by the absence of a developed constitutional profile as regards the dimensions of constituent power, societal integration and political reflexivity. As is well-known, the EU political system, and in particular the Community method of Commission proposal and Council and European Parliament disposal has long been criticised for its democratic deficit, and this critique can be linked to constitutional truncation in two main ways. First, and most obviously, the absence of a *pouvoir constituant* in the form of an inclusive process of constitutional initiation speaks to a lack of deep democratic foundations - to the lack of a democratic pedigree for the system of government itself. Secondly, the weak level of societal integration and the absence of a deep sense of political reflexivity, both of which may be abetted by the absence of the assertion of democratic pedigree through a process and act of self-authorship, may curtail the potential of those institutions and aspects of the system of government that themselves claim democratic credentials and whose quality and effectiveness depends upon a sense of belonging to and engagement with political community that we earlier associated with minimum levels of trust, solidarity and common political vernacular.

We cannot understand the main line of arguments made in defence of the constitutional credentials of the EU political system except as a way of anticipating or addressing these lacunae and the criticisms they suggest. These arguments - what we may term non-constituent forms of constitutionalism - typically proceed in two stages. In the first place, in exploring the logic of political action peculiar to the EU they either makes a virtue of the apparently non-democratic pedigree and unfavourable democratic-constitutive prospects of the EU, and in a manner which typically draws on and seeks to reinforce its credentials as a distinctive and self-contained legal order;<sup>69</sup> or, at least, they hold that its origins in or homologation through a popular constituent act are of no or marginal relevance to the question of the ongoing democratic quality of the EU system of governance.

As regards the first of these possibilities, in their rather different ways, for instance, the ordoliberal tradition<sup>70</sup> and Hans Ipsen's idea of the EU as a special purpose association<sup>71</sup> - perspectives that inspired or tracked political positions that were influential in the early years of integration<sup>72</sup> - saw the supranational as a domain of activity which could and should be shielded from direct expression or representation of popular political interest. For the ordoliberals, the Treaty of Rome supplied Europe with its own economic constitution, a supranational market-enhancing system of rights whose legitimacy depended precisely on the absence of democratically responsive will formation and consequential pressure towards market-interfering socio-economic legislation at the supranational level, a matter which should instead be left to the member states - and even there only insofar as compatible with the bedrock

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<sup>69</sup> See references to n68 above.

<sup>70</sup> See e.g. E-J Mestmacker, "On the Legitimacy of European Law" (1994) *RechtsZ* 615; see also D. Chalmers, "The Single Market: From Prima Donna to Journeyman" in J. Shaw and G. More (eds) *New Legal Dynamics of European Union* (Oxford:OUP, 1996)55-72. On the continuities between the legal and political thought of the Weimar Republic and post-war thinking about supranationalism more generally, see C. Joerges and N.S. Ghaleigh (eds) *Darker Legacies of Law in Europe* (Oxford, Hart, 2003).

<sup>71</sup> H-P. Ipsen, "europäische Verfassung – Nationale Verfassung" (1987) *EuR* 195.

<sup>72</sup> See C. Joerges "'Good Governance' in the European Internal Market: An Essay in Honour of Claus-Dieter Ehlermann" *EUI Working Papers*, RSC No. 2001/29.

economic constitution. Ipsen's theory, to which Majone's work on the idea of a European "regulatory state"<sup>73</sup> is a notable successor, shares with ordoliberalism the idea that supranationalism transcends partisan politics, but here the invisible hand of the market is supplemented by the expert hand of the technocrat. The scope of European law is no longer restricted to negative integration – to the market-making removal of obstacles to wealth-enhancing free trade, but also extends to certain positive measures of an administrative nature. In Majone's elaborately developed model, these regulatory measures are concerned not with macro-politically sensitive questions of distribution, but with risk-regulation in matters such as product and environmental standards where expert knowledge is paramount, and where accountability is best served by administrative law measures aimed at transparency and enhanced participation in decision-making by interested and knowledgeable parties rather than the volatile preferences of broad representative institutions.

If these approaches, whether through providing a form of rights-insulation and guarantor of predictability and calculability in market relations, or through developing and refining forms of governance which counteract received models of broad representative government, suggest a constitutional sensibility that treats democracy as something to be contained or cordoned off, the second way of justifying the absence of an autonomous democratic pedigree instead places the nurturing of postnational democracy back in the frame. It does so, however, in a way that eschews or downgrades the value of a holistic conception of democracy. On this view, rather than nominal – 'democracy' – the key index of value is adjectival – 'democratic'. The worth of democracy is divorced from the development of an idea and a self-conception of common political community and located instead in certain disaggregated and mobile virtues of democratic arrangements. In particular, emphasis tends to be placed on democratic and deliberative practices in communities defined not in territorial terms but in functional, epistemic or practical 'problem-solving' terms, with 'output' at least as important as, and inextricable from democratic 'input' in the legitimation of such forms.

What the many and sophisticated variants of an adjectival conception of democracy in the European debate have in common is an emphasis on the special treatment at the transnational level of two of the mobile democratic virtues, namely the enhancement of decision-making capacity through building common knowledge and understanding and the articulate expression and adequate consideration of the diversity of particular interests. It is claimed, first, that democratic contestation is best located in domains of discrete engagement, where the necessary motivation and knowledge to put things effectively in common already exists and, secondly, that such discrete engagement is best realised through innovative institutional forms designed to nurture the relevant motivational and knowledge capacities and to respond to the particular voices in question.<sup>74</sup> The total sum of added value is not ignored, but capacity and

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<sup>73</sup> G. Majone, "The Rise of the Regulatory State in Europe" (1994) *W.Eur.Pol* 77; see also n1 above. On the connections between Ipsen and Majone, see C. Joerges, n72 above.

<sup>74</sup> To take two relatively recent examples, For example, for all their differences, both the influential defence of the Open Method of Co-ordination in the name of democratic experimentalism on the one hand, and those forms of deliberative supranationalism that look to the complex of national, supranational and sectoral interest representation and pooling of knowledge in EU "comitology" or committee structures as paying an epistemic dividend on the other, share this adjectival conception of democracy. See e.g. (for OMC and experimentalism) O. Gerstenberg and C.F. Sabel "Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?" in C. Joerges and R. Dehousse (eds) *Good*

pluralism are seen as optimally developed and recognized in a bottom-up mode and through mutual learning and exchange of good practice rather than as a function of a prior transnational political identity.

As our term suggests, the significant mark left by the non-constituent approach to the justification of the EU political system, unlike the predominantly mimetic approach to the question of legal order, stands in stark contrast to the state-based constitutional tradition. Indeed, this is underlined by the ambivalent attitude by the partisans of the various approaches collected under the non-constituent banner to the very discourse of constitutionalism.<sup>75</sup> Yet, however packaged, such views are indubitably constitutional in nature to the extent that they purport to provide an adequate normative theory for the EU political system – one based on the relational premise of the EU's partial contribution to a broader governance project. And to the extent that they do not succeed, their (implicit or explicit) constitutional vision may be considered deficient.

The common vulnerability of the various species of non-constituent constitutionalism is exposed if we move to the second stage of their argument. For underlying the majority of the positions within the horizon of non-constituent constitutionalism, whether or not this is explicitly acknowledged, is a continued reliance on the indirect pedigree of national constitutional authority and democratic origins.<sup>76</sup> Whether couched in the language of delegation theory,<sup>77</sup> or national sovereignty,<sup>78</sup> or international law,<sup>79</sup> or realist or liberal versions of international relations,<sup>80</sup> or whether simply taken for granted, it is precisely the continuing *employment* of the idea of constituent power at the national level and its extension to

*Governance in Europe's Integrated Market* (Oxford: OUP, 2002); J. Zeitlin, "Social Europe and Experimentalist Governance" in G de Burca (ed) *EU Law and the Welfare State: In Search of Solidarity* (Oxford: OUP, 2005) 213-241; (for deliberative supranationalism) C. Joerges, "'Deliberative Supranationalism': Two Defences" (2002) 8 ELJ 133. See also Walker n10 above.

<sup>75</sup> To the extent that we can discern a recent momentum in favour of constitutional language even in such unpromising quarters, this is surely not unconnected with the emergent standing of constitutional discourse as *the* master trope of normative discussion in the EU – a development both signalled and reinforced by the drafting of the Constitutional Treaty – and so is as at least in some measure strategic and tending towards a nominalist reading of constitutionalism (see n10 above). For discussion of this strategic development, see e.g. N. Walker, "Europe's Constitutional Momentum and the Idea of Polity Legitimacy" (2005) 3 ICON 211-238.

<sup>76</sup> The majority, but not all. Some versions of constitutional scepticism are deep rather than contingent, involving a critique of the very idea of constituent power as a meaningful or desirable way of thinking about political authority in any of the political sites of late modernity – national or post-national. Interestingly, such sceptical conclusions can issue from both ends of the ideological spectrum; from positions highly supportive of the efficiency and other dividends of markets and critical of conditional steering mechanism that would too easily interfere with these dividends (e.g. K.-H. Ladeur, "Towards a Legal Theory of Supranationality - The Viability of the Network Concept" (1997) 3 *European Law Journal* 33-54.) as much as from positions highly critical of the injustices of the market and of constitutionalism's tendency to act as a handmaiden to neoliberalism (e.g. G. Anderson, *Constitutional Rights after Globalization* (Oxford: Hart, 2005) .

<sup>77</sup> See e.g. P. Lindseth "Delegation is Dead: Long Live Delegation; Managing the Democratic Disconnect in the European Market Polity" in C. Joerges and R. Dehousse (eds) *Good Governance in Europe's Integrated Market* (Oxford; OUP, 2002) 139-63.

<sup>78</sup> See e.g. Grimm, ns7 and 47 above.

<sup>79</sup> See e.g. .J. Klabbers and P. Leino. "Death by Constitution" (2003) 12 *German Law Journal* 1293-1305.

<sup>80</sup> e.g. A. Moravcsik "The European Constitutional Compromise and the Neofunctionalist legacy" (2005) 12 *Journal of European Public Policy* 349-386.

cover the authorisation of the transnational or supranational pooling of authority that accounts for the readiness of thinkers in this category to accept the *redundancy* of the idea of transnational constituent power. Crucially, then, at this final stage the necessity of constituent power and the secondary status of the EU polity reasserts itself. It is not the case that the majority of writers who accept the redundancy thesis reject the purposes and merits normally associated with the idea of constituent power as irrelevant to the supranational domain. It is just that they believe these purposes to be well enough served by the combination of indirect democratic legitimation from national means and whatever other first-stage arguments they rely on at the supranational level itself – whether rights insulation, technocratic expertise or disaggregated and instrumentalised democratic benefits.

The argument that treats direct constituent power at supranational level as redundant, then, is at root empirically based. It arises in the context of an investigation of the *application* of a normative theory of constituent power directed towards the discovery of its optimal location, rather than in the questioning of that normative theory *per se*. Accordingly, it is only as convincing as the evidence it can muster in its defence. If that is so, however, there are in fact several developmental features of the supranational polity which appear to stretch the plausibility of the indirect legitimation thesis, and of those supranational constitutional positions that depend on that thesis, to breaking point.

To begin with, to return to the intrinsic normative claim of the pedigree argument, the idea of constituent power refers us to a general argument about the virtues of self-rule and the standing of democracy as a meta-value of modern politics, one that argues for a popular founding for those political systems that attain a certain threshold of authority and of autonomy. That threshold is reached in these systems that, in terms of their authoritative scope and the quotidian procedures through which such authority is translated into political decisions, are capable of significantly affecting the life-chances of those who are subject to them and of doing so in a manner that cannot be effectively counter-influenced at the level of any other political system. The relevance of this to the EU is palpable. The double movement, accelerating over the 20 years since the signing of the Single European Act, towards expanding the scope of the EU from internal market regulation to large areas of social and security policy combined with the reduction or sacrifice of national veto positions in legislative and other decisional procedures, suggests such a profound transformation of both the scope and autonomous capability of the EU as to undermine the claims for indirect legitimation and underline the demand for direct legitimation.<sup>81</sup>

What is more, if we move onto the consequentialist arguments associated with constituent power, those concerned with its causal relationship with societal integration and with political reflexivity, again the case has become more persuasive, albeit its tenor remains more speculative. This can be developed on at least three grounds, the first two of which mirror the arguments made by the proponents of the disaggregated democratic version of non-constituent constitutionalism.. In the first place there is the capacity argument. Just as at the state level,<sup>82</sup> we can distinguish between the formal legal competence and the effective political capacity of the EU polity. The notorious

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<sup>81</sup> See N. Walker, “A Constitutional Reckoning” (2006) 13 *Constellations*, 140-150.

<sup>82</sup> See Loughlin, 25 above, ch.5

“joint-decision trap”<sup>83</sup> of a contemporary decision-making constellation that seeks to track the different sites and multiple levels of collective action problems that we confront under conditions of economic, cultural and political globalisation, speaks to the ways in which the increase in competence at the EU level in matter such as monetary policy and positive regulation of various general social interests and against certain general social threats can reduce both competence and capacity at the state level without necessarily generating a compensatory (still less a surplus) measure of additional capacity at the EU level. Super-majoritarian decision rules and the residual veto positions they entertain are only part of the problem here. Much more important is the lack of shared political capital - and so the absence of the elements of trust, mutual concern and common terms of reference of which such shared capital is comprised - necessary to put and keep things in common sufficiently to exploit European political capacity. The danger, then, is of “false negatives,”<sup>84</sup> of the EU’s inability to fulfil its formal democratic potential by effectively putting in political common those matters that cannot, or cannot any longer, be adequately addressed through the variety of national political agendas. And the possible contribution of a theory of constituent power here is instrumental rather than intrinsic, not based upon the political morality of democratic pedigree *per se* but on how pedigree can help guarantee the continuing quality of democracy. It is, in short, based on the proposition that the political act of self-constitution may contribute to the fostering of a sense of political community and the production of a common political capital sufficient to overcome the problem of false negatives.<sup>85</sup>

In the second place, and less obviously, there is the argument from pluralism. This holds that however much the European people want to put things in common, whether more so than presently, much the same, or perhaps even less, and wherever they want to strike the balance between national and supranational action, respect for diversity and responsiveness to the variety of internal opinion can only be enhanced by an increase in the resources of dedicated political capital available at the European level. The key to this argument is historical as well as normative. It lies in asserting that the idea of constituent power and of its relationship to a dedicated public or political sphere that we find in the enlightenment thought of such as Locke and Sieyès, and which inspired at least some of the protagonists of the English, French and American revolutions, was not intended, as has often subsequently been misunderstood or misappropriated, simply as an assertion of the greater power and potential impact of a political authority founded in popular opinion rather than proprietary right.<sup>86</sup> Just as important a dividend of popular sovereignty as the empowerment of public authority in the name of the public good was that of the limitation or forbearance of government authority in that same name. For the idea of an *indivisible* collective foundational of government denies to any section of that collective, or to any government operating in

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<sup>83</sup> F. Scharpf, “Problem Solving Effectiveness and Democratic Accountability in the EU” Max Planck Working Papers (2003).

<sup>84</sup> P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: OUP, 2<sup>nd</sup> ed. 1999)

<sup>85</sup> See e.g. J. Habermas, “Why Europe Needs A Constitution” (2001) *New Left Review* Sep-Oct (11), 5, and n38 above. See also, N. Walker, “Europe’s Constitutional Engagement” (2005) 18 *Ratio Juris* 387-399.

<sup>86</sup> See e.g. B. Yack, “Nationalism, Popular sovereignty, and the Liberal Democratic state” in T. V. Paul, J. Ikenberry and J.A. Hall (eds) *The Nation State in Question* (Princeton Univ Press: Princeton NJ, 2003) 29-50.

the name of any section of that collective, final and unlimited exercise of constitutional authority. That is to say, if self-government properly rests in the constituent authority of the collective people, then any Constitution based upon an image of collective self-government must be concerned as much with checking governmental factionalism or abuse of minorities as with democratic empowerment of majorities. This ambitious thesis, moreover, need not be dismissed as wishful thinking or pious hope. For the normative strength of the aspirational model of political community which has been contained in much of Western constitutionalism lies precisely in the promise (however imperfectly delivered) that investment in a shared political capital will engender a sufficient sense of a community of attachment and a sufficient fund of shared political capital not only to make the idea of non-unanimous decision-making - of sometime winners and losers - fair and palatable to all in a longer perspective, but also, and reciprocally, to restrain what may legitimately be done to any part of the community by the sometime winners in the name of the whole

In the third place, there is an argument more specifically concerned with political reflexivity. The undeniable fact that the quotidian regulatory structure of the EU inevitably contains many of the democracy-containing or constraining mechanisms applauded by the non-constituent constitutionalists is on close analysis an argument for rather than against a more general democratic cradling. The significant extent to which the primary regulatory structure of the European supranational political system emphasizes expert knowledge and the protection of core freedoms alongside and in some measure instead of democratic mechanisms makes it all the more important that a threshold sense of democratic collective subjectivity be fostered, sustained and capable of political operationalization, and this for two reasons. First, and substantively, without such a threshold sense of collective subjectivity the overall direction of the policy agenda to be pursued through the semi-democratic primary regulatory structure will lack democratic articulation.<sup>87</sup> Secondly, and procedurally, without such a threshold sense of collective subjectivity, the very semi-democratic form of the primary regulatory structure lacks an ongoing monitor and guarantee of democratic approval.<sup>88</sup>

*(b) the deep structure of supranational documentary constitutionalism*

Coming finally to the politics of the present, we cannot understand the impetus behind the current documentary constitutional process without reference to the deep structure of the EU's truncated constitutionalism. For all the attention its contents have received, the CT is of only modest importance as a story of the sum of its detailed provisions, and not just because these detailed provisions look increasingly unlikely ever to enter into force. Largely a consolidating measure, the CT announces only modest substantive reforms, all of which could in principle have been provided by the regular process of Treaty amendment.<sup>89</sup> More so than as a *text*, the CT is significant as an *event* - one that has grown out of a cumulative sense of challenge to the overall "polity legitimacy" of a post-state order of unprecedented jurisdiction.<sup>90</sup>

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<sup>87</sup> See A. Follesdal and S. Hix, "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik" (2005) *European Governance Papers* No. C-05-02

<sup>88</sup> See Walker, n81 above

<sup>89</sup> See e.g. J.H.H. Weiler, "On the Power of the Word: Europe's Constitutional Iconography" (2005) 3 *I\*CON* 173-190.

<sup>90</sup> See Walker, n32 above.

As an event, the CT dramatizes both the resilient creative potential of constitutionalism in the state tradition and its deep contestability. On the one hand, a powerful if often implicit concern of some promoters and supporters of the CT has been to address just these system deficiencies set out above by seeking to harness and to adapt the broader constructivist promise of the state-inspired constitutional tradition. From this perspective, a documentary constitutional act might repair the hole in the middle of EU constitutionalism, providing the absent ingredient of a democratic founding. It might also supply, in consequence, a mechanism for diffusing and regularizing political conflict, an occasion for a new and more intense mobilization of a sense of common political engagement, a token of community and an amplifier of common values, as well, in the longer haul, as a chapter in an identity-building common historical narrative and an anchor for a self-evolving sense of transgenerational constitutional multilogue. And in so doing, it might engender the kind of socially integrative momentum that the current EU lacks and which undermines the capacity, pluralism and collective reflexivity of its political community.<sup>91</sup>

Such an approach, crucially, pays equal attention to both the challenge and the opportunity presented by the horizontal characteristics of constitutionalism in the state tradition.<sup>92</sup> It recognizes the strength of the holistic requirement – of the unavoidable interdependence of all five dimensions of constitutionalism – and how this requirement means that for so long as EU constitutionalism is concentrated on just two dimensions, it is bound to remain a truncated and democratically diminished constitutionalism in the ways set out above. However, this approach also recognizes what our tendency to freeze and reify particular constitutional achievements often obscures, namely the deep sense in which constitutionalism under the sign of the modern state has always been constructivist in nature, and has always possessed the closely related and complementary attributes of legal-political symbiosis and projection. Constitutionalism, then, has always been a way of actively developing as well as recording and consolidating the development of the political imaginary, and it is this ‘cumulative open-endedness’ – this quality as a “palimpsest”<sup>93</sup> rather than a sacred text – that in the final analysis underwrites the translatability of its various dimensions to the postnational level.

On the other hand, as an event provoked by system deficiency, the constitutional debate must also be seen as much as a symptom of that deficiency and of the conundrums and conflicts that underpin it as a means of overcoming it. Indeed, what we observe in the simultaneous resort to and deep contestation of a constitutional discourse of reform is a double paradox. In the first place, and most obviously, as dramatically highlighted in the Dutch and French ‘no’ votes and in the polarised political atmosphere surrounding these votes,<sup>94</sup> debate over a first documentary Constitution has provided a vivid public frame within which latent disagreement over the type of polity the EU is or should be may be brought to the surface. Yet the potential for the sharpening and amplification of difference over the polity orientation of the EU is not just a matter of the heightened public profile that a self-styled

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<sup>91</sup> See Walker, n85 above.

<sup>92</sup> See Section 2(f) above.

<sup>93</sup> As one writer has described the British constitution; see D. Marquand, “Pluralism v. Populism”, *Prospect*, 42, June 1999, 27, at 29.

<sup>94</sup> See e.g. W Pfaff, “What’s left of the Union?” (2005) *New York Review of Books*, Vol. 52, No. 12 July 14, 26-29; A. Moravcsik n6 above.

constitutional event brings. It is also, in the second place, about the way in which disagreement is built into the evolution of the constitutional idea itself. As noted at the outset, each of the approaches to the translatability or otherwise of the state constitutional tradition raises fundamental questions about the intimacy of the link between state and constitution, and the answers they suggest closely track differences over the terms on which and the extent to which it is possible to imagine polities other than the state. The constitutional process, it follows, is no mere platform for disagreement over polity aspirations, but one that bears an internal, question-begging relationship to the terms of such disagreement.

Alongside the constructivist agenda with its ambitious adaptation of state constitutional ideas, therefore, we can observe other deep orientations at play in the constitutional debate. In particular, we may point to two broad attitudinal clusters or coalitions. One is of constitutional limitation, and maps onto the sceptical approach to EU constitutionalism. The other, an even broader tent, we may describe as an attitude of constitutional vindication,<sup>95</sup> and it maps onto both the continuity and the nominalist approach, while sharing some of the basic background assumptions as the sceptics.

The immediate point is not to examine these complex groupings in depth,<sup>96</sup> but simply to indicate their potential to induce constitutional gridlock. Constitutional scepticism refuses to credit the possibility that the missing goods of constitutionalism that constructivism seeks to supply through its postulation of supranational constituent power as an affirmation of democratic pedigree and as the basis of reflexive construction and maintenance of political community as well as an indirect stimulant towards an enhanced collective decision-making capacity and a pluralist respect for different communities of attachment and interest, are indeed better served by the diversification and multiplication of 'constituent' constitutional sites beyond the state. Rather, constitutional scepticism can be seen as the inverse image of constructivism, calculating that beyond current levels of integration of supranational political community there is a negative or at best zero-sum relationship between the simultaneous promotion of voice, capacity and respect for pluralism at national and supranational levels. In turn, far from the tapping of unrealized potential in the relationship of heterarchically located political communities, the strategic dividend of scepticism is likely to be one of limitation in either of two senses. Negatively, this may take and often has taken the form of denying the validity of the very process of documentary constitutionalism beyond the state for fear that its efforts in creating positive-sum dividends effects succeed only in eroding the key indices of national political community. More positively, as we have seen in recent years when the momentum of documentary constitutionalism has threatened to consign to the margins anyone unprepared to frame their claims in such constitutional terms, it may take the form of drawing competence-delimiting or rights-protecting constitutional lines in the sand to minimize the prospect of such national erosion.<sup>97</sup>

The attitude of constitutional vindication has even greater internal complexity and is less directly in conflict with the constructivist perspective, but arguably it offers just as great a challenge to constructivism. By vindication we mean an approach which treats the conclusion of the constitutional episode and the nominal constitutional

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<sup>95</sup> See Walker n32 above, 228-230.

<sup>96</sup> *Ibid.*

<sup>97</sup> For example, in the decision of the notoriously Eurosceptic *Economist* magazine to come out in favour of a power-limiting EU Constitution; *The Economist*, 4 November 2000.



achievement itself as the symbolic key, rather than, as in the broader constructivist approach, only one element in a multi-faceted and progressive social technology associated with constitutionalisation. The temptations of constitutional vindication are apparent. Its backward-looking bias – its sense of the constitutional act as a higher validation and celebration of something that already exists – resonates closely with the peculiarly truncated nature of EU constitutionalism. For in the absence of favourable conditions for the kind of social integration that state constitutionalism has typically assumed or sought, the vindication approach falls back on the old supranational faithfulness of a mature and familiar legal order and a mature and unfamiliar specialized political system. As we have seen, there is a powerful strand of thought that views the constitutional strength of the EU legal system as lying precisely in its continuity with the state legal order, while there is another equally powerful and often complementary strand of thought that sees the strength of its political system as lying in its *sui generis* – and so as relying on a nominalist understanding of constitutionalism as including those ‘non-constituent’ brands whose virtue in the postnational domain is at least partly dependent upon their acceptance in common with the sceptics of the premise that there is simply no scope for democratic assertion of constituent power at different levels simultaneously. On this view, the CT becomes a kind of “achievement constitution”,<sup>98</sup> its very constitutional self-coding both confirming the venerable status of the EU’s constitutional roots and vindicating its accumulated record. The deep difficulty with such an approach, however, is that it risks treating the problem as the solution. It tends towards closing down and treating as finally resolved<sup>99</sup> the very debate about constitutional possibility that the EU must keep open, and to do so in terms that explicitly authorize and reinforce the truncated tradition that such debate needs to put at issue.

As noted in the introduction, constitutional theory as an activity directed towards and implicated in the domain of practical reason always contains a self-fulfilling element – it operates by assuming the very social and political conditions of action of whose viability or inevitability it seeks to convince its audience. And in the debate over the terms of supranational constitutional possibility we see the opposition between just such self-fulfilling assumptions – from adaptation on the one side through continuity and nominalist approaches to scepticism on the other side – and the danger of a deep impasse at the various points of mutual disconnection. Even if the current constitutional process is somehow revived or renewed, then, is the idea of constitutionalism beyond the state not fatally compromised by the very depth of contestation between different meta-theoretical understandings of the proper domain and purpose of the constitutional? More concretely, as these differences percolate through to the constitutional process, is such a constitutional project not vitiated by the inevitability of disagreement or blockage over the optimal balance of representation of national and post-national constituencies, interests and aspirations, at various stages, whether at the point of initiative, in the content of the text, in its wider symbolic ambition, or in the terms of its interpretation and revisability? On this view, the theoretical plausibility of the constructivist approach to the adaptability of the state constitutional tradition threatens to be of little value, defeated by the very conditions of action that it can only plaintively claim could have been otherwise.

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<sup>98</sup> C. Mortati, *Le forme di governo* (Padova, Cedem: 1973) 393.

<sup>99</sup> See Walker n32 above, 231.

The only possibility of avoiding this bleak prospect is to point to one final and more positive implication of the grounding of constitutionalism in the domain of practical reason. If practical reason, quite simply, is any reason aimed at a conclusion concerning what to do, then any ‘constitutional’ situation that cannot tell us what to do and how to go on displays a kind of performative contradiction. Arguably, the present constitutional situation is of that order. It is not only that the documentary constitutional initiative is blocked, but also that the circumstances of its blockage undermine any default solution. To the extent that the CT’s failure not only thwarts the constructivist approach but also foils the vindication approach, it thereby also undermines the existing Treaty configuration that is the object of the failed vindication, while providing no positive mandate for any broader dismantling of those proto-constitutional features of the framework of legal and political integration that may be preferred by some brands of scepticism. In short the tribulations of the CT tell us not what we can do in ‘constitutional’ common, but only what we cannot or cannot any longer do<sup>100</sup>

The case for renewal of the constitutional debate and for the continuing exploration of the lessons of the state tradition, then, ultimately depends upon taking a step backwards in the face of the destabilizing diverse manifestations of our common commitment to the very idea of constitutional commitment. It involves an additional reflexive turn whose purpose and very justification is none other than an examination of the limits or otherwise of the kind of political reflexivity inaugurated under the state constitutional tradition. In circumstances where the contemporary European peoples stand not only “unavoidably side by side”<sup>101</sup> but ever more closely mutually implicated, we are faced with a situation of deep disagreement over the constitutional conditions under which and even the basic framework of constitutional frames with which we may optimize democratic voice, effective political capacity and respect for diversity, but one of consensus that we must indeed seek to do all of these things. All we know in common in pursuit of these shared hopes and fears are; first, that we do indeed disagree over constitutional means; secondly, that there is no authoritative default for deciding and providing such means in the presence of disagreement, only our current capacity to face up to and resolve any such disagreement, and; thirdly, that according to our national experience, however we resolve our disagreement, its constitutional resolution under circumstances of inclusive deliberation may contribute to the very conditions of political community indispensable to the success of any such resolution.

In a nutshell, however sceptical or otherwise we are over the available models of post-state constitutionalism, under circumstances of intimate interdependence we have no option other than to go back to the table with those with whom we are intimately interdependent to try to resolve the optimal conditions of our interdependence. In the final analysis, it is that deeper premise of collective reflexivity – the idea that we can only decide the terms and limits of our common action together and through some putative frame of collective subjectivity - rather than the particular set of candidate goods associated with collective reflexivity under the state tradition, that provides *the* most pertinent if also the most attenuated legacy of the state constitutional tradition.

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<sup>100</sup> See Walker n81 above.

<sup>101</sup> As in the famous Kantian formulation in the context of his advocacy of cosmopolitanism; *Kant’s Political Writings* ed. and intro, by Hans Reiss, (Cambridge: Cambridge University Press, 1970) 107-8

Proponents of this or any successor EU Constitution cannot succeed unless they can persuade their diverse audiences that the answer to the question of the viability and potential of a post-state constitutional frame of common political engagement and commitment is one we cannot afford not to address in common – that we must seek to be collectively reflexive ‘all the way back’ about our scope for collective reflexivity in the tradition inaugurated by state constitutionalism. Equally, they do not deserve to succeed unless they insist that the terms on which such a question is posed are true to the best understanding of its motivation; that is to say, under the kind of open conditions of collective reflexivity where no candidate constituencies and no candidate solutions to the perennial but highly mobile problem of collective political action – whether or not so-called ‘Constitutional’ – are ruled out in advance.