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PREFACE

Traditionally, the European Community has been set apart from all other international organizations, as well as from states, and European Community law has been distinguished from both international law and from domestic law. This was so because of the supposed unique internal structure and processes of the European Community. This "splendid isolation" is no longer viable. Increasingly in the behavior – and study – of other transnational organizations, polities or regimes, the European transnational experience has come to provide a model, a yardstick and a set of analytical and critical tools, and perhaps erroneously, a desideratum. While European Community law is no nirvana, it has contributed to our world-view both as a substantive demonstration of one developmental path and as the instrument of reformation of our perceptions of international law. It is time to recognize that European Community law is not a different species of law, but is a mutation of the same species.

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The alleged uniqueness of the European experience is often captured by the words/concepts of constitutionalization and constitutionalism – which for a very long time have provided the vocabulary for describing and thinking about the European construct. Increasingly, one finds this vocabulary of constitutionalism employed in discourse of other international organizations, notably the GATT and WTO. Sometimes the vocabulary is explicit – like the pioneering work of Petersmann both describing and prescribing the WTO in constitutional terms. Sometimes other words – legalization, juridification and the like – are used to describe the same phenomenon. Sometimes one finds constitutional borrowing in proposals for institutional and doctrinal reform: Article 177 of the EC Treaty – the procedural cornerstone of European constitutionalism – has been famously advocated for the GATT and for the European Court of Human Rights and a broader use of direct effect – such as that which prevails in Europe – is a regular feature in the examination of free trade areas.

The dangers of "borrowing" from one legal system to another are famous: the law of any polity is a construct embedded in a specific social and political culture and its transmutation to other polities is not easily achieved. Similarly, it is dangerous to assume that intellectual conceptualizations travel with any less difficulty. Law, like any other human institution, always has a history. This too has proven to be a trap for comparative analysis. First, there is a tendency to make our comparison at a given point in time, thereby overlooking some of the dynamic effects of the phenomena compared. Second, it is often hard to synchronize the different time scales of the comparison. Third, law is a complex social phenomenon that confounds simple metrics of comparison and prescription. Finally, the intellectual prisms through which law is observed and conceptualized are also often quite different in disparate systems. The very word "theory" means different things in, say, continental legal dogmatics and American law. Yet, it is irresponsible and defeatist to think that no cross-fertilization among legal systems is possible. The European Union should no longer be viewed as either *sui generis* or nirvana, but its distinct history should not be disrespected.

Seeing the extent to which the European "constitutional" experience is being used in other contexts, this essay tries to make a contribution by addressing some of the specificities of that experience. This essay will address the intellectual history of constitutionalization and constitutionalism in European integration as well as some of the recent challenges to the concept and its practices. By doing so, it is

hoped to contribute to the evolving methodology of comparative transnational constitutionalism.

Constitutionalism came into being as a result of a process and went through "different versions." Alec Stone, a political scientist, offers as good a characterization of the constitutionalization process as any:

> [T]he process by which the EC treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within [the sphere of application of EC law].

A slightly different characterization capturing much of the legal literature as well as the rhetoric of the European Court itself would focus on the alleged shift from a legal order founded by international treaties negotiated by the governments of states under international law and giving birth to an international organization, to a Community which has evolved and behaves as if its founding instrument were not a treaty governed by international law but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law.

The importance of this characterization, in our view, is that it not only catches what the legal literature has considered most important in the structural evolution of the European Community but also the fascination, not to say enamored fascination – and pragmatic interest (measured in the currency of money, power and status) which Constitutionalization has held to the community of Community lawyers. Symbolically, in a very basic sense constitutionalism appears to resolve the perennial existential insecurity of international lawyers once and for all: In constitutionalization Community law was to be recognized as "real" law – in the eyes of courts, the legal community, governments and parliaments and, most difficult to satisfy, even hard-nosed international relations scholars.

One problem with this classic understanding is its finitude. Constitutionalization seeks a particular goal and is completed at a particular moment: history ends. Take, for example, the purported distance between constitutionalized Community law and its birth parent – international law. Is that distance truly so large? Was it ever so large? Has it remained so large? And so critical?

Another problem is that constitutionalism comes with a normative ballast, which, in the euphoric fascination and minute attention paid to its legal "what's" and its social science "how's" and "why's" has often been neglected. When an international treaty begins to

boast an integrated legal system conferring rights and creating duties on all public and private persons altogether new questions of legitimacy come to the fore which cannot be resolved by reference to the ordinary legitimating mechanisms of international law. Harmony turns to dissonance. The European Community today may be a model and icon for concretizing international obligations through the grafting of constitutionalism. It is also a cautionary tale about the normative side-effects associated with that operation.

These two themes will accompany much of our exploration of the concept of European constitutionalism in this essay.

European Constitutionalism – Reality and Perception

Constitutionalism, more than anything else, is what differentiates the Community from other transnational systems and, within the Union, from the other "pillars."

The impact of constitutionalism is inevitable and profound. In computer terms, it is like the operating system conditioning the process of governance itself and within which all Community programs – economic, social, political – function and malfunction. These Community programs have, of course, their specific content, but they are "written in" and "written for" a constitutional setting (and would not necessarily "boot up" in another operating system). Even the most superficial comparison between, say, a Council of Europe and European Community policy with similar objectives and even similar material content, will illustrate the differences. The former will look very much like a traditional international treaty, but the latter will often be indistinguishable from national legislation in the same field in any federal state.

Constitutionalism in the European Community is the operating system, but we shall argue that it is the Windows operating system and not DOS. That is, DOS was the original personal computer operating system and Windows was constructed to overlay DOS. Similarly, public international law is the original operating system of the European Community and of other international relations, and European Community constitutionalism was constructed to overlay – to use and to supplement – the fundamental public international law operating system.

Because constitutionalism captures, more than anything else, what is special about the process of European integration, it becomes the focal point of both the contentment and contempt of those involved in the process.

Consider carefully the position of, say, the Commission, champion of integration, in the ongoing saga of treaty revision from the Single European Act, through Maastricht to the 1996/97 intergovernmental conference. The holiest sanctuary of all has been the preservation of the *acquis communautaire*, and within the *acquis*, the holy of holies is the constitutional framework of the Community. A measure of the Commission's past success, or, perhaps, a remarkable measure of the hold of European integration itself, is that the constitutional operating system became axiomatic, beyond discussion, above the debate, like the rules of democratic discourse, or even the very rules of rationality themselves, which (until challenged by post-modern normative and epistemological precepts) seemed to condition debate but not to be part of it.

The controversies about weighted majorities, blocking minorities and other sensitive issues of voting power within the Council illustrate well this point. The debate is as fierce and consequential as it is only because it takes place within a constitutional framework in which the outcome of votes matters. The British government, champion of state's rights in the Community process, had to toil so valiantly, so few against so many with tears and sweat aplenty, to preserve the voting prerogatives of the large member states because it tacitly accepts, or puts up with, the legal consequences of constitutionalism.

In the countless narratives of European constitutionalization, one of the high moments, possibly the single most important one in the process that transformed the EC treaties from a set of legal arrangements binding only upon sovereign states, was the rendering of individuals too, no longer only states, "subjects of the law" – so at least argue the legal purists. Whether individuals were rendered true subjects of the law is something to which we shall turn later. The international relations realist masquerading as a legal realist, however, would argue that the true achievement of constitutionalism, and the reason Britain felt it so necessary to defend its beaches against ever-increasing majoritarian decision-making, was not in the rendering of the individual a subject of the law but in rendering *states and governments* "subjects of the law" (in part by providing rights to individuals against states). For whatever their formal status, in relation to "normal" (unconstitutionalized) treaties, states often give the impression, under traditional "unconstitutionalized" treaties, of being able to act as above the law.

The operating system often hums silently in the background and it is not necessary for its users fully to perceive or articulate its impact.

Sir James Goldsmith, to give a somewhat comic example, focused his campaign on the alleged evils of the Maastricht Treaty and its potential sequel. But if you scrutinize his manifesto with care you will see that, like many avowed Euroskeptics, it is the constitutional framework, already in place long before Maastricht, that is at the source of his rage.

We academics are often no less comic than the Sir James' of this world. Sometimes we would like to think, and write as if, there is "out there" a constitutional landscape offering itself to various interpretations. Yet, constitutionalism is, too (some would say is only), but a prism through which one can observe a landscape in a certain way, an academic artifact with which one can organize the milestones and landmarks within the landscape (indeed, determine what is a landmark or milestone), an intellectual construct by which one can assign meaning to, or even constitute, that which is observed.

Here, too, constitutionalism often hums silently in the background. There is increasingly a welcome, substantial and growing literature on the various policies of the Community, be it environmental policy, consumer protection, transport or social policy, which focuses on objectives, content, impact but, as with the comparable literature within a national context, takes the constitutional operating system for granted. Even studies specifically dealing with the European system of governance will frequently not bother, or not bother any longer, with the constitutional premise. For example, constitutionalism is often not part of that rusty but trusty old discussion of the Community democracy deficit (and how to solve it . . .) but is inevitably premised on its presence. Absent constitutionalism, the same set of issues would emerge as the even rustier discussion of member state democratic control of foreign policy. Likewise, New Institutionalism, rightly, does not expend too much energy on the constitutional setting of the Community. But try to consider its illuminating insights outside that setting. They just do not make sense.

Trite then as it is to recall, the discourse and history of constitutionalism are not only a political – legal discourse and history in which the players are actors such as governments and courts and the script is made of cases, and treaties, and resolutions and debates and social, political and legal praxis. They are, too, an intellectual history and discourse of conceptualization and imagination.

The political-legal history, the accounts of how ". . . the EC treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially en-

forceable rights and obligations on all legal persons and entities, public and private, within EC territory" are very well known and do not need repeating. Though constitutionalization narratives vary, and despite very different interpretative optics employed, most accounts share very similar images of the key political and legal milestones and landmarks which make up the constitutional landscape. There is no need, then, to map that landscape again.

But it is our intention to discuss briefly, to map if you wish, the intellectual history of European constitutionalism and constitutionalization. Map, note, not chronicle. Whereas, as mentioned, accounts of the "out there" view of constitutionalism and constitutionalization exist aplenty, we are unaware of any systematic "discussion of the discussion" of constitutionalism and constitutionalization.

Such a discussion, even if brief, is of importance: more than any other concept of European integration, constitutionalism has been the meeting ground of the various disciplines which engage, conceptualize and theorize about European integration, principally political science, international relations, political economy, law and, more recently, sociology. To understand the intellectual history of constitutionalism is to understand integration studies as a cross-disciplinary endeavor.

There is another reason for trying to map this intellectual history. For the thesis of this essay is that European constitutionalism is undergoing a reformation, the nature of which we shall be exploring. If there is any merit, other than trendiness, to the use of DOS and Windows as metaphor for European constitutionalism, then a reformation would have the same kind of underlying and far reaching – yet often invisible – consequences as the change in a computer operating system. While the focus of our view of the reformation is the European Community, the same phenomenon has reformed international law, and the international law perspective on the European Community. Thus, while constitutionalism has made much of the separation of European Community law from public international law, this reformation argues for the convergence of European Community law and public international law. As such, it is a reformation of both European Community law and public international law. Perhaps it would try the reader's patience to refer to Windows 95, a unitary operating system that modifies and combines the functions of both DOS and Windows?

What is meant by reformation will emerge in time, but inevitably the elements of that reformation are both new data "out there" in the

shape of, say, new positions adopted by key political actors and even public opinion but also by a new kind of intellectual observation and conceptualization. The reformation has to be located in both histories of European constitutionalism.

The Geology of European Constitutionalism

1. In the beginning there was Doctrine

In the beginning there was doctrine: the disparate legal doctrines of the Court grappling to interpret the Treaties, to solve concrete legal conundrums before it. Schuman said:

> Europe will not be made all at once, or according to a single, general plan. It will be built through concrete achievements, which first create a de facto solidarity.[1]

Delightfully, this prediction – or prescription – certainly is borne out by the first stages of constitutionalization. The first steps were just that – concrete steps. Momentous? Sure. But hardly part of a general plan and certainly not all at once. There is even truth to the de facto solidarity part of the Schuman Declaration, also consistent with constitutionalization. The success of constitutionalization would depend not only, or even primarily, on the utterances of the European Court but on constitutionalism: on their acceptance by national actors, mainly courts, and principally national constitutional courts. That solidarity of national legal actors was developed through concrete achievements, as the neo-neo functionalists were to argue convincingly, and has remained to this day in many cases more de facto than de jure.

For its part, the first intellectual stratum was the more traditional analysis of the judicial developments qua "doctrine:" Working out their contours, examining their reach, trying to understand their rationale and their legal significance. Some might dismiss this kind of work as intellectually empty, without systemic significance, et cetera. And yet, this doctrinal work is the foundation for all that came after. Clever archeologists may, through flights of creative imagination, construct rich interpretative narratives from fragments of pottery, debris of buildings, remnants of documents. But someone must have dug the fragments up, exposed the debris, salvaged the remnants. The original doctrinal work is truly foundational in this sense. It has another enviable trait: more than any other aspect of the academic discussion of

[1] Schuman Declaration of May 9, 1950, *reprinted in* 13 Bull. Eur. Communities No. 5, at 14-15 (1980).

constitutionalism, it has a vital and constant link to the "out there;" it is a project which retains its professional rationale and relevance. In this respect, doctrine is not a foundational stratum at all – it is more like a gold seam that runs from deep down to the very surface and still yields its riches.

2. The House That Eric Built

"Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe."[2] This is the famous opening line of Eric Stein's 1981 article in the *American Journal of International Law*. It is a prime example of the second stratum in academic constitutional discourse about Europe. What this type of remarkable work did (and it, and some others like it, did a lot more besides) was to take disparate legal doctrines, to baptize them as "constitutional" and put them together with the bold assertion that the whole was greater than the parts – that a constitutional framework had come into being long before the Court was willing to use that vocabulary or, arguably, even think in those terms. Constitutionalization was transformed into constitutionalism.

The intellectual feat here was not simply one of conceptualization. There was already in that early work an interesting working out of relationships which involved legal and other actors. Today, with hindsight, we can quibble or even quarrel with the early description and analysis. We have, say, come to appreciate, through the work of a new generation of scholars revisiting this story, that, for example, the fashioning of the constitutional framework was the result of a far broader interaction than Stein emphasized. Not only, as he perceptively explained, between Commission, governments, advocates general and the Court, but national courts and other statal actors too. We would have written the opening sentence as something like – "The European Court with its national brethren, with . . . [add in your favorite actors]" – but all the new and transformative renovations take place in the House that Eric and his colleagues, to whom we are all indebted, built.

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2 Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

3. Eureka! Social Science Discovers Constitutionalism (and Constitutional Lawyers Discover Social Science. . .)

The Archimedes of this part of the story, arguably the single most influential group of contributors to general European integration theory, remain Haas, Schmitter, Lindberg and Scheingold with their neo-functionalist theory. Even with profound skepticism toward the view of humanity which underlies neo-functionalism and which provides it with its explanatory power, one may readily acknowledge the impressive intellectual construct created by its architects. Interestingly, the original neo-functionalist work both understood and integrated what we have called constitutionalism even if using a different vocabulary. But, like Greek and Roman classicism, this integration was somehow forgotten, and needed a renaissance to bring it back. The mutual "rediscovery" of social science and constitutionalism is this renaissance and it adds several strata to the geology of constitutionalism.

Social science discovered constitutionalism in more than one way. We will speak about international relations, political science and sociology.

International relations has had a fickle relationship with European integration, for many years not quite being able to decide whether the Community constituted a consort of sufficient importance to be worthy of its attentions. The Single European Act and the 1992 program face lift had, at least, one positive result: enticing international relations back. Just as lawyers have an inbuilt bias toward constitutionalism, so international relations has an inbuilt bias against it. Constitutionalism, after all, is in some ways the antithesis of internationalism, and constitutionalism as a motive for compliance with a constitution contradicts much of short-term interest-based international relations theory. The advent of constitutionalism is to international relations experts in the field what perestroika was to sovietologists. For the practitioners of international relations as conventionally conceived, the continued centrality of the national and the state is ontologically necessary. Like all of us, they have come to love the object of their study and would hate to see its demise. The only reason to wish the full triumph (God forbid) of constitutionalism over the national and the state – a final phase of constitutionalization – would be to witness the comic effects of their disappearance on the EC as an object of study for international relations. The revival of international relations' interest in European integration has been, thus, accompanied by a deep ambivalence toward constitutionalism.

Today (unlike, say, ten years ago) it has become uncommon to find international relations studies of Europe which do not perceive constitutionalism as an important, unique, feature of the system. The ambivalence manifests itself, however, in three principal ways. Some studies acknowledge the importance of constitutionalism (or of the phenomena which have been conceptualized by others as constitutionalism) in their descriptive matrix of the Community but then it disappears in their analytical apparatus. It apparently requires no explanation. It is just there, as a datum. Other studies take battle, overt or covert: the intergovernmental paradigm of European integration – the paradigm which most plays down supranationalism vis. constitutionalism – has seen its most brilliant articulation in the immediate post-SEA period, arguably the crest of Constitutionalism. But, then, aren't our finest hours frequently when under siege? We all look for the lost key, not where it is, but under our own lamp post. Moravcsik's intergovernmental lamp post has, admirably, been a veritable searchlight. This approach is not without its power. By employing the concepts of delegation, principal/agent relations and problematizing informational and institutional constraints, Moravcsik convincingly accounts for some of the reasons for the Court's success relative to other supranational institutions, notably the Commission. At this broad level, such theories are convincing, yet such approaches, even with "two-level" extensions, remain, in political science terms, underspecified, and from a legal perspective, fall short of a true appreciation of the subtle, multilevel dynamics of representation and discourse that have powered the European Community legal system forward. Finally, there are those, taking the wise counsel of Machiavelli, who have sought to hegemonize. If you cannot squash them, hug them, the astute Florentine instructed. So, the elements of constitutionalism are incorporated into the description – courts, law and all. But the explanation is the familiar orthodoxy of international relations: interest, consent or compulsion. States accept it because it is in their interest, qua states.

Political science has taken two interesting tacks toward constitutionalism. One has been to observe its constitutive systemic role and seek, within this new framework, to explore the classic concerns of political science which developed in statal contexts. There is nothing deja vu in the work of the likes of Majone, Sbragia, Schmitter and Fligstein, and of political economists like Pelkmans, Jacquemin and Adams. For classical as the concerns of the regulatory state, of federalism and the aggregation of power, of the distributive choices in mod-

ern society may be, they receive in the work represented by these well-known scholars and others like them a new sheen since they are explored in the context of a polity, the uniqueness and peculiarity of which are not only stipulated but are often the *raison d'etre* of the inquiry. In this strand, constitutionalism is not the object of inquiry but its condition.

A second and more direct engagement of political science with constitutionalism has been its positioning as an object in and of itself worthy of analysis – and certainly not left to lawyers alone to either describe or articulate. In this case it was not constitutionalism as a factor or parameter in the operation of the system that needed explanation. The European Court, its doctrines and its interactions with other actors – Community institutions, national courts, the bar, etc. – became a central concern to political science with extraordinarily rewarding results. Of course it was possible to bring to this inquiry the conceptual and methodological insights developed in court studies in national contexts. The work of, say, Martin Shapiro, became an inspiring model: a basis from which to rethink just about all major components of the elements of constitutionalism and, in particular, to try to give explanation to judicial activity which was not rooted in hermeneutics or doctrine. The causal questions that were asked as to the success and failure of the spread of constitutionalism, the methodology employed in trying to respond to these questions and the implications from them broadened and deepened the discourse of constitutionalism beyond recognition, at times forcing a rethinking of certain doctrinal positions, so that even the most doctrinal of lawyers would have to take note. It is Burley and Mattli who revitalized the debate by offering the first theoretically coherent neo-functionalist account of the development of the Court, one that has spawned much research and withstood considerable criticism. On a parallel track, Dehousse has explored similar issues. The work of Alter and Wincott are superb examples too. And Stone has now developed his own impressive Neo-Realist theory. These intellectual phenomena were not a simple grafting onto Community constitutionalism of disciplinary and methodological insights culled from other national contexts. One of the achievements of this work and these scholars has been in reshaping the way we think about the phenomenon of constitutionalism and its elements given its transnational experience. It is most evident to see the migration of the insights gained here to, say, the WTO and even the United Nations.

But it was not only political science which discovered constitutionalism as an important parameter in the system or as an object of inquiry in itself. Law also discovered social science. Hjalte Rasmussen's widely discussed study of the Court is an interesting milestone. Strictly speaking his famous critique is rooted in a doctrinal approach to constitutionalism: The Court "got it wrong," meaning that it departed from acceptable (normative) and accepted (empirical) interpretative standards. But to say, from within European law, that the Court got it wrong in its most important constitutional decisions, and to say it with such fresh rudeness, was a major development. But Rasmussen's book does more than that: by making it meaningful to ask whether the Court's rulings were accepted rather than acceptable, by treating the Court as a political actor and introducing openly the question of judicial politics, by making it relevant who the actual judges were (rather than treating it as a disembodied institutional voice), by highlighting in print the existence of a critical discourse among academics who were not, however, ready to go to print, he was breaking a whole series of taboos.

Francis Snyder's admirable *New Directions in European Community Law*, the first chapter of which is manifesto, agenda and methodology, is the best, in English, for insightful and expanded European legal discourse of constitutionalism. The new directions are not only in the areas he discusses but in the way they are discussed. There are now, embryonically, a European law sociology and a sociology of European law. There is also doctrinal discourse which is fully attuned to the socio-political context in which it is situated and which often conditions its contours and is increasingly attuned to its own position. A group of young Turks in Britain exemplified by the Shaw and More volume on the *New Legal Dynamics of the Union* is testimony to a changing legal landscape.

Marking the arrival of this field, there is even a successful new journal, *The European Law Journal*, the subtitle of which – *Review of European Law in Context* – is indication of the maturity of discourse within the law.

The Church of Constitutionalism Is Under Challenge

Except for a small fringe, the challenge to constitutionalism is not revolutionary, for example a claim to overturn the *ancien regime*, but is more in the nature of a reformation, with its historical religious connotations. It is not about breaking faith; it is about affirming faith. It is in at least that sense conservative, and in this case, it is consolidat-

ing, retracting some of the more extravagant modernist promises of the heady early days. And yet, at one and the same time, reformation introduces a challenge to core articles of faith and foundations. Reformation is, thus, far more radical than evolution, far more grounded than revolution. The reformation of constitutionalism takes place alongside the convergent evolution of constitutionalization in general international law.

What are the signs of the challenge to classical constitutionalism which justify talking of reformation? They are, like the early elements from which we constructed the constitutional image, varied and disparate. They take place in both constitutionalization and constitutionalism and in all the gradations which take place between these two phenomena. This essay will eventually focus on the challenge to, and possible reformulation of, some of the key legal doctrines that comprise constitutionalization. But before we turn to these, it is useful to provide a non-exhaustive list of developments that can be considered part of the challenge.

- There are challenges from the collectivity of member states of the European Union. Consider first the Maastricht Treaty itself. In a praiseworthy and deservedly famous article reflecting on the constitutional dimensions of Maastricht, entitled "The Constitutional Structure of the Union: A Europe of Bits and Pieces," Deidre Curtain criticizes the fragmentation and constitutional incoherence of the Union structure and has, too, harsh words for a certain assault on the Court in the Maastricht process.
- There are challenges from individual member states. In the Maastricht process it was the United Kingdom and Denmark. In the current IGC there is a Franco-German (!) draft which contemplates such variable geometry as to make the Community pillar itself one of bits and pieces. Whether it will be accepted is neither here nor there; it is evidence of the challenge to what was considered a veritable orthodoxy. In the same breath one can mention the breathtaking proposal to amend Article 189a which requires unanimity to modify a Commission proposal. A better targeted attack on the constitutional powers of the Commission is more difficult to imagine. This proposal is sure not to pass, but it is a sign of the attack on the *acquis*.
- There are challenges from constitutional actors within member states. Most interestingly to the theme of constitutionalism are the challenges coming from the national judiciary and in particular the highest courts. The German Constitutional Court and its Belgian counterpart have been most explicit. But there are signs from others as well, challenging precisely the hegemony of the European Court of Justice. There has been an understandable reaction trying to minimize and paper over the cracks. But it is there for anyone who wishes to look.
- There are challenges from, yes, new constituencies within the Court of Justice. (We should not commit the error of imagining the Court as a

monolithic actor free of internal factions, disagreements and internal conflicted views on many issues, including the contours of constitutionalism. The oft-deep divisions on fundamental issues between advocates general – full Members of the Court – and the Court itself surely mirror similar divisions within the College of Judges.) Consider the post-Maastricht jurisprudence of the Court itself – for example its famous (or, to some, infamous) Keck Decision or other controversial decisions such as Opinion 1/96. Assailed by many champions of the Single Market as a heresy, Norbert Reich used the Keck Decision among those justifying his analysis of a veritable economic constitutional revolution.

- There are challenges from general public opinion in several member states. Maastricht, refreshingly, gave the lie to years of a Eurobarometer ostrich syndrome. It is clear that Euroskepticism is not just another English vice. At a minimum, Europe is no longer part of consensus, nonpartisan politics in many Member States, not least the new ones. As suggested above, though the discontent is in many instances non-specific, it goes often to what one would consider the constitutional *acquis*.

It is hard to gauge the depth behind these challenges and it is even harder to explain the reasons for them. We offer some speculations on what may account for this change of mood.

- As regards governments and states, one explanation must rest with the hugely expanded role of majority voting which came into effect with the Single European Act. How and why the governments accepted this sea-change is a story for another day. Clearly majority voting has been fundamental in the ability of the Community to move ahead with the creation of a single market (of sorts) and has generally transformed the climate of decision-making. But it also removed one of the key political artifacts that had facilitated the acceptability of constitutionalism. Constitutionalism with a veto and without a veto are two very different games and what we are seeing in the challenges of member states – individual and collective – is an adjustment to that reality.
- We will not dwell here much on courts which must be the subject of another essay. The dialogue between the European Court and national courts has become more complex, nuanced and, at times, terse. In part courts are part of their national context and reflect the changing mood of public opinion, both elite and popular. In part certain strands of the European jurisprudence and certain failures of the European Court (as perceived by its interlocutors) in such areas as competences, have become more visible and less acceptable. In part the national challenges are a paradoxical sign of an acknowledgment by national courts of the constitutional nature of the European Court's posture. It is, strangely, easier to deal with the doctrinal elements of constitutionalism (which after all constitutes the official vocabulary of the inter-court dialogues) when they can be pigeonholed as international law, and therefore, taken less seriously. A constitutional-constitutional dialogue has its inbuilt conflictual elements. Likewise, while reserving chapter and verse for another occasion, all of the "strange" decisions of the European Court should be seen as part of its response both to the general European con-

text in which it finds itself and as part of its dialogue with a much more difficult national interlocutor.

- The change in general public opinion is most interesting and conditions much of the other responses.
- There is, first, what one could term the paradox of success. In its foundational period, the European construct was perceived as part of a moral imperative in dealing with the heritage of World War II. Governments and states may have been happily pursuing their national interest but the European construct could be cloaked with a noble mantle of a new-found idealism. Within Europe, war may be possible but it is certainly unthinkable. With that huge success of its principal objective, what Europe now is presented as delivering is bread and circus. Remove the moral imperative, remove the mantle of ideals, and it's politics as usual with the frustrating twist that in Europe you cannot throw the scoundrels out at election time. So you try and throw the whole construct out.
- Arguably, public attitudes go even deeper than that. We come here to a more sobering consideration in this regard, whereby the European Union may be seen not simply as having suffered a loss of its earlier spiritual values, but as an actual source of social *ressentiment.* Here are the highlights of what surely deserves much more than this superficial summary.
- In his pre-choleric days, Ernst Nolte wrote a fascinating study on the origins of fascism in its various European modes. Consider, chillingly, the turn to fascism in Italy, France and Germany at the beginning of the 20th century. In his profound comparative analysis of the cultural-political roots of the phenomenon, the common source was identified as a reaction to some of the manifestations of modernity.
- At a pragmatic level, the principal manifestations of modernity were the increased bureaucratization of life, public and private; the depersonalization of the market (through mass consumerism, brand names and the like) and the commodification of values; the "abstractism" of social life, especially through competitive structures of mobility; rapid urbanization and the centralization of power.
- At an epistemological level, modernity was premised on, and experienced in, an attempt to group the world into intelligible concepts which had to be understood through reason and science – abstract and universal categories. On this reading, fascism was a response to, and an exploitation of, the angst generated by these practical and cognitive challenges. Up to here this is a fairly well known story.
- Eerily, at the end of the 20th century, the European Union can be seen as replicating, in reality or in the subjective perception of individuals and societies, some of these very same features: it has come to symbolize, unjustly perhaps, the epitome of bureaucratization and, likewise, the epitome of centralization. One of its most visible policies, the Common Agriculture Policy, has had historically the purpose of "rationalizing" farm holdings which, in effect, meant urbanization. The single market, with its emphasis on competitiveness and transnational movement of goods, can be perceived as a latter day thrust at increased com-

modification of values (consider how the logic of the Community forces a topic such as abortion to be treated as a "service") and depersonalization of, this time round, the entire national market. Not only have local products come under pressure, even national products have lost their distinctiveness. The very transnationalism of the Community, which earlier on was celebrated as a reinvention of Enlightenment idealism, is just that: universal, rational, transcendent and wholly modernist.

- To this sustained and never resolved angst of modernity we have new, *fin de siècle* added phenomena as illuminated brilliantly by Brian Fitzgerald.
- To capture these phenomena we can resort to what Jose Ortega y Gasset called creencias – the certainties of life which needed no proof – both in the physical and social world: Water falls downward, there is a difference between machines and humans, higher forms of life differentiate by gender, etc. To the sustained challenge of modernity is added a profound shattering of the most fundamental creencias – deeper still, a shattering of the ability to believe in anything. It is worth tracing some of the manifestations of this process.
- There is first, or was, for a sustained period in this century, the assault of the reductive social sciences. Not only are things not what they seem to be, but their reality always has a cynical malevolence. Public life and its codes mask power and exploitation; private life with its codes masks domination. By an inevitable logic this assault turned on itself, whereby the illumination brought by these insights was not a vehicle for liberation but in itself for manipulation. The epistemic challenge of post-modernism deepens the shattering. For, in the old, modernist perspectives, there was at least a truth to be explored, vindicated – even if that truth was one of power, exploitation and domination. One can find distasteful the post-modernist self-centered, ironic, sneering posturing. But, without adjudicating the philosophical validity of its epistemic claim, there is no doubt that the notion that all observations are relative to the perception of the observer, that what we have are just competing narratives, has moved from being a philosophic position to a social reality. It is part of political discourse: multiculturalism is premised on it as are the breakdown of authority (political, scientific, social) and the ascendant culture of extreme individualism and subjectivity. Indeed, objectivity itself is considered a constraint on freedom – a strange freedom, empty of content. Finally, the shattering of so many creencias (of the notion of creencia itself) has found a powerful manifestation in the public forum: it is dominated by television which distrusts and, by its pandering, non-judgmental transmission or cheap moralization, undermines creencias. This occurs in a vertical forum in which each viewer is isolated and addressed alone, unable to hear and join the objections of other viewers.
- To the angst of modernity is added the end of century fragmentation of information, and the disappearance of coherent world view, belief in belief and belief in the ability to know let alone control.
- There are many social responses to these phenomena. One of them has been a turn, by many, to any force which seems to offer "meaning."

Almost paradoxically, but perhaps not, the continued pull of the nation state, and the success in many societies of extreme forms of nationalism (measured not only in votes and members but in the ability of those extreme forms to shift the center of the public debate) are, in part of course, due to the fact that the nation and state are such powerful vehicles in responding to the existential craving for meaning and purpose which modernity and post-modernity seem to deny. The nation and state, with their organizing myths of fate and destiny, provide a captivating and reassuring answer to many.

- Here too the failure of Europe is colossal. Just as Europe fuels the angst of modernity it also feeds the angst of post-modernity: giant and fragmented at the same time, built as much on image as on substance, it is incomprehensible and challenges increasingly the creencias of national daily life. This is not to suggest that Europe is about to see a return to fascism, nor most certainly should this analysis, if it has any merit, give joy to fin-de-siècle chauvinists, whose wares today are as odious as they were at the start of the century. But it does suggest a profound change in its positioning in public life: not, as in its founding period, as a response to a crisis of confidence, but 50 years later as one of the causes of that crisis. Constitutionalism – but for the sake of what?
- Finally, last and least, there is also a change in the academic discourse of constitutionalism. Recall those two remarkable articles by Curtain and Reich. Their critique is as telling as the phenomena criticized. The implicit view from which it is made is the classical European constitutional vision which privileges an image of a mono-centered, vertically integrated, polity. It is a view of a single "Single Market" as a privileged constitutional value, part of the economic constitution of the Union, of an authoritative Court which enjoys and deserves deference both from national courts and all other political actors, of a respect for member state diversity which, however, has to be subject to a Community discipline in the sphere of application of Community law. In short, exactly the Stein vision of European constitutionalism as a ". . . framework for a federal-type structure in Europe." To the extent that the single market is viewed as a peremptory norm, without the possibility that other norms are posited because the other norms are either outside the jurisdictional bounds of the Community or are not reflected in the Community legislative process, it was predictable that centralization of authority would follow.
- Maastricht does represent a "rebellion" against that image of constitutionalism. It is clear that the principal *raison d'etre* of the pillar structure, with the meticulous and explicit attempt to exclude the Court, was the wish of the Member States to operate outside the European constitutional structure. And if one finds a certain emotional edge in the articles dealing with decisions of the European Court in cases such as Keck and others like it, this is understandable. These decisions are painful since they seem like a betrayal from within the Vatican itself.
- The *Weltanschauung* from which the critique is made is also totally understandable. It is entirely consistent with the repeated vocabulary of classical European constitutionalism. Consider the legal underpinnings

of constitutionalism in, say, Article 177, with its explicit rationale of a uniform interpretation (and application) of Community law. This view has a pragmatic rationale to it, as well as embodying a certain vision of equality before the law. But is it not too the par-excellence monocentric view of the polity? Or of the potent idea of the rule of law which, in the rhetoric of the European Court, meant that any legal act is to be subject to judicial scrutiny. This is noble and in many ways persuasive. But it has, too, far reaching consequences to the primordial self-positioning of the Court. And to anyone who grew up on Dassonville as an article of faith affirming not only the substantive unity of the market, but also the subjection of any fragmentation to Euro-scrutiny, the notion of exclusion from such scrutiny a la Keck is sacrilege. Exclusion is certainly inconsistent with Dassonville's audacious grab for centralized power, but is it inconsistent with a reformed and consolidated constitutionalism?

- We witness in recent years the emergence of a new academic discourse which attempts to rethink the very way in which classical constitutionalism was conceptualized. The most powerful and influential voice is that of MacCormick in his trilogy: *Beyond the Sovereign State*; *Sovereignty, Democracy and Subsidiarity*; and *Liberalism, Nationalism and the Post-Sovereign State*. Here is a voice that understands the impossibilities of the old constitutional discourse, in a polity and a society in which the key social and political concepts on which classical constitutionalism was premised have lost their meaning. Note in particular two of the hallmarks of this new reformed discussion. The first is a more explicitly normative and critical discussion of constitutionalism. The second is its challenges to the dualist prism of the traditional constitutional image. The dualist approach places the relationship between Community/ Union and the member states at the center of the discourse and, likewise, places a huge premium on a hierarchy of norms – centrist and uniform – as a representation of, and resolution to, constitutional conflict. The new reformed discussion – in MacCormick, de Areilza, Dehousse, Joerges – recognizes and at times suggests a different, "horizontal," "poly-centered," "infranational" image of the European polity and its constitutional framework.

Let us represent here a discussion of particular challenges to the old constitutionalism as they relate to some of the core articles of faith and then present some suggestions for a reformed discussion of those concepts.

Direct Effect and Citizenship, Supremacy and Demos

Direct effect and supremacy are at the core of the constitutional construct: if constitutionalization is the finite process by which the EC treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere of application of EC

law, then direct effect and supremacy are essential conditions for constitutionalization. Doctrinal constitutionalism sought to root (or critique) direct effect and supremacy in an acceptable and accepted hermeneutics. Political science has tried to explore the systemic implications of the doctrines and the dynamics of the constitutional conversation about them.

The reformation described in this essay has begun to address a new question: by what authority, then, if any – understood in the vocabulary of normative political theory – can the claim of European law to be both constitutionally superior and with immediate effect in the polity be sustained? Who is the constituent power? Why should the subjects of European law in the Union, individuals, courts, governments, etc., feel bound to observe the law of the Union as higher law, in the same way that their counterparts in, say, the United States are bound, to and by, U.S. federal law? It is a dramatic question since constitutionalization has formally taken place and to give a negative answer – as has recently been given by actors and "observers" – would be tantalizingly subversive. The failure to address this question is partly why the critique of European Union constitutional democracy is often conflicted. One can, it seems, proclaim a profound democracy deficit and yet insist at the same time on the importance of accepting the supremacy of Union law. It is a dramatic question too, since it goes to membership, to citizenship and nationality and, thus, seems to bring European constitutionalism into direct conflict with the constitutionalism of its Member States. To whom is primary allegiance owed? By whom is it owed? Of course the articulation of this question demonstrates its fundamental incoherence. This essay concludes that there are multiple allegiances and therefore multiple centers of power, and that we cannot point to a single constituent power or institutional fount of sovereignty.

One place to look for the answer to the issue of normative authority would be international law. The high contracting powers – the member states of the European Community – entered into an international treaty based on international law which created an organization with these wide capacities and established its institutions empowered to exercise the various powers. What, then, of authority? On this view the transnational authority of the Community writ, so long as *jus cogens* was not violated (and it clearly was not), derives from international law: *pacta sunt servanda*. The internal authority of the Community writ, so long as internal constitutional norms were not violated (and apparently they were not) derives from the constitutional author-

ity which governments enjoy to engage their respective states, including the authority to undertake international obligations with internal ramifications in national law. The nature of the European polity on this reading is an international organization belonging to the states that created it.

For a long time the international law view has been out of vogue, and for a long time, the international law view has been myopic. Despite its terse elegance the international view runs against one of the great orthodoxies of the system: if we look to the rhetoric of the European Court in the celebrated Van Gend en Loos case – the embodiment of constitutional orthodoxy – the Community is not an "old" order of international law; it is more than an agreement which merely creates mutual obligations between the contracting states. Rather, ". . . the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights. . . ."[3]

In subsequent cases the Court dropped the reference to international law altogether and in the 1980s, in cases such as *Les Verts*, it referred to the treaties as the constitutional charter of the Community.

The internationalist view does not simply contradict this rhetoric. Given the massive transfer of competences to the Community, the unprecedented empowerment of Community institutions (and through them, indirectly, of the executive branch of the Member States at the expense of, say, national parliaments) and the consequent creation of considerable democratic deficiencies in central aspects of European public life, the internationalists' construct provides a poor legitimation to this new architecture of power.

But if we reject the internationalist view as grounding direct effect and supremacy what comes in its place? Answering this question is exactly where, at least in the first place, political theory has to replace social science. Political theory tells us that the international view is as accurate as the domestic view: that power is divided and that there are no absolutes. It does not seem to matter whether international law is the fount of all authority, authorizing sovereignty and hence domestic constitutionality, or whether power flows the other way, with domestic constitutions authorizing the formation of international law. The flow of authority is bidirectional.

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[3] Case 26/62, Van Gend en Loos v. Nederlandse Administratie van Belastingen, 1963 E.C.R. 1, 12, C.M.L.R. 105 (1963).

While there is no single institutional fount of authority, political theory provides a single earthly fount of authority. In Western, liberal democracies, under one guise or another, public authority requires legitimation through one principal source: the citizens constituting the political subjects of the polity. The principal hallmark of citizenship is not simply the enjoyment of human rights characterized by their extension to all in their quality as humans rather than citizens. The deepest, most clearly engraved hallmark of citizenship in our democracies is that in citizens vests the power, by majority, to create binding norms, to shape the political, social and economic direction of the polity. More realistically, in citizens vests the power to enable and habilitate representative institutions which will exercise governance on behalf of, and for, citizens.

Note too, that this huge privilege and power of citizenship has, traditionally, come with duties – not simply a duty to obey the norms (that falls on non-citizens too) but a duty of loyalty to the polity with well known classical manifestations. Citizenship is so basic that, for the most part, it is simply assumed in democratic political theory which engages mostly the conditions and practice of its exercise. This theory is challenged by the notion of dual citizenship in vertical terms: citizenship of both the member state and the Union. We address potential resolutions of this challenge below. Here, it is sufficient to note that divided citizenship implies fractured loyalties.

One might think that this issue has been addressed in the Community constitutional architecture. In the same Van Gend en Loos we read: "Independently of the legislation of Member States, Community law . . . not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."

This phrase wonderfully sharpens the issue: For here are obligations imposed on individuals independently of the legislation of member states. Member state legislation derives its authority and legitimacy to impose obligations on individuals because it is made by, or in the name of, its subjects – the citizens of the member states. If Community law imposes obligations independently of the legislation of member states, who are its subjects?

Surely this is where the legal doctrine of direct effect is so significant. For direct effect purports not simply to address the issue of the status of norms (so essential to individuals qua litigants – and thus to their lawyers) but also the political status and identity of the subjects of those norms.

Lawyers recite dutifully that the ". . .Community constitutes a new legal order . . . for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."

Individuals, not only states, are thus subjects. Semantically, in English, "subjects" is often synonymous with citizenship. The Queen's subjects of old are the present citizens of the Realm. It could seem, thus, that in the very articulation of one of the principal "constitutionalizing" doctrines – direct effect – the condition for its authority was provided by elevating individuals to the status of full subjects alongside member states.

But this would be a highly problematic construction.

Direct effect means that obligations among states created by a treaty confer rights on individuals which courts must protect, even against their own statal public authorities. It is in this sense that calling individuals subjects of the treaty alongside member states may be justified. But note, individuals are "subjects" only in the (direct) effect of the law. In this sense alone is Europe a new legal order. Consider the following *reductio ad absurdum*: Imagine three states which still allow slavery. There is trade among these states, including trade in slaves. Imagine further that the three get together and conclude a treaty that creates mutual obligations among them such as prohibiting a workday for slaves of more than 20 hours. They also create institutions empowered to regulate all matters concerning slavery. Imagine now that they do not wait for a judicial decision but include explicitly in their treaty what the ECJ "found" in Van Gend en Loos: That these obligations, are, independently of national legislation, intended to create rights for the slaves themselves, and that national courts would have to protect those rights. Another new legal order will have come into being. Does the fact that the obligations created by the states, the high contracting parties which bestow rights on our poor slaves make them subjects of the treaty? Yes in the limited sense of deriving rights created by others. No, in the sense that they have no say in the making of those rights. Enjoying rights created by others does not make you a full subject of the law. Thus, in Van Gend en Loos, to the extent that the high contracting parties retained the prerogatives to make the obligations, bestowing rights on individuals, there was, in this sense, little new in the legal order, except that it accentuated the problem of legitimacy. For if the Community and Union have the capacity to exercise law-making power over individuals independently of national legislation, by whose authority does it enjoy that power? Again, we

have lost the ability to identify a discrete and unified institutional locus of power.

One could object to this absurd example and claim that in the Union context the Member States are composed of citizens, not slaves; citizens who enabled their States to create institutions which create obligations. One could object further that the act of authorization of the treaties, which bestow these powers on the Community, by national parliaments provides the authority. That is true, but note how that argument reintroduces legitimation through the mediation of the State and authority through public international law, thus waving good-bye to the "new legal order" and constitutionalization. That argument relies, without analysis, on the democratic nature of national politics. It appears that the new legal order and constitutionalization only addressed half of the citizen-state relationship: the effect of law as a source of claims, but not the formation of law.

To use our current vocabulary, though the Community seen through the eyes of Van Gend recognized nationals as subjects in one sense (effect of law), it stripped them of citizenship in the sense of direct participation. One paradox, then, has been that the very doctrine which is foundational to European constitutionalism is, at the same time, its denial.

Citizens constitute the demos of the polity. This is the other, collective side, of the citizenship coin. Demos provides another way of expressing the link between citizenship and democracy. Democracy does not exist in a vacuum. It is premised on the existence of a polity with members – the demos – by whom and for whom democratic discourse with its many variants takes place. The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a demos.

Simply put, if there is no demos, there can be no operating democracy. If the European Community lacks an operating democracy, how can it be a community? Is there, can there be, a European demos which would legitimate the authority of European constitutionalism? Can this European demos be arrayed against national demoi where they conflict?

As part of the reformation debate, there has emerged an articulate and powerful No Demos Thesis. One implication of this thesis, espoused, among others, by the German Constitutional Court, is to deny any meaningful democratization of the Union at the European level, to reassert the implicit underpinning of the Community legal order in international law, and if one is to be intellectually consistent,

to negate likewise any meaningful content to European citizenship. Space does not permit full elaboration but a few hints will suffice.

Under this view, the nation or the people, which is the modern expression of demos, constitutes the basis for the modern democratic state. The nation and its members – which need not be irredentist but may be defined in many different ways – constitutes the polity for the purposes of accepting the discipline of democratic, majoritarian governance. Both descriptively and prescriptively (how it is and how it ought to be) a minority will/should accept the legitimacy of a majority decision because both majority and minority are part of the same demos, the same people. That is an integral part of what rule-by-the-people, democracy, means on this reading. Typically (though not necessarily) the state constitutes the arena, and defines the political boundaries within which the nation/people exercise their democratic power. The significance of the political boundary is not only to the older notion of political independence and territorial integrity, but also to the very democratic nature of the polity. A parliament is, on this view, an institution of democracy not only because it provides a mechanism for representation and majority voting, but because it represents the demos, often the nation, from which derive the authority and legitimacy of its decisions. To drive this point home, imagine an anschluss between Germany and Denmark. Try and tell the Danes that they should not worry since they will have full representation in the Bundestag. Their screams of grief will be shrill not simply because they will be condemned, as Danes, to permanent minorityship (that may be true for the German Greens too), but because the way nationality, in this way of thinking, enmeshes with democracy is that even majority rule is only legitimate within a demos, when Danes rule Danes.

Turning to Europe, it is argued as a matter of empirical observation that there is no European demos – not a people and not a nation. Neither the subjective element (the sense of shared collective identity and loyalty) nor the objective conditions which could produce these (the kind of homogeneity of the organic national-cultural conditions on which peoplehood in the European tradition depend, such as shared culture, a shared sense of history, a shared means of communication) exist today. Can long-term peaceful relations with thickening economic and social intercourse be confused with the bonds of peoplehood and nationality forged by language, history, ethnicity and all the rest?

The consequences of the No Demos thesis for the European construct are interesting. The rigorous implication of this view would be that absent a demos, there cannot, by definition, be a democracy or democratization at the European level. This is not a semantic proposition. On this reading, European democracy (meaning a minimum binding majoritarian decision-making at the European level) without a demos is no different from the previously mentioned German-Danish anschluss except on a larger scale. Giving the Danes a vote in the Bundestag is ice cold comfort. Giving them a vote in the European Parliament or Council is, conceptually, no different. This would be true for each and every nation-state. European integration, on this view, may have involved a certain transfer of state functions to the Union but this has not been accompanied by a redrawing of political boundaries which can occur only if, and can be ascertained only when, a European people can be said to exist. Since this, it is claimed, has not occurred, the Union and its institutions can have neither the authority nor the legitimacy of a demos-cratic state. Empowering the European Parliament is no solution and could – to the extent that it weakens the Council (the voice of the member states) – actually exacerbate the legitimacy problem of the Community. On this view, a parliament without a demos is conceptually impossible, practically despotic. If the European Parliament is not the representative of a people, if the territorial boundaries of the EU do not correspond to its political boundaries, then the writ of such a parliament has only slightly more legitimacy than the writ of an emperor.

But the problem goes even deeper. The No-Demos thesis in its strongest version is not descriptive. It is not simply an empirical observation that as yet the conditions for European peoplehood do not exist. At its most serious the thesis is normative. The telos of European integration is ". . . an ever closer union among the peoples of Europe." Europe is not meant to be about nation building, or a melting pot – quite the contrary. There is no European demos and there should not be one.

Here, then, is the second paradox. The constitutional architecture is a feature of the Union which defines its uniqueness and, functionally, emerged as necessary for attaining the objective of an ever closer union among the peoples of Europe. The normative legitimation of this constitutionalism requires a demos, the emergence of which would however negate that very basic telos. Put differently: to realize the objectives of the Union in a democratic way, the only way which enjoys political legitimacy, a European demos would seem nec-

essary. But a European demos would seem to negate those very objectives. This paradox may only be solved by the acceptance of the possibility of multiple demoi.

European citizenship and peoplehood are problematic in another sense. The "Union among Peoples" telos does not represent a second best option chosen out of political pragmatism. It is not simply the most that would be acceptable politically in Europe, but something falling short of the ideal-type – a European people. The "Union among Peoples" telos is, instead, a reflection of a deep moral ethos. The alternative telos, creating one people out of the many, would contradict one of the most basic European ideals: inventing new ways and contexts which would enable distinct nations and States to thrive, interact and resolve their conflicts without the disastrous apocalyptic results witnessed in Europe during the 20th century. The Union among Peoples is, in part, about creating a political culture which learns new ways to deal with the other. A European citizenship could be seen, on this view, as part of a statal telos and an exclusionary ethos – according to which Europe is about redefining a polity in which the Us may no longer be Germans or French or Italians and the Them no longer British, or Dutch or Irish. The Us would become European and the Them, non-European. Of course the question could then be asked: if Europe, part of whose roots were an attempt to tame the excesses nationalism and the classic nation-state embrace, were to define a new other, even if "only" at the symbolic level European citizenship, on what moral ground can one turn against French National Fronts, German Republicans and their brethren elsewhere who embrace Member State nationalism. On the ground that they chose the wrong nationalism to embrace?

Is one faced, then, with a tragic choice in which absent citizenship the normative authority of European constitutionalism would become untenable but in which the introduction of citizenship would not only mean a redefinition of the "peoples" Telos, but introduce an exclusionary ethos of dubious moral credentials?

Direct Effect and Supremacy – Citizenship and Demos: A Reformed Debate

The choice would, indeed, be tragic if the understanding of European citizenship and European demos were to embrace (a) that strand in European political thought and praxis which understands nationality in the organic terms of culture and/or language and/or religion and/or ethnicity; and (b) a new vertical irredentism (creating the pos-

sibility of horizontal irredentism) that conflates nationality and citizenship so that nationality is a condition for citizenship and citizenship means nationality.

Is it mandated, we should ask, that demos in general and the European demos in particular be understood exclusively in organic cultural homogeneous terms? Can we not break away from that tradition and define membership of a polity in civic, non-organic cultural terms? Can we not imagine a demos understood in non-organic terms, a coming together on the basis not of shared ethnos and/or organic culture, but a coming together on the basis of shared values, a shared understanding of rights and societal duties and shared rational, intellectual culture which transcend organic-national differences. Article 8 TEU offers strange promise in this regard.

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union [. . .].

The introduction of citizenship to the conceptual world of the Union could be seen as just another step in the drive toward a statal vision of Europe, especially if citizenship is understood as being premised on statehood. But there is another more tantalizing and radical way of understanding the provision, namely as the very conceptual decoupling of nationality from citizenship and as the conception of a polity the demos of which, its membership, is understood in the first place in civic and political rather than ethno-cultural terms. On this view, the Union belongs to, is composed of, citizens who by definition do not share the same nationality. The substance of membership (and thus of the demos) is in a commitment to the shared values of the Union as expressed in its constituent documents, a commitment, inter alia, to the duties and rights of a civic society covering discrete areas of public life, a commitment to membership in a polity which privileges exactly the opposites of nationalism – those human features which transcend the differences of organic ethno-culturalism. On this reading, the conceptualization of a European demos should not be based on real or imaginary trans-European cultural affinities or shared histories nor on the construction of a European "national" myth of the type which constitutes the identity of the organic nation. The decoupling of nationality and citizenship opens the possibility, instead, of thinking of co-existing multiple demoi. Thus it is possible to conceptualize European demos and citizenship as part of a polity with multiple political demoi to which its members would belong simultaneously.

One objection to this concept of demos and citizenship would be that it all happens in the space between the ears, that it is cerebral, rational and lacks the requisite emotional charge and psycho-sociological attraction, which are indispensable for the kind of cohesion, identification and collective identity that are part of the hallmark of nationality.

One view of multiple demoi, quite common, may consist in what may be called the "concentric circles" approach. On this approach one feels simultaneously as belonging to, and being part of, say, Germany and Europe; or, even, Scotland, Britain and Europe. What characterizes this view is that the sense of identity and identification derives from the same sources of human attachment albeit at different levels of intensity. Presumably the most intense (which the state, qua nation, always claims to be) would trump in any normative conflict. But we must ask at least three questions about this presumption. First, would intense emotion always trump hard logic, where logic indicates a different governance? Second, is the state representative of its demos or nation? Third, is the emotional attachment to the state qua nation a passing historical phase, to the limited extent that the emotional attachment to the tribe has passed in some parts of the world?

The view of multiple demoi suggested, one of truly variable geometry, invites individuals to see themselves as belonging simultaneously to more than one demos, based, critically, on different subjective factors of identification. I may be a German national, or French or Italian, in the in – reaching strong sense of organic – cultural identification and sense of belongingness with all the attendant emotional charge that may (at least to many) seem necessary and positive. I may simultaneously be a European citizen in terms of my European transnational affinities to shared values that transcend the organic-national diversity and which are the subject not of emotional identification but of reflective, deliberative rational choice. So much so, that in a range of areas of public life, I am willing to accept the legitimacy and authority of decisions adopted by my fellow European citizens in the realization that in these areas I have given preference to choices made by my outreaching demos, rather than by my in-reaching demos.

On this view, the Union demos turns away from its antecedents and understanding in the European nation-state. But equally, it should be noted, we suggest here something that is different from simple American republicanism transferred to Europe or of Habermas-

sian constitutional patriotism transferred to Europe. Americanism was too, after all, about nation building albeit on different premises. Its end state, its myth, as expressed in the famous Pledge of Allegiance to the America Flag – "One Nation, Indivisible, Under God" – is not what Europe is about at all: Europe is precisely not about One Nation, not about a Melting Pot and all the rest, for despite the unfortunate rhetoric of Unity, Europe remains (or ought to remain) committed to ". . . an ever closer union among the peoples of Europe." Likewise, it is not about indivisibility nor, blessedly, about God. And the Habermas concept was to provide a new basis for traditional German nationalism. What's more, both these other concepts continue to conflate citizenship and nationality even if making the latter conditional on, even synonymous with the former.

Critically, on this view, European citizenship has no independent existence without member state nationality. They are ontologically dependent on each other, although European citizenship may, over time, diminish the number of threads that form the fabric of member state nationality. No-one any longer sees the nation-state as the model for international law or organization. A more complex model is required.

According to the multiple demos concept suggested here, there is a recognition of both the force and the potential value in the survival of the traditional European nation-state imbued with the force of national identification, cultural differentiation, a vision in which the Tower of Babel dispersal was not a punishment but a blessing. The Eros of nationalism is, thus, recognized and approved. But there is also, or should be also especially in the European tradition, an acknowledgment of the huge destructive potential, moral and physical, of nationhood unchecked. Nationalism, of all types – German, French, American – evokes fate and destiny in constructing its mobilizing myths. Indeed, as mentioned above, it is by evoking fate and destiny that nationalism can respond to the deepest existential yearning in a secular age, that of giving meaning and purpose to life which extends beyond mere existence or selfish fulfillment. Who am I? A member of "a great" nation, is the national answer. What and why am I here for? To serve national destiny. That is the pull and the claim of nationality and its embodiment in the state. Religion, with greater legitimacy, occupies itself with these deeper recesses of the human spirit and it is not surprising that in its iconography the nation state appropriates religious imagery, often latent. The mixing of state loyalty and religion risks, of course, idolatry from a religious perspective

and can be highly dangerous from a political one. Historically, it seems as if volk and staat, blood and soil, did indeed come to occupy these deepest parts of the human spirit to the point of being accepted "uber alles" with terrifying consequences. It is not that the very idea of nation and state was murderous nor even evil. It is the primordial position which Nation mixed with State occupied, instilling uncritical citizenship which allowed evil, even murderous designs to be executed by dulling critical personal faculties, legitimating extreme positions, subduing transcendent human values and debasing one of the common strands of the three monotheistic religions that human beings, all of them, were created in the image of God.

How does one tame this tantalizing but terrifying eros? Not by replacing the national with the European. It is in this sense that the creation of alternatives, such as the European Community, seems to expose the state to the freshening wind of vertical competition, facilitating critical citizenship. Supranational citizenship, more deliberative, rational, transcendent, but perhaps with its own cooler eros – is the civilizing force which is to help keep the hot-blooded Eros of the nation at bay. The European construct we have put forward, which allows for a European civic, value-driven demos co-existing side by side with a national organic-cultural one (for those nation-states that want it), could be seen as a deeply conservative construct. However, it is designed to reestablish a new framework for a new epoch in the life of the European nation state, and, at the same time, give legitimacy to the normative claims of European constitutionalism. For on this reading, the treaties would have to be seen not only as an agreement among states (a Union of States) but as a "social contract" among the nationals of those states that they will in the areas covered by the Treaty regard themselves as associating as citizens in this civic society. Nationals of the Member States are European Citizens, not the other way around. Europe is "not yet" a demos in the organic national-cultural sense and need never become one.

Maybe in the realm of the political, the special virtue of contemporaneous membership in an organic national-cultural demos and in a supranational civic, value-driven demos is in the effect which such double membership may have on taming the great appeal, even craving, for belonging and destiny in this world which nationalism continues to offer but which can so easily degenerate to intolerance and xenophobia. Maybe in the reaching national-cultural demos and the outreaching supranational civic demos, by continuously keeping each other in check, offer a structured model of critical citizenship. Is this

the true definition of subsidiarity: steering between the scylla of fascism due to nationalism borne of insufficient centralization and the charybdis of fascism due to modernism borne of excess centralization?

One should not get carried away with this construct. Even this construct of the European demos, like the national-organic construct, depends on a shift of consciousness. Individuals must think of themselves in this way before such a demos could have full legitimate democratic authority. The key for a shift in political boundaries is the sense of feeling that the boundaries surround one's own polity. We do not claim that this shift has already occurred. We simply assert that it is in this sense we should understand European citizenship and demos and seek to realize it. This understanding of demos makes the need for democratization of Europe even more pressing. A demos which coheres around values must live those values.

Jurisdictional Limits as Fundamental Boundaries— Between two Constitutionalisms

We turn now to a twinned issue which has also become the subject of reevaluation in the new constitutional debate – the jurisdictional limits of the Union. Let us first invoke a truism of formal constitutionalism. Although the principle of universal suffrage and majoritarianism informs all modern systems of democratic governance, it is not an absolute principle. Modern democracies, taking their cue principally from the American rather than British democratic tradition, increasingly acknowledge a higher law – typically a constitution – which binds even the legislature. In an increasing number of modern democracies, the higher law is backed up by courts and a system of judicial review which give it, so to speak, teeth. Within this constitutional ethos judicial protection of fundamental human rights has a central place. Constitutionalism, despite its counter-majoritarian effect, is regarded as a complimentary principle to majoritarianism rather than its negation. One formulation which describes the complex relationship between the two is the notion of protection against a tyranny of the majority – seemingly an oxymoron. We will not enter into the complex theoretical discussion of rights and their relationship to democracy. The appeal of rights, whatever the theoretical justification, has to do with two roots. The first of these two roots regards fundamental rights as an expression of a vision of humanity which vests the deepest values in the individual which, hence, may not be compromised by anyone. Probably one of the oldest and most influential sources of this vision is to be found in the Pentateuch: And

God created man in His own image, in the image of God created He him. (Gen.I:27). With this pedigree, what legislator has the authority to transgress the essential humanity of the species? Naturally, there are secular, humanist parallels aplenty. The other root for the great appeal of rights and part of the justification of their countermajoritarian semblance looks to them as an instrument for the per-se value of putting constraints on power. Modern democracy emerges, after all, also as a rejection of absolutism and absolutism is not the monopoly of kings and emperors.

Similar sentiments inform the great appeal of fundamental boundaries in non-unitary systems – federal states and the European Union. We use the term "fundamental boundaries" as a way of conceptualizing in a normative sense the principle of enumerated powers or limited competences of the central authorities in these systems. The appeal of fundamental boundaries rests in two parallel roots.. First as an expression of a vision of humanity which vests the deepest values in individual communities existing within larger polities which, thus, may not be transgressed. The vision of humanity derives from an acknowledgment of the social nature of humankind, as a counterbalance to the potential atomism of fundamental rights – And the Lord God said: It is not good that man should be alone (Gen. II:18) – and from the realization that smaller social units can suffer parallel oppression to individuals by stronger societal forces. That enumeration is also said to work as a firewall against aggregation of power is its second appeal, which is the basis behind the Catholic origins of subsidiarity.

We are unaware of any federal system that does not claim to give expression to these notions. But there are as many variants as there are systems. Comparative analysis can be particularly alluring here. In Europe there has been a practical eruption of the hitherto dormant question of Community "competences and powers," a question and debate which has found its code in the deliciously vague word, term and concept of subsidiarity. This is inevitably connected to the continued preoccupation with governance structures and processes, balance between Community and member state and the democracy and legitimacy of the Community. With multiple goals and various ways to collate and assimilate them, we might say that each communal decision, each piece of legislation, or each "package deal," or perhaps the whole mechanism that provides the constitutional basis for a continuing series of package deals, represents a separate telos. Each separately conceived telos confounds the search for a discrete coherent

demos, without the need for mediation through different political devices: statal representative government, or international representative governance.

1. What Accounts for This Eruption?

First a bit of history. The student of comparative federalism discovers a constant feature in practically all federative experiences: a tendency, which differs only in degree, toward controversial concentration of legislative and executive power in the center/general power at the expense of constituent units. This is apparently so independently of the mechanism for allocation of jurisdiction/competences/powers between center and "periphery." Differences, where they occur, are dependent more on the ethos and political culture of polities rather than on mechanical devices.

The Community has both shared and differed from this general experience. It has shared it in that the Community, especially in the 1970's, has seen a weakening of any workable and enforceable mechanism for allocation of jurisdiction/competences/powers between Community and its Member States. How has this occurred? It has occurred by a combination of two factors:

(a) Profligate legislative practices especially in, for example, the usage of Article 235.

(b) A bifurcated jurisprudence of the Court which on the one hand extensively interpreted the reach of the jurisdiction/competences/powers granted the Community and on the other hand has taken a self-limiting approach toward the expansion of Community jurisdiction/competence/powers when exercised by the political organs.

To make the above statement is not tantamount to criticizing the Community, its political organs or the Court. This is a question of values. It is a sustainable thesis that this process was overall beneficial, in its historical context, to the evolution and well-being of Community, member states and their citizens and residents. But this process was also a ticking constitutional time bomb which one day could threaten the evolution and stability of the Community. Sooner or later, "supreme" courts in the member states would realize that the "socio-legal contract" announced by the Court in its major constitutionalizing decisions, namely that "the Community constitutes a new legal order . . . for the benefit of which the states have limited their sovereign rights, albeit within limited fields" had been shattered, that although they (the "supreme" courts) had accepted the principles of the new legal order – supremacy and direct effect – the fields no longer seemed anymore to be limited, and that in the absence of Com-

munity legislative or legal checks it would fall on them to draw the jurisdictional lines between the Community and its member states.

The interesting thing about the Community experience, and this is where it does not share the experience of other federative polities, is that despite the massive legislative expansion of Community jurisdiction/competences/powers there had not (until Maastricht) been any political challenge or crisis on this issue from the member states. How so? The answer is simple and obvious and resides in the pre-Single European Act decision-making process. Unlike federal states, the governments of the member states themselves (jointly and severally) could control absolutely the legislative expansion of jurisdiction-competences-powers. Nothing that was done could be done without the assent of all national capitals. This fact diffused any sense of threat and crisis on the part of governments.

This era passed with the shift to majority voting after the entry into force of the SEA and the seeds – indeed the buds – of crisis became visible. It became simply a matter of time before one of the national courts would defy the European Court on this issue and that the member states would become aware that in a process that does not give them a de jure or de facto veto, the question of jurisdictional lines has become crucial.

To be sure, the European Court already has jurisdiction to resolve this kind of issue under Article 173 and 177(b) (lack of competences), but since to date no Commission or Council measure has been struck down for pure and simple lack of competence, our assessment is that this existing provision in itself will not satisfy the fears of the Member States. And indeed, somewhat later than predicted, the German Constitutional Court, in its Maastricht decision, rejected the ECJs claim to exclusive judicial Kompetenz-Kompetenz and claimed that the limits to Community legislative powers was as much a matter of German constitutional law as it was a matter of Community law. As such it, the German Constitutional Court, regards itself as competent, indeed as mandated by the German constitution, to monitor the jurisdictional limits of the Community legislative process.

Formally, the decision constitutes a flagrant act of defiance vis-a-vis the European Court of Justice in direct contradiction to its jurisprudence on the power of national courts to declare Community law invalid. It flies in the face, *inter alia*, of the third paragraph of Article 177. It is also untenable in a legal functionalist sense: There would be as many fundamental boundaries to the Community as there are

member states. And how can the same Community measure be considered *intra-vires* in one member state and *ultra-vires* in another?

But we are faced, here too, with a paradox of constitutionalism. As MacCormick explains in *The Maastricht Urteil: Sovereignty Now*, this outcome is an inevitable result from the clash of two constitutionalisms. And, we should add, two constitutionalisms which understand themselves and each other in classical, mutually exclusive, sovereignty-based fashion.

On this view, there is a conversation taking place here, but it is the conversation of two super-powers: two institutions with unlimited authority and the power to destroy at least one world. Somewhat inappropriately – given the conversation metaphor – we will use some of the dynamics of the Cold War as a device for evaluating the judicial Kompetenz-Kompetenz aspect of the Maastricht decision of the German Constitutional Court. But then, alas, we expect hostility by and toward reformation movements?

On this reading, it is not a declaration of hot war but the commencement of a cold war with its paradoxical guarantee of coexistence following the infamous MAD logic: Mutual Assured Destruction. For the German Constitutional Court actually to declare a Community norm unconstitutional rather than simply threaten to do so, would be an extremely hazardous move, so hazardous as to make its use unlikely. The use of even a tactical nuclear weapon always was considered to carry the risk of creating a nuclear domino effect. If other member state courts followed such a lead, or if other member state legislatures or governments were to suspend implementation of the norm on some reciprocity rationale, a veritable constitutional crisis in the Community could become a reality – the legal equivalent of the Empty Chair political stand-off in the 1960's. It would be hard for the German government to remedy the situation, especially if the German Court decision enjoyed general public popularity. Could the German Constitutional Court, would the German Constitutional Court, be willing to face the responsibility of dealing such a blow (rather than a threat of a blow) to European integration?

But the logic of the Cold War is that one has to assume the worst and to arm as if the other side would contemplate a first strike. The European Court of Justice would, thus, have to be watching over its shoulder the whole time, trying to anticipate any potential move by the German Constitutional Court. It would be careful not to precipitate such a first strike, and to give its critics little basis for arguing that a first strike was justified.

If we now abandon the belligerent metaphors (and contemplating verbal rather than nuclear weapons), it could be argued that this situation is not unhealthy, that the German move is an insistence on a more polycentric view of constitutional adjudication and will eventually force a more even conversation between the European Court and its national constitutional counterparts. The German move of the 1990's in relation to competences resembles their prior move in relation to human rights; it was only that move which forced the European Court to take human rights seriously. Thus, the current move will force the Court to take competences seriously.

This view is not without its functional problems:

- There is no "non proliferation treaty" in the Community structure. MAD works well, perhaps, in a situation of two superpowers. But there must be a real fear that other Member State Courts will follow the German lead in rejecting the exclusive judicial Kompetenz-Kompetenz of the ECJ. The more courts adopt the weapon, the greater the chances that it will be used. Once that happens, it will become difficult to push the past[e] back into the tube.
- Courts are not the principal Community players. But this square-off will have negative effects on the decision making process of the Community. The German government and governments whose Courts will follow the German lead, will surely be tempted to play that card in negotiation. ("We really cannot compromise on this point, as our Court will strike it down. . . .")

Here, too, there is an interesting paradox. The consistent position of the European Court, as part of its constitutional architecture, has been that it alone has judicial Kompetenz-Kompetenz, the power to adjudicate issues concerning the jurisdictional limits of the Community, since those limits are a matter of interpretation of the Treaty. The German Court, as part of its reassertion of national sovereignty and insistence of legitimation of the European construct through statal instrumentalities and the logic of public international law, has defied this position. It seems that the internationalist logic claimed by the German Court either negates its own conclusions or must reject at least one of the cardinal principles of direct effect and supremacy. Surely the reach of an international treaty is a matter of international law and depends on the proper interpretation of that treaty. Since the treaties give the ECJ exclusive jurisdiction over all disputes concerning their proper interpretation, from an internationalist perspective there can be little foundation to the position of the German Court.

If, however, the European polity constitutes a constitutional order as claimed by the European Court of Justice, then this issue is far more nuanced. There has been no constitutional convention in Eu-

rope. European constitutionalism must depend on a common law-type rationale, one which draws on and integrates the national constitutional orders, and the constitutional discourse in Europe must be conceived of as a conversation of many actors in a constitutional interpretative community rather than a hierarchical structure with the ECJ at the top. It is the constitutional perspective, then, which paradoxically, gives credibility to the claim of the German Court. A feature of neo-constitutionalism in this case would be that the jurisdictional line (or lines) should be a matter of constitutional conversation, not an international law diktat.

And yet, the solution offered by the German Court is no conversation either. Since, although the German Court mentions that these decisions have to be taken in cooperation with the European Court of Justice, it reserves the last word to itself. A European diktat is simply replaced by a national one. And the national one is far more destructive, if one contemplates the possibility of 15 different ones.

How, then, can one square this circle? Elsewhere, it has been suggested as one possible solution the creation of a constitutional council for the Community, modeled in some ways on its French namesake. The constitutional council would have jurisdiction only over issues of competences (including subsidiarity) and would decide cases submitted to it after a law was adopted but before coming into force. It could be seized by any Community institution, any member state or by the European Parliament acting by a majority of its members. Its President would be the President of the European Court of Justice and its members would be sitting members of the constitutional courts or their equivalents in the member states. Within the constitutional council no single member state would have a veto power. The composition would also underscore that the question of competences is fundamentally one of both national constitutional and Community constitutional norms but still subject to a Community solution by a Community institution. The principal merit of this proposal, if it has any, is that it gives expression to the fundamental boundary concern without however compromising the constitutional integrity of the Community as did the German Maastricht decision. Since, from a material point of view, the question of boundaries has an inbuilt indeterminacy, the critical issue becomes not what are the boundaries but who gets to decide. The composition of the proposed constitutional council removes the issue, on the one hand, from the purely political arena; on the other hand, it creates a body which, on this issue, would, it is hoped, enjoy a greater measure of public confi-

dence than the ECJ itself. Does this proposal betray a craving for the mono-centrism of the old Constitutional order?

Why is this proposal superior to MAD? The cold war described here will never end. As noted above, this cold war is not unhealthy. Rather, it is a permanent state of human affairs, reflecting the tension between the one and the many, and between the institutions that reflect the former and the institutions that reflect the latter. Even in the United States, the cold war is still being fought (although tempered significantly by the hot Civil War) but is played out more between other institutional actors and in the "political" arena. Perhaps the main advantage of this proposal is that it places some of the human protagonists in a single room and requires of them reasoned and generalizable (legal) discourse. It removes the decision from the linguistic realm of inter-judicial politics, in which a national court might say "we know this will destroy the Community, but it is our mandate," to the linguistic realm of inter-judicial law, in which the decision requires Community-level justification. A second advantage is in the ability of the national members of this constitutional council to speak to the council of their own national eros, and by doing so, and being heard to do so, to legitimate its restraint. This institution thus would replicate and hopefully would reflect at the Community institutional level the national eros. Its potential advantage is in accommodating and coopting national constitutional fidelity, making it an integral component of the Community legal order. For Community constitutionalization can never be complete in the sense of erasing the national, but can only proceed by adding institutional layers that reflect actual vertical relationships and complexity.

Conclusion

There is, really, no conclusion. Classical European constitutionalism has had the exquisite fate of being a concept and reality which moved from being ahead of its time to being behind the times with no interregnum. For those who wish to borrow – *caveat emptor*! However, borrowing has been made more attractive by the fact that European constitutionalism now appears less unique. Designers of institutions –whether negotiators of treaties, ambassadors, legislators or adjudicators – no longer are required to choose between only municipal law and international law, with perhaps a furtive covetous glance at that *sui generis* European construct. It is time to view European constitutionalism as a model that may be copied, if and to the extent that its structure seems useful in other contexts. The constitu-

tionalism of Arthur Dunckel is not necessarily of a lesser order than the constitutionalism of Jean Monnet, or, dare we say it, James Madison.

The reformation of constitutionalism described here reflects the reformation also of the international law perspective and of international law itself. International law is not separate from municipal law. Rather, international law and municipal law are to be seen as mutually interdependent and mutually interpenetrating. Each has different applicability in different contexts. European constitutionalism is international law, and it is domestic law. Law is law. The world is one and each of us lives in a single legal system. But this world is complex, comprised of multiple overlapping teloi and legitimated by multiple overlapping demoi. The only viable theoretical perspective is monism, but dualism remains with us as a matter of policy technique. Law is law, and international law may penetrate the state, but whether it should or not is a technical decision based on the desired outcome.

On this reading *Van Gend en Loos* did not mark the creation of a new legal order, but the commencement of a mutation of the old international legal order. It is time to view European constitutionalism as a mutation of international law that has survived and, dare we say, flourished. The real world has evolved and it is time to adjust, or reform, our perception to accommodate this evolution.

Bibliographical Note

What follows is not an exhaustive bibliography but more of a personal recommendation for further reading on some of the themes touched upon in this introductory essay.

A. On European Constitutionalism and Democratic Governance — Classical Approaches

Dierdre Curtain, *The Constitutional Structure of the European Union: A Europe of Bits and Pieces*, 30 Common Mkt. L. Rev. 17 (1993).

Andrew Wilson Green, Political Integration by Jurisprudence: The Work of the Court of Justice of the European Communities in Political Integration, (1969).

Koen Laenarts, *Constitutionalism and the Many Faces of Federalism*, 38 Am. J. Comp. L. 205 (1990).

J. Lodge, *Transparency and Democratic Legitimacy*, 32 J. Comm. Mkt. Stud. 343 (1994).

G. Frederico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595 (1989).

Neunreither, *The Democracy Deficit of the European Union, in* 29 GOVERNMENT AND OPPOSITION 299 (1994).

HENRY G. SCHERMERS & DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES (Kluwer, Deventer & Boston, eds., 5th ed., 1992).

Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

Norbert Reich, *The "November Revolution" of the European Court of Justice: Keck, Meng and Audi, revisited*, 31 COMMON MKT. L. REV. 459 (1994).

B. Political and Social Science Discovers European Constitutionalism and Constitutionalism Discovers Political and Social Sciences

1. General

ERNST B. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES, 1950-1957 (1958).

Ernst B. Haas & Philippe C. Scmitter, *Economics and Differential Patterns of Political Integration: Projections about Unity in Latin America*, 18 INT'L ORG. 7070 (1964).

EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE "NEW" EUROPEAN COMMUNITY (Alberta M. Sbragia ed., 1992).

J. Pelkmans & P. Robson, *The Aspirations of the White Paper*, 25 J. COMM. MKT. STUD. 181 (1987).

FRANCIS SNYDER, NEW DIRECTION IN EUROPEAN COMMUNITY LAW (1990).

N. Fligstein & I. Mara-Drita, *How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union*, 102 AM. J. SOC. 1 (1996).

A. Jacquemin, *Imperfect Market Structure and International Trade*, 35 KYKLOS 1 (1982).

LEON N. LINDBERG & STUART A. SCHEINGOLD, EUROPE'S WOULD BE POLITY (1970).

W.J. Adams, *Economic Analysis of European Integration, in* 4 AEL book 1 (1995)

Fritz W. Scharpf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, 66 PUB. ADMIN. 239 (1988).

Robert O. Keohane & Stanley Hoffman, *Institutional Chance in Europe in the 1980s*, *in* THE NEW EUROPEAN COMMUNITY: DECISION-MAKING AND INSTITUTIONAL CHANGE (1991).

2. *Intergovernmentalism*

Andre Moravcsik A., *Preference and Power in the European Community: A Liberal Intergovernmentalist Approach*, *in* ECONOMIC AND POLITICAL INTEGRATION IN EUROPE: INTERNAL DYNAMICS AND GLOBAL CONTEXT (S. Bulmer & A. Scott eds., 1994).

ANDRE MORAVCSIK A., WHY THE EUROPEAN COMMUNITY STRENGTHENS THE STATE: DOMESTIC POLITICS AND INTERNATIONAL COOPERATION, (Harvard University CES Working Paper No. 52) (presented at the Conference of Europeanists, Chicago, April, 1994).

3. *On New Institutional Thinking of the Union*

Simon J. Bulmer, *The Governance of the European Union: A New Institutionalist Approach*, 13 J. PUB. POL. 351 (1994).

Simon J. Bulmer, *Institutions and Policy Change in the European Communities: The Case of Merger Control*, 72 PUB. ADMIN. 423 (1994).

4. *The Court*

K. ALTER, EXPLAINING NATIONAL COURT ACCEPTANCE OF THE EUROPEAN COURT JURISPRUDENCE: A CRITICAL EVALUATION OF THEORIES OF LEGAL INTEGRATION 1995 (Eur. Univ. Inst. Working Paper R.S.C. No. 95/27).

Anne-Marie Burley and Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993).

HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986).

A. STONE SWEET, CONSTITUTIONAL DIALOGUE IN THE EUROPEAN COMMUNITY 1995 (Eur. Univ. Inst. Working Paper).

A. STONE SWEET, FROM FREE TRADE TO SUPRANATIONAL POLITY: THE EUROPEAN COURT AND INTEGRATION (Center for German and European Studies, Univ. of Calif. Berkeley, Working Paper 2.45).

Daniel Wincott, *Political Theory, Law, and European Union*, *in* NEW LEGAL DYNAMICS OF EUROPEAN UNION 293 (Jo Shaw and Gillian More eds., 1995).

C. The New Constitutionalism: Horizontal, Fragmented, Infranational Approaches to European Constitutionalism and Governance

R. DEHOUSSE, INTEGRATION OU DISINTEGRATION: CINQ THESES SUR L'INCIDENCE DE L'INTEGRATION EUROPEENNE SUR LES STRUCTURES ETATIQUES 1996 (Eur. Univ. Inst. Working Paper R.S.C. No. 96/4).

B. DeWitte, *Droit Communautaire et Valeurs Constitutionelles Nationales*, 14 DROIT 87 (1991).

N. MacCormick, *Sovereignty, Democracy & Subsidiarity*, *in* DEMOCRACY AND CONSTITUTIONAL CULTURE IN THE UNION OF EUROPE (R. Bellamy, V. Bufacchi and D. Castiglione eds., 1995)

Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1990).

G. Majone, *Regulating Europe: Problems and Prospects*, *in* JAHRBUCH ZUR STAATS—UND VERWALTUNGSWISSENSCHAFT 159 (T. Ellwein et al. eds., 1989).

NEW LEGAL DYNAMICS OF EUROPEAN UNION (Jo Shaw and Gillian More eds., 1995).

CH. JOERGES & NEYER, MULTI-LEVEL GOVERNANCE, DELIBERATIVE POLITICS AND THE ROLE OF LAW 1997 (Eur. Univ. Inst. Working Paper).

Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

D. The New Constitutionalism: The Debate about Identity, Demos and Democracy

E.W. Boeckenfoerde, *Die Nation: Identitaet in Differenz*, POLITISCHE WISSENSCHAFT 974 (1995).

DIE EUROPISCHE OPTION (A. Von Bogdandy ed., 1993).

J. Habermas, *STAATSBURGERSCHAFT UND NATIONALE IDENTITAT*, *in* FAKTIZITAT UND GELTUNG BEITRAGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS (1992).

ELIZABETH MEEHAN, CITIZENSHIP AND THE EUROPEAN COMMUNITY (1993).

ADRIAN OLDFIELD, CITIZENSHIP AND COMMUNITY: CIVIC REPUBLICANISM AND THE MODERN WORLD (1990).

Ulrich K. Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relation Between Constituent Power and the Constitution*, 14 CARDOZO L. REV. 639 (1993).

Ulrich K. Preuss, *Citizenship and Identity: Aspects of a Political Theory of Citizenship*, *in* DEMOCRACY AND CONSTITUTIONAL CULTURE IN THE UNION OF EUROPE (R. Bellamy, V. Bufacchi & D. Castiglione, eds., 1995).

EUROPEAN IDENTITY AND THE SEARCH FOR LEGITIMACY (Garcia Soledad ed., 1993).

DEMOCRATIE ET CONSTRUCTION EUROPEENNE (M. Telo ed., 1995).

E. Other Authors mentioned

B. Fitzgerald, *The Future of Belief*, 63 First Things 23 (1996).

ERNST NOLTE, THE THREE FACES OF FASCISM: ACTION FRANCAISE, ITALIAN FASCISM, NATIONAL SOCIALISM (Leila Vennewitz trans., 1965).