The Constitutionalization of the EU

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Discussion Paper

Andrew Glencross

Lecturer in International Relations

University of Pennsylvania

aglenc@sas.upenn.edu

'Constitutions Past, Present and Future: The EU in Comparative Perspective'

ABSTRACT

The purpose of this talk is to situate constitutional debates about the contemporary EU – as well as its future – in an appropriate comparative and historical context. This means examining analogous issues of constitutionalization and associated problems of political representation in the US and Swiss federal experiences. Constitutionalization is understood here as limited government, judicial review and horizontal and vertical separation of powers. In a democratic/republican context, constitutionalization further gives rise to vexing questions about the location of and mechanism for exercising popular sovereignty. The constitutional experience of EU integration is thus contrasted with similar issues arising in the course of American and Swiss political development. In both the latter, important constitutional issues about the dual separation of powers were resolved through presidentialization and direct democracy respectively. Current EU constitutional debates are then discussed in terms of the applicability of not only presidentialization and direct democracy but also a sui generis notion of "politicization" to see what promises and pitfalls each model has for resolving constitutional conflict in the EU.

Situating EU Constitutional Debates in a Comparative Historical Light

The study of the EU has for some time been preoccupied with the question of whether this is a unique phenomenon. Initial reluctance to make comparisons with the US or other mature federal systems – as opposed to other forms of regional integration (Haas and Schmitter, 1964) – has now receded because the EU is taken to be a sufficiently consolidated political system and so can be examined alongside other federal states

(Sbragia, 1992; Zweifel, 2003; Kelemen, 2004; Menon and Schain, 2006; Schmidt, 2006; Fabbrini, 2007). Debates over the constitutional nature of the EU, as well as its constitutional future, have also profited in particular from comparative historically-informed study (Forsyth, 2001; Goldstein, 2001; Howse and Nicolaïdis, 2001; McKay, 2001; Magnette, 2006). The Convention on the Future of Europe (2002-03), which deliberately mimicked the Philadelphia Convention of 1787-88, at least in title if not in product, obviously helped spur analogies with the US federal constitution. However, various issues of comparative research design still dog attempts to use historical insights from other examples of the constitutionalization of federal government. This is particularly true because of the EU's nature as a union of formally (and internationally recognized) sovereign states: a status not applicable to the units in the federal systems with which the EU is now compared.

Nevertheless, two historical cases seem particularly apposite when attempting to understand the EU by comparison: the United States and Switzerland. Both share the EU's dual horizontal and vertical separation of powers (Fabbrini and Sicurelli, 2004; Kelemen, 2004). The US also, for a period, followed the EU pattern of territorial expansion that recasts certain constitutional questions. This presentation, therefore, first seeks to situate the EU's current constitutional predicament in relation to how the American and Swiss federal systems not only experienced but also dealt with similar constitutional conflicts. In particular, it is the debate over the nature of political representation within constitutionalism and its role in resolving thorny constitutional questions, notably over the dual separation of powers, that will be examined. The rationale for this choice is the fact that the US and Switzerland represent two different, organic models for the exercise of popular sovereignty in a federal system: presidentialization and direct democracy.

At present, the EU – in response to the increasingly hard to ignore "democratic deficit" critique – is seemingly torn between these two constitutional models. The Lisbon Treaty, like the Constitutional Treaty, has created a presidential role, albeit one without an electoral mandate. At the same time, a plethora of national referendums on EU matters have been held in the past decade, accompanied by calls for EU-level referendums as well as the introduction of a "popular initiative" procedure contained in the Lisbon Treaty (again, a hangover from the Constitutional Treaty). Thus the second aim of the presentation is to discuss what promise these two methods have for resolving related problems of constitutionalization and democratic legitimacy that bedevil the EU. As part of this discussion, I examine the call for the "politicization" of the EU both within EU institutions (Hix, 2008) but also as a process that can take place within member states. Politicization is thus treated as a *sui generis* method of achieving the same end of injecting greater democracy into the constitutional process.

Defining Constitutionalization and Relating it to Popular Sovereignty

In recent debates over EU integration, the term "constitutionalization" is often used somewhat permissively to not only describe various features of the existing EU system but also as an aspiration for how it should function with a more formal constitutional arrangement. One of the chief reasons for this imprecision is, as pointed out by Glyn Morgan, the difficulty of actually defining what stage of integration has already been reached (Morgan, 2005: 17). Given this context, this presentation aims to avoid the risk of concept stretching by first defining constitutionalization and how it applies to the EU as well as its analogues.

EU lawyers were the first to debate whether the EU has in effect a *de facto* constitution (Weiler, 1981). Pointing to the doctrines of direct effect and supremacy promulgated by the European Court of Justice in the early 1960s, the mainstream position in EU legal studies is that the treaty system has been constitutionalized. Above all, this is taken to mean that legal architecture is one in which member state sovereignty is circumscribed by a higher, autonomous legal order that functions through the cooperation of national courts and their judges (Weiler, 1999; Stone Sweet, 2004). Therein lies the basis of the EU's uniqueness in the world of treaty-based international organizations.

At the same time, constitutionalization – with its connotation of constitutionalism i.e. restraining the arbitrary exercise of power – is implicitly considered a positive development. Besides direct effect and supremacy, the EU evinces various features of constitutionalism: vertical division of power between the EU and member states, horizontal division of power amongst EU institutions, a court for adjudicating competency disputes and a Charter of Fundamental Rights. Yet many aspects of this complex legal and political architecture are difficult to reconcile with classical features of constitutionalism.

For instance, the nature of fundamental rights in the EU system is unclear. This is because the Charter, which became law with the ratification of the Lisbon Treaty, only applies when implementing EU legislation and even then operates under the proviso that the ECJ's rights jurisprudence will take account national legal traditions when interpreting the actual content of these rights. There are also various peculiarities concerning the dual separation of powers. Ultimately, the boundaries of EU authority in relation to that of the member states is at the discretion of unanimous member state agreement. Unanimity is an extremely powerful tool that can fundamentally recast the relationship between both levels. Since subsidiarity, the principle for determining the level where competences are best exercised, is based on an efficiency criterion, the genuine "constitutional" prerogatives of member states are open to question. At the same time, the horizontal separation of powers is blurred given features such as the Commission's monopoly of legislative initiative in the first pillar as well as the reduced role for the Commission, ECJ and Parliament in the second and third pillars. Finally, as Bartolini (2008) has pointed out, the constitutionalization of the EU system also entails

shielding substantive policy goals from political i.e. partisan and majoritarian decision-making. That is, the treaties not only define institutional architecture and decision-making rules, as with any constitutional document, but also contain lengthy references to specific policies such as the CAP, structural funds, monetary union etc, whose raison d'être thus cannot be called into question in the course of ordinary EU politics.

Unsurprisingly, therefore, political accountability is highly problematic in this supposedly constitutionalized system. In particular, the element that Richard Bellamy (2007) calls "political constitutionalism" is weak. That is, instead of drawing on party competition and majority rule on the basis of one person one vote to overcome political disagreements over policy and constitutive questions, the EU system is more reliant upon inter-institutional agreement and elite consensus, supplemented by ECJ jurisprudence. The result is a system of governance that singularly fails to mobilize citizens and create an affinity between the governed and governing (*ibid.*). This lacuna weakens the democratic legitimacy of the constitutional process for resolving disputes over the separation of powers both vertically and horizontally.

Another way of expressing this problem is by reference to popular sovereignty. In the modern republican tradition that is the progenitor of the democratic era, political authority is understood to be exercised legitimately only when done so in the name of the people rather than in the name of religion or a dynastic claim (Morgan, 1988; Yack, 2001). With the people as the ultimate source of all legitimate political authority, popular sovereignty can be conceived of as either engaged (active) or recessed (passive), depending on whether the actual exercise of political authority is delegated or not (Deudney, 1995: 197-200). Hence in anything besides a small, Rousseaunian republic – where the people can always be an active sovereign – the politics of legitimacy is closely related to the nature of the mechanisms for representing the people (representative democracy) or else allowing them to express their preferences periodically without mediation (direct democracy).

However, in the case of the EU there is no single popular sovereign that can be represented or allowed to express its preferences directly. This is what makes political constitutionalism so hard to realize in the EU context as the absence of a single people to represent renders the parliamentarization of power difficult in theory as well as practice. Yet this is a problem not unique to the EU. The US and Swiss federal systems, both created first as unions of states and citizens (Forsyth, 1981; Fabbrini, 2007) also had to resolve this conundrum of mobilizing citizens to render political authority legitimate without immediately adopting a fully parliamentary model. Hence it is worth examining the constitutionalization process in both these polities to explore how they were able to incorporate popular sovereignty into their respective constitutional systems.

US Constitutionalization: Party Systems and the Presidency

At the outset of the federal founding, the political dimension of US constitutionalism – party competition and popular mobilization – was deliberately muted. Parties were seen with suspicion whilst elites were also diffident about popular participation, hence the various mechanisms for filtering out populism, notably the indirect election of senators, the electoral college and longer terms of office for the Senate. However, there was one element of the original constitutional moment that did mobilize citizens: the special state conventions convened to ratify the constitution in the former British colonies. These gave the imprimatur of popular sovereignty, exercised at the state level, to the novel federal arrangement.

Indeed, this device proved very important for understanding the federal government as the creation of the people, thereby serving a vital legitimizing function. This is best illustrated by Chief Justice John Marshall's reference to the state conventions in *McCulloch v. Maryland* (1819) when he declared:

> From these conventions the Constitution derives its whole authority. The government proceeds directly from the people … The assent of the States in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments (quoted in Baker, 1974: 595).

However, despite Marshall's expansionary reading of the Constitution buttressed by the method of its adoption, the actual role of the Supreme Court as an impartial arbiter of conflict between two competing levels of government was contested throughout the antebellum (Goldstein, 2001). In this sense, the original imprimatur of popular sovereignty with which the federal constitution was endowed was not a legitimating resource sufficient to quell constitutional contestation pitting the states against Washington i.e. the vertical separation of power. Rather, it was the Presidency – following the historic changes surrounding the rise to power of Andrew Jackson – that served as the lightning rod for the clash over where popular sovereignty resided in the antebellum federal system and what this meant for state-federal relations.

The Jacksonian period can thus be characterized as the rise of a new element of political constitutionalism as the party system emerged to contest the Presidency and try to settle constitutional questions based on mobilizing (white, male) citizens. This was possible because of a profound change in the Electoral College system. In 1804 eight of the seventeen states provided for the direct election of presidential electors; by 1824 only six out of a total of twenty-four did not allow for direct election. Only Delaware and South Carolina did not follow suit by 1828. In this way the state legislatures lost control

over the selection of presidential electors, enabling politics to become both more populist and national. Furthermore, as the parties in the post-Jacksonian era organized to mobilize political support they turned the election of presidential electors from one based on congressional districts to a winner-take-all principle so that the winning candidate received all the Electoral College votes (Gienapp, 1996: 87).

It was these developments in political representation that turned the Presidency into an expression popular sovereignty. This is revealed by the fact that Jackson's 1832 proclamation response to South Carolina's nullification of the federal tariff was based on the claim that "We are ONE PEOPLE in the choice of the President and Vice President The people, then, and not the States, are represented in the executive branch' (Elliot, 1836, vol. 4: 589). Indeed, the crisis over nullification sparked a full-blown theoretical reflection on the proper connection between states' sovereign status and popular sovereignty within the union. The result was the 1830 Senate debate between Daniel Webster and Robert Hayne. The former espousing the "popular" or "people's" conception of the founding, claiming that the constitution 'was not the creature of the states' (quoted in Fritz, 2008: 224) but rather the product of the American people in the aggregate. The latter, argued (following the republican theory of John C. Calhoun) that popular sovereignty was and remained in the possession of the people of the various individual states, implying the people of a state could nullify a federal law or even secede.

Of course, Webster's position eventually won out as it was this republican ideology that Lincoln shared when keeping the federal system together by force of arms. By virtue of its victory, the post-war Union thus acquired a new constitutional settlement: states lost their claim to be able to withdraw from the Union, nullify laws or unilaterally question the constitutionality of its acts (McDonald, 2000). Under this new understanding of the constitution, therefore, popular sovereignty at the state level could not be used to unilaterally contest federal authority. Indeed, the two mechanisms for introducing political constitutionalism that arose during the antebellum, presidentialization and the party system, continued to be the inspiration for solving constitutional conflict where legal mechanisms, i.e. the Supreme Court, provided imperfect or unwanted solutions.

This was the case in two transformative movements of the first half of the twentieth century: Progressivism and the New Deal. Whilst the progressive movement aimed to shake-up corrupt machine politics and aloof party leaders for the sake of more responsive federal government (Hofstadter, 1955), the New Deal conflict over the role of the judiciary was designed to prevent Supreme Court justices fettering the will of a popularly elected government (Ackerman, 1998). In both cases, active popular sovereignty, channeled through the (evolving) party system and the Presidency, was the resource for solving fundamental constitutional issues about the legitimate role of

the federal government. This process has continued as demonstrated by the case of the civil rights movements: a fundamental constitutional debate about the nature of federal citizenship with important implications for the states.

Swiss Constitutionalization: Direct Democracy

The 1848 Swiss Constitution was adopted at a time of revolutionary political upheaval throughout Europe. Prior to that, the Swiss Confederation had proven a peculiar yet enduring feature of European political history (Körner, 1986). A treaty arrangement for mutual self-defense based on unit sovereignty over religious matters and veto power over common decisions, the Confederation pre-dated the Peace of Westphalia. It survived for hundreds of years punctuated only by collapse, through invasion, during the Napoleonic wars (Kölz, 1992).

At the outset, the federal level of government had a problematic relationship with the principle of popular sovereignty, indicative of the problem of establishing political constitutionalism in a union of states and citizens. The 1848 Constitution was put to a vote in each of the constitutive cantons but six and a half of the twenty-two rejected this new arrangement as conservative Catholic cantons feared centralization by liberal and Protestant majorities, although overall there was a majority of citizens in favour (Zschokke, 1875). Nevertheless, the federal parliament adopted the constitution and recalcitrant cantons were loathe to resume their unsuccessful military skirmishes that had provided the original impulse for a new constitutional settlement. Since this time, political constitutionalism has emerged by means of direct democracy rather than presidentialization associated with a national party system. This is perhaps not surprising since the Swiss cantons had a historic tradition of citizen participative decision-making based on the *Landesgemeinde*, or popular assemblies which still exist in certain cantons today (Kriesi and Trechsel, 2008).

To allay fears that the 1848 Constitutional arrangement would trample over cantonal prerogatives, a revision mechanism was devised to allow the cantons a say in constitutional amendment, alongside the national majority. The result was the dual majority principle, whereby amendment is dependent upon an electoral as well as cantonal majority (*ibid*.). This continues to be the principle determining revisions to the Swiss Constitution.

However, advocates of centralization remained powerful amongst the Swiss elite. Thus in return for enhanced federal competences, the Constitution was overhauled in 1874 to include the "optional legislative referendum". This device allowed 30,000 (50,000 today) voters or else eight cantons to propose a change to a published federal law they disagree with. In this case a popular national majority is sufficient to ratify an alternative piece of legislation. Since 1921 and 1977 this optional referendum procedure has also

come to apply to international treaties of unlimited duration and irrevocable international treaties respectively. Moreover, the 1977 amendment of this procedure entailed applying the double majority principle to proposed membership of international organizations. In this way, direct democracy has played the decisive role in settling constitutional questions such as membership in NATO, the UN and the EU.

Proponents of popular sovereignty in the shape of direct democracy were not fully satisfied by the 1874 arrangement – they wanted a strengthened tool for resolving constitutional disputes without having to rely on federal representatives. In 1891, proponents of enhanced direct democracy succeeded in establishing a popular initiative procedure for partially revising the constitution. This initiative requires the collection of 50,000 signatures (100,000 since 1977) in the space of eighteen months. Since initiatives proposed in this fashion necessarily entail a possible revision of the constitution, this procedure also is subject to the dual majority principle. Between 1848 and 2007, federal referendums have been held 543 times (*ibid.*, 70). These votes have included referendums on fundamental constitutional issues such as women's suffrage and the legitimacy of federally-mandated welfare policy. In this way, direct democracy has added a fundamental element of political constitutionalism to a federal system based on a plural executive, de facto "pillarization" of religious, linguistic and ethnic cleavages and one where the judiciary has traditionally not played a prominent role in resolving issues arising from the separation of powers.

EU Constitutionalization: Neither Presidentialization nor Direct Democracy

Contrary to the expectations of federalists critics of functionalist integration, such as Altiero Spinelli, the EU has developed a legal order capable of circumscribing member state sovereignty (Glencross, 2009). The ECJ's ability to treat individual citizens legal actors, endowed with treaty rights against their own member states, recalls Publius' original distinction between a league and a government, namely the ability to 'extend the authority of the Union to the persons of the citizens' (Hamilton, Madison and Jay, 2003: 68). Yet this process of constitutionalization via law has remained only indirectly linked with popular sovereignty given the limited powers of the European Parliament and the low salience of its elections. In this context, political constitutionalism operates at best indirectly, through political contestation within member states rather than across them. This explains the use of terms such as 'pluralist democracy' (Coultrap, 1999), "output legitimacy" (Scharpf, 1999) or 'audit democracy' (Eriksen and Fossum, 2002) to describe the EU's limited democratic features.

The EU thus appears mired in a situation reminiscent of the antebellum US or the 1848 Swiss Constitution where constitutionalism is only indirectly linked to popular sovereignty. Indeed, as a result of the importance of the ECJ in resolving constitutional issues surrounding the nature of the treaty system and its effects on member states, the

EU above all resembles the antebellum US. Consequently, there is a growing demand to democratize this constitutional system, which entails injecting a stronger element of political constitutionalism in the hope of legitimating the way constitutional debates, particularly about relations between member states and the EU, are resolved. Discounting the idea of parliamentarizing the EU by establishing the European Parliament as the principal decision-making body, three models have been mooted: direct democracy, presidentialization, and "politicization" in the context of member state politics. It is important to explore the pitfalls and promises each method entails for the development of political constitutionalism in the EU.

Direct Democracy

The direct democracy option for enhancing political constitutionalism in the EU relies on the periodic activation of popular sovereignty through referendums. In the Swiss federal system, a dual majority of both cantons and the national population is required for constitutional amendment. Such a principle clearly suggests that democratic legitimacy ultimately belongs at the federal level because the exercise of popular sovereignty at a cantonal level is not decisive. As a result, the sovereign status of the units in what is still technically known as the Helvetic Confederation is unambiguously circumscribed. Applied to the EU, therefore, a similar double majority principle would constitute a radical departure precisely because of the circumscription of sovereignty that it would entail. After all, according to standard international public law, notably article 40.4 of the Vienna Convention on the Law of Treaties (1969), the treaty system of the EU ensures that member states cannot be forced to become parties to amended multilateral treaties to which they have not consented (de Witte, 2004).

Introducing a double majority principle in the EU, as suggested by some (Trechsel, 2005; Auer, 2007), would thus likely contribute to the polarization of the current debate over whether member states are the proper locus of popular sovereignty in the EU system. This debate arose precisely as a result of failed referendum votes on treaty reform, particularly the rejection of the Constitutional Treaty by French and Dutch voters in 2005. Given European elites' desire to avoid another flurry of referendums on the Lisbon Treaty, it is not obvious that the crucial constitutional issue of how to amend the treaty system can be settled by recourse to direct democracy.

The new Lisbon Treaty does contain a new "citizen's initiative" procedure. Under Article 8 b, a million citizens from across the EU – the number of states has not yet been specified – 'may take the initiative of inviting the Commission within the framework of its powers, to submit an appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.' However, this attenuated form of direct democracy is unlikely to be an instrument for changing the separation of powers between member states and the since any petition –

which itself is non-binding – could only refer to a policy area already within the existing powers of the Commission. In fact, a specialist on Swiss direct democracy has already argued that this citizens' initiative would most likely be co-opted into consensus-building procedures rather than introduce majoritarian political contestation. This is because the Swiss experience shows that direct democracy instruments are 'largely incorporated into the overall consociational framework, and strengthen it instead of acting as majoritarian devices' (Papadopoulos, 2005: 461).

Presidentialization

This is best thought of as the American solution for fostering political constitutionalism. As outlined previously, the nature of the US Presidency changed fundamentally in the course of the nineteenth century, transforming the contest for the executive into a competition for the popular vote rather than an indirect election of the most suitable candidate by those who should know best. The democratic legitimacy furnished by this unique connection between the presidency and the united sovereign US people has enabled various presidents to reform the US body politic as well as overcome policy impasses within the legislature by mobilizing citizens directly. Compared with Swiss direct democracy based on the dual majority principle, the US presidential system constitutes perhaps a subtler form of political constitutionalism as there is no explicit hierarchical demand that popular sovereignty at the unit level defer to a greater majority. For instance, in the US the national popular sovereign – not authorized to express itself directly by federal referendum – remains much more recessed than in Switzerland: it is only actively constituted every four years. The rest of the time it is recessed although constantly appealed to by the leader of the federal executive. Moreover, the quality of political constitutionalism is very much contested today even from within the legal academy, as can be seen from the "popular constitutionalism" movement that claims the US system is over-dependent on the Supreme Court for resolving constitutional debates (Kramer, 2004).

Nevertheless, the EU has chosen to go down the path of presidentialization albeit again in a highly attenuated fashion. The new President of the European Council does not have an electoral mandate but is expected to provide better leadership and represent the EU to its citizens. Yet even endowing this new office with an electoral platform does not guarantee the development of a bond that can inject political constitutionalism into the EU system. This is because the development of Presidentialization in the US was predicated not only on denying the sovereignty claims of the states but also the party mechanism for enabling the cross-unit mobilization of citizens. Such a development – despite three decades of direct elections to the European Parliament – still has no parallel in the EU although there are proposals to employ financial inducements to create enhanced supranational representation through transnational parties (Schmitter, 2000).

Politicization

The third, very much *sui generis*, proposed model for developing political constitutionalism in the EU rests on acknowledging the impossibility of parliamentarizing the EU whilst rejecting direct democratic or presidential solutions. As such, there appear to be two dimensions for "politicization" – that is, increasing political debate and contestation over questions of European integration – to occur: within EU institutions and within member states.

Politicization within EU institutions corresponds with the idea that the entrenched institutional status quo is still amenable to the injection of left/right politics over policy choice (Hix, 2006). This politicization model advocated by Simon Hix argues that a minimalist majoritarian element can be introduced thanks to the QMV-elected president of the Commission who is also dependent on securing a majority in the European Parliament. Moreover, the European Parliament further has a veto over the appointment of the College of Commissioners. In this context, rival candidates for the presidency of the Commission could put forward competing policy programmes, based on the traditional cleavage of left and right, prior to European parliamentary elections. If this were the case, Hix claims, a more partisan college of Commissioners could emerge; one at the same tied to the ruling party coalition in the European Parliament, thereby leading to a virtuous circle that increases the salience of elections to the European Parliament (Hix, 2008). In short, EU citizens would get a Commission in line with their ideological preferences.

From the perspective of political constitutionalism, what is surprising about this argument is the fact that the left/right cleavage it assumes can be transferred to the EU level is itself contingent on constitutional debates over the nature of EU-member state relations. That is, the ability to decide upon left/right policy programmes is bound up with questions of competences and decision-making rules that member states have deliberately sought to control through unanimity or generally insulate from majoritarianism (Bartolini, 2006). Thus it is not at all clear why a limited democratic politics of left/right policy choices in a polity that has little redistributive capacity could resolve long-standing constitutional issues over the nature of the EU system (*ibid.*). In addition, as European Parliamentary elections are out of kilter with those for national executives, this politicization strategy could be undone by partisan conflict between the Council and the Parliament.

However, political constitutionalism in the EU is not merely dependent on what happens within EU institutions. Since the legitimacy of this order is compounded it 'depends on both EU and national levels' (Schmidt 2004, 982). In this way, politicization can also be imagined as something that needs to take place at the national level. Yet constitutional issues surrounding European integration have seldom been politicized in national

contexts. On the one hand, elites have set aside disputes over what form the nascent polity should eventually take in favour of creating a new venue for pursuing policy goals less fettered by domestic constituencies. On the other hand, those same national elites have failed to contest the institutionalization of Europe in the appropriate forums of representation and contestation. They 'prefer to talk about the institutionalization of Europe when competing in elections to the European parliament, where it's largely irrelevant, and they prefer not to raise these questions when competing in national elections where it matters' (Mair, 2005: 10).

At the very least, therefore, a strategy of national politicization of EU constitutional questions requires EU elites to be capable of emplotting this supranational project, particularly the effect it has on sovereign prerogatives, into their national narratives of politics. For instance, as the Prodi government in Italy, seeking to join the single currency, justified the necessary austerity measures by declaring it was time for Italy to join the rank of normal European countries and stabilize its public spending (Ginsborg, 2003: 304-8). A similar logic of reconciling member state identity and sovereignty within the EU project has been at play with Germany's attempts in the last decade to "normalize" its foreign policy stance by advocating a strengthening of the EU's Common Foreign and Security Policy, which would allow Germany to play a greater role on the world stage through EU action. It is also apparent that prospective members of the EU, past and present, have followed this path of politicization in order to advocate and prepare for the constraints (as well as rewards) of membership as part of a new direction in their country's history. Of course, it is not a given that all member states have the ability or, perhaps more importantly, can continue to emplot European integration into their domestic political context. However, when contrasted with a national referendum vote on treaty reform, the strategy of persuading national publics – through domestic partisan electoral processes – about the merits of continued integration does have the fundamental merit of not provoking continent-wide battles lines over the question of the level where popular sovereignty can legitimately be exercised.

Conclusions: The Future of Political Constitutionalism in the EU

Putting the constitutionalization of the EU into a historical perspective with American and Swiss political development suggests there is no easy remedy for enhancing political constitutionalism. EU constitutionalism, especially the process of negotiating the boundaries between member state and EU authority, is currently only indirectly linked to popular sovereignty. Without the mobilization of citizens across member states, it is left to European elites and the judicial system to resolve fundamental constitutional questions. During the so-called "permissive consensus" era, the absence of political constitutionalism did not pose a problem. However, integration today can no longer rely on citizens' deference to national elites. In addition, the increasing complexity of the

treaty architecture means the ECJ is called upon to adjudicate in increasingly sensitive areas. For instance, the Court is having to weigh the stipulations of the internal market against national welfare state provisions that may run counter to the former. This was the case in Laval (2007), where the EU's top judges had to rule on whether Swedish trade unions acted within their rights by taking collective action against the subsidiary of a Latvian construction company – forcing it out of business – that was not party to Swedish collective bargaining agreements on pay. Such dilemmas will probably increase now that the Charter of Fundamental Rights has entered into force.

The value of historically-nuanced comparison is thus to show that the EU is not unique in facing the challenge of fostering political constitutionalism where there is no unified concept of the people to represent or appeal to. The United States and Switzerland both developed their own method for enhancing the democratic element within their constitutional processes, which was most necessary when issues surrounding the vertical separation of powers were at stake. At the same time, this type of comparison also demonstrates the difficulties of interpreting direct democracy or presidentialization as nostrums for the EU's democratic woes. Likewise, the "politicization" approach appears incapable of fulfilling the hopes that some have placed in it.

Nevertheless, EU constitutionalization continues as the successful Irish referendum re-vote on the Lisbon Treaty in October 2009 finally put an end to a fraught process of institutional reform. The process itself lasted nearly a decade; the Laeken Declaration that originally called for an intergovernmental conference to study how to render the EU more democratic, effective and transparent dates back to 15 December 2001. On all three counts, the Lisbon Treaty has made some progress but the changes contained in the new treaty are unlikely to be sufficient to end popular contestation over the EU's legitimacy and the functioning of the separation of powers in practice. Some of this constitutional contestation surfaced in the referendum rejections in France, the Netherlands, and Ireland that punctuated the process of treaty reform. It is also apparent in the increasing turn, across the EU, towards anti-EU and populist parties both in European parliamentary elections as well as within domestic politics. In such circumstances, the development of political constitutionalism in the EU is not only highly uncertain but also more important than ever.

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