

ESSAY: Postnationalism, (Dis)organised civil society and Democracy in the European Union: Is Constitutionalism Part of the Solution or Part of the Problem?

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Note: The ideas in this paper were inspired by a conference organised by Grainne de Burca and Neil Walker at the European University Institute, Florence, entitled "Law and Disorganised Civil Society: The Framing of Postnational Political Movements in the Context of Global Economic Governance" (1), and form part of an ongoing research project into European Constitutionalism. **Abstract** *The idea of a European constitution has been a constant refrain in academic and political discourse on European integration, and has recently gathered considerable momentum due to the intervention of politicians and the media and its explicit institutional recognition in the Laeken Declaration on the Future of the European Union. If much of the debate is characterised, tainted even, with a top-down logic of legal-constitutional engineering - a logic which arguably flows from the elitist political roots and philosophy of the project itself - there is nevertheless a growing tendency to examine the theoretical alternatives through which a more open and inclusive constitutional process might be understood. There is considerable irony in an endeavour to 'democratise' a postnational polity through a constitutional settlement, brought out when the theoretical underpinnings of the constitutional movement are laid bare, and the alternatives to a hierarchical or legocentric understanding of constitutionalism's reach are examined. The purpose of this paper is to suggest some of the possible pitfalls in a constitutionalist position fixated on a hierarchical or federal arrangement, and highlight some theoretical alternatives which appear accommodating, even demanding, of a more bottom-up approach and conducive to a radical inclusion of civil society, both organised and disorganised, in the structures of constitutional construction and negotiation. I.*

Introduction [1] The current stage of integration in Europe, precipitated by the Treaty of Maastricht and given explicit juridical interpretation by the German Federal Constitutional Court in its (in) famous Maastricht decision, is marked by an increasing concern over the democratic legitimacy of the project. The precise contours of this concern, on one account necessitated by the transformation of an intergovernmental trade association between states into an increasingly economically and politically integrated polity with a single currency, are difficult to assess. The boundaries of integration- normative, territorial, functional - are the subject of constant flux, frequent contestation and occasional differentiation and therefore difficult to filter into a single perspective or holistic assessment of the project. Retrospectives of what have been 'achieved', prospectives of what might be, issues of description and prescription are often conflated: enlargement of the substantive fields of integration and the functional spill over effects; deeper political and monetary union; Eastward enlargement; the demand for the EU to become a more effective international player; a general popular disenchantment with and the perceived illegitimacy of the institutions and politics of the European Union shown in referendums from Denmark to Ireland; the extent to which there is or can be a European society. From a sociological, political and normative standpoint, little is certain in terms of Europe or European integration. What is certain is that from many different perspectives democratic or popular legitimacy is often considered as its Achilles heel. [2] The constitutional discourse which has been self-consciously adopted not only amongst scholars, but by politicians and even the media involves a characterisation and thereby transformation of the process of integration itself: on one level to give some overall coherence to the (dis)array of structures, norms and institutions; on another to infuse the project with a particular normative vision. Although certainly not new, the constitutional debate in Europe has recently not only become more prevalent - leading towards what Joseph Weiler has termed a 'normalisation' of the constitutional discourse - but has been institutionalised by the Council's adoption of a Convention in the Laeken Declaration. (2) It is important to understand the deeper significance of the constitutional discourse, in terms of its relation both to the underlying concern for democratisation and more broadly to a particular vision of integration. Given that groups with radically different interests - both Europhile and Eurosceptic - advocate a European constitution, which shows the ambivalence inherent in the concept - perhaps justifying its label as an "essentially contested concept" (3) - we need to dig beneath the surface to uncover some of the theoretical and empirical assumptions on which such views are based. [3] Once the phenomenon of constitutionalism is examined in any detail it is seen to be subject to deep ambivalence in its relationship to democracy, an ambivalence barely concealed by claims proclaiming its 'triumph' (4) or 'global hour'. (5) The tension between constitutionalism and democracy which is present at the core of any theoretical debate on sovereignty or legitimacy is hardly resolved within the nation-state paradigm- witness the deep disagreement in American constitutional theory between, to name one example, Dworkin's liberalism and Michelman's republicanism- let alone at any non-state level. Even leaving aside for the moment the more radical critique of modern constitutionalism as telling a story of exclusion and assimilation, (6) the ambivalence - paradox even - in terms of democracy is particularly and persistently striking. [4] In the European debate the story is complicated because of the explicit discussion about the relationship of a constitution not just to democracy in the abstract or to a demos as a given, but also to a 'demos' in particular. (7) It is not only that the precise boundaries of the community are questioned (and changing) but the claim that at a non-state level there is a political community capable of sustaining a public sphere, civil society or a constitution at all. (8) There is further confusion in that a constitution is often proclaimed to exist

already in the European Union; the Treaties themselves along with a body of case law of the ECJ have already constitutionalised the (putative) European polity, due to which we have a 'constitution without constitutionalism'. (9) This means that the "higher but more weakly legitimated European law in fact increasingly trump[s] the strongly legitimated law of the nation state", (10) leading to a 'double perversion of democracy'. (11) From one perspective then, a constitution along the lines of a 'neo-liberal Rechtsstaat' has already been created, founded upon individual (economic) rights and their entrenchment at a post-national level. It is through arguments of the inadequacy of such a scenario that negative integration needs to be supplemented with positive (re-)regulation which in turn needs more than functional or technocratic legitimation; fundamental freedoms and economic liberty are not sufficient to ground a political union; the 'impersonal rule of law', or 'imperium' (12) conception of the relationship between law and society is no substitute for social cohesion, solidarity or 'reflexive homogeneity' (13) - that the constitutional debate is fuelled. If we are in favour of a more 'social' or 'democratic' Rechtsstaat at the supranational level, we have to ask what kind of solidarity, if any, our constitutional arrangement requires and whether a constitutional process can generate it. **II. Top-Down Constitutionalism and the Organisation of Civil Society** [5] It is with this background in mind that the drive for a formal constitution for the European Union can be examined, a call made with federalist implications by both prominent politicians (14) and intellectuals. (15) Whilst we know that those who adhere to a constitutional solution do not necessarily advocate the case for statehood of the European Union (16) - Eurosceptics may want a constitution in order to delimit the competencies and limit the authority of the EU (17) - there is a tendency by many to assume that the democratic deficiencies of the present scheme can at least in part be remedied by a constitutional settlement. It is therefore crucial to look more closely at the reasons for constitutionalisation, the type of constitution desired, and, crucially for understanding the relationship with democracy, the type and degree of societal integration, if any, assumed by it. (18) *The Economist*, for example, and those of a neo-liberal philosophy more generally, might support a constitution in order to preserve the 'status quo' of the current arrangement: a constitution which would imply little, if any, more transnational societal cohesion. This in itself might imply that we need to change our conception of what constitutionalism has become - a 'thin' structuring of political and economic organization that has no necessary link to a cultural or social entity such as a nation-state. Those in favour of a social democratic or redistributive regime at the transnational level might support a constitutional arrangement in the hope that through it a deliberative public sphere might develop and generate social cohesion, solidarity and social rights. Others might not have a specific social and political agenda and desire a constitution for pragmatic reasons of accountability and good governance. [6] For those who favour a move from a liberal market to a social democratic transnational 'Rechtsstaat' through constitutional integration the theoretical background which provides much of their intellectual currency is a vision of Habermasian deliberative democracy and his procedural law paradigm - perhaps the most compelling theoretical resolution of the tension between constitutionalism and popular sovereignty. (19) For Habermasians, "any association of free and equal persons under law also presupposes the existence of social conditions under which private and public autonomy may be unfolded and developed." (20) The state therefore must take the responsibility to secure those "social, technological, and ecological conditions that make an equal opportunity for the use of equally distributed basic rights possible". (21) Any translation of his program into a specific political and constitutional framework is nevertheless subject to considerable dispute. It is quite plausible to accept Habermas' theory whilst rejecting its application at a supranational level for empirical reasons. Although believing in the development of supranational institutional responses to counteract economic globalisation, Habermas affirms that "any assessment of the chances for a European-wide democracy depends in the first place on empirically grounded arguments." (22) [7] It is in the gap between the ideal and the real that the controversy is most intensely felt, a gap which for Habermas is filled with an optimism which hangs on the idea of law and constitutional patriotism as capable of providing the framework to integrate and bind a political community: "the forms and procedures of the constitutional state, together with the democratic mode of legitimation, simultaneously forge a new level of social integration." (23) However, for some the claim that "the ethical-political self-understanding of citizens in a democratic community [can] be taken as the fluid content of a circulatory process that is generated through the legal institutionalisation of citizen's communication" (24) depends on an optimism belied not only by historical experience but by his own critical project. (25) [8] Whilst the process is described as 'circulatory' there is a historical question over the extent to which social integration was forged in the nation-state in that way. (26) But, and more significantly, there is also a conceptual question as to whether the constitutionally regulated circulation of communicative power - from public sphere to political system - is the norm or the exception in contemporary 'democratic' societies. If the "circuit is established only fleetingly and exceptionally [and] the top-down systems paternalistic model of power is the norm - both in the sense that power is usually exercised in that way, and, much more controversially, in the sense that it usually should be" (27) then the conditions of ideal deliberative democracy are compromised to a great extent, even more so when decontextualised in a postnational setting. [9] So there is another ambiguity in the 'federalist' constitutional position, an ambiguity which may also be raised against Habermasian optimism and cosmopolitan democrats more generally, which is both conceptual and empirical. This is the extent to which the forging of a European post-national identity, civil society, constitutional patriotism or the emergence of a public sphere relies on a top-down constitutional logic on the one hand incompatible with the democratic freedom of individuals involved or on the other simply insufficient to generate that which it needs to substantiate it. (28) This in turn asks a bigger question regarding what exactly is it that needs to be generated or mobilised in the constitutional process - is a one-off event enough? And how far can the ideal of a deliberative model be compromised? There are thus many different ways in which the top-down 'imperial'

logic of constitutionalism on which much of the debate flows can be contested. (29) [10] Habermasian constructivism might be criticised not only for being unable to do enough - in that an appeal to European constitutional patriotism and civil society is insufficient for the requisite culture or 'ethos' at a European level - but, from a different angle, for attempting to do too much. Whilst it takes the ethnic or cultural 'demos' out of constitutionalism and democracy, it arguably retains a 'personification' (30) of political community because it relies on the ultimately substantive - in the sense of community-specific- idea of constitutional patriotism. Without the time or space to go into his theoretical program any further I will examine in more detail some claims sceptical of a constructivist constitutional logic and then outline two attempts to frame a decentred constitutionalism which address some of these concerns and are perhaps apposite in terms of a radical inclusion of (dis)organised civil society. **III Constitutional Scepticism** [11] The 'no demos' theory - associated with the German Federal Constitutional Court in its Maastricht decision and the writings of Dieter Grimm (31), amongst others, - is well rehearsed and need not be repeated here. It is not the scepticism or essentialism (32) of political or methodological nationalists, or 'defensive internationalists' (33) that I am concerned with here. Neither will I examine in any detail Joseph Weiler's imaginative and quite unique constitutional scepticism related to the way he understands the European ethos of 'constitutional tolerance', an ethos which would be undermined by the very process of formal enactment in a constitutional document. (34) For Weiler the top-down hierarchical nature of a constitutional project could lead Europe full circle back towards the statist legacy it has so successfully left behind - an irony of tragic proportions. (35) Although these arguments are clearly salient to the European debate I want to focus here on a more general critique of constitutionalism from a deeply theoretical perspective. [12] The type of constitutional scepticism that I am concerned with is largely captured in Neil Walker's analysis of the critiques of 'constitutional fetishism' and 'normative bias' of modern constitutionalism. (36) Whilst these critiques are not framed in reference to the European context, they have a clear relevance to the initiative of postnational constitutionalism. [13] The first is concerned "with the more general limitations of any constitutional discourse as a means to capture the nature of social and economic relations and articulate the contours of political choice". (37) Situated here is a deep scepticism about law and constitutionalism in terms of their impact in civilising, constraining or ordering the domain of politics, democracy and resistance. This is a complex epistemic critique, concerned with the way in which law's representation of the political in its own discourse - and the structural inertia with which law is institutionally set - involves a reduction or containment of the political itself. (38) Against the proposition that constitutionalism is sufficiently reflexive to provide a framework for democratic agitation - a framework that is itself, reflexively and continually, up for renewal - Christodoulidis contends that law's conceptual and normative hegemony in framing the debate hijacks political and ethical claims, and denies them their own authentic voice. In terms of disorganised civil society the legal or constitutional framing or determination of resistance would reduce the very impact and quality of the resistance itself. We should therefore "keep the idea of constituent power and with it 'under-determination' - disorganisation as we have called it here - as the realm of pure 'unstructurable' agonistics." (39) For him even a pluralistic account of constitutionalism such as Walker's will inevitably collapse on the side of the institutional: "Constituent power becomes institutionalised in the sense [that] it is operationalised within a forestructure of norms that bestow it legal meaning as norm and in the process channel it and circumscribe it." (40) [14] The second critique, of normative bias, argues that "even a constitutional culture modestly weighted towards a homogenizing ethic and a set of constitution-generating principles moderately disinclined to recognize group differences, is enough to nurture a systematic bias against, or deprioritization of social identity claims other than those which correspond with and reinforce the boundaries of the constitutional polity in question". (41) Situated here is the work of those who have focused on the dangers of cultural assimilation - whether of gender, race, or class - inherent in modern constitutionalism and urged a more inclusive approach which focuses on diversity and pluralism. (42) [15] Although there is a clear sense in which these critiques overlap, most of the following focuses on the second. An epistemic critique of law and constitutionalism is a difficult tool with which to further the constitutional debate. It poses a significant challenge: how to maintain structure and inclusion without taming disorder, institutionalising and/or neutralising resistance? The more so since "the limits of our imagination of the institutional dimension of alternative political possibilities seem inextricably bound up with the limits of our imagination of law." (43) [16] However, focusing on substance rather than form, we might well turn the critique on its head: it is precisely through the emancipation of political and economic activity from the rule of law that we have witnessed many of the trends and dynamics of global capitalism and the erosion of state sovereignty that civil and political movements contest. On this account it is not just resistance that is outside constitutionalism but also capitalism itself which has escaped; and constitutionalism must be part of the solution. (44) In other words it might be argued that we need more, not less, global constitutionalism and institutional solutions in order to counteract the escape of political and economic enterprise from juridical, democratic and ultimately individual control. I will therefore focus on the ways in which change might be viewed through the lenses of constitutionalism rather than without them. [17] The alternative theoretical frameworks which are suited to a more openly societal or 'bottom-up' constitutionalism - and which might address some, if not all of the sceptic's concerns - focus on spontaneous decision-making units, a dispersal of power, contestation, and accommodating pluralism and diversity. They tend to resist the template of the nation-state or any particular boundaries, forms, or 'personification' of political community. Positioned against the "empire of uniformity" (45) associated by some with the philosophy of modern constitutionalism, or the "God of uniformity" (46) as a philosophy of European integration, they seize on the opening of boundaries associated with the postnational movements as an opportunity for new forms of democratic freedom to take shape. "The opening boundaries of the

modern polity, the undeniable increase in heterogeneity that follows, and the manifold institutional responses that these changes in turn provoke are better seen as creating the occasion for, indeed in part anticipating, a radical re-definition of our democratic and constitutional ideals, rather than as signs of democratic declension." (47) [18] Two trends of democratic thinking which seem particularly apposite for a framework for (dis)organised civil society to express itself and its relationship - whether through contribution or opposition - to the concepts of supranational law and constitutionalism are agonistic and experimental democracy. They both share with Habermas a rejection of the choice between global markets and national social democracy, or between "European economic constitutionalism" and "nationally embedded re-distributive legal order" (48) as a 'false dichotomy'. (49) They argue against the separation of the economic from the political and against a distinction between efficiency-oriented and distribution-oriented standards of legitimacy characteristic of much EU scholarship, suggesting that we must develop democratic structures, and ultimately constitutionalism, beyond or without the nation-state. Where they depart from Habermas in conceptual and normative terms is in a rejection of a transcendental solution to the puzzle of constitutional democracy; this translates in institutional terms in a rejection of a shared constitutional identity as a limit to constitutional pluralism. Whilst each originates from a distinct intellectual background, there is a startling convergence in their advocacy of pluralism 'at all levels' of constitutional interpretation, formal and informal inclusion of marginalized voices and focus on decentralisation and an incremental program of mutual learning or mutual recognition in an open-ended constitutional dialogue. I will now turn to an examine each in some more detail. **IV Agonistic democracy (50)** [19] The ideas surrounding agonistic democracy are rich and varied, and influence explicitly and implicitly a large and diverse section of theoretical writing on democracy and constitutionalism. (51) James Tully has outlined the contours of an approach, conducive to appropriation to the European debate, which emanates from the equiprimordial status of the two principles of democracy and constitutionalism and - situated in the changing framework of contemporary political organization - shows how a legitimate political association must combine these two principles in equal measure in a constant dialectical relationship. (52) Features of this 'dialectic' include: the irreducibility of reasonable disagreement, which is seen not only as a political reality but as an ideal to be pursued- disputation applies to the very constitutional arrangement itself; negotiation of the political association - there is no definitive ordering of a legitimate political association, nor a definitive theory of justice; modification through political globalisation- people are diverse and dispersed, as are the functions, layers and forms of government and the practical relationship to the citizenisation of peoples through participation as cultural members. It is these considerations which are intimately bound up with the conception of an agonistic, as opposed to consensus-oriented, model of constitutional democracy. [20] Since the *facts* of pluralism in contemporary society and consciousness of the interconnectedness of values, fates and environments - the consequences of late modernity - force us to take into account the very different types of forms and styles of politics which have a cultural existence and specificity, in order for the procedures of politics to facilitate an equal and authentic voice to all, those procedures themselves must be open to be constant critical reflection and renewal. For Tully, then, the principle of democracy requires that the constitutional arrangement is constantly re-appraised. [21] From this basis, Tully casts a critical eye over several recent developments from the global juridification of economic freedom and human rights and the devolution of political power and association to sub-units under pressure of the politics of recognition (multi-nationalism, multi-culturalism and regionalism) to the decline of democratic deliberation and decision-making within the traditional institutions of representative nation-states. Linking these with a decrease in citizen participation and increase in public apathy and malaise, he argues that "[t]hese three trends work together to insulate the growing global social and economic inequalities from public democratic discussion and reform", (53) a situation effective struggle against which can only be made through the exercise of genuine democratic freedom. [22] Tully thus firmly distances himself both from the neo-liberal 'third way' political ideology - advocated by thinkers such as Anthony Giddens, which celebrates the features of a globalised modernity and juridification that have opened up the space for lifestyle politics though the market freedoms of the Moderns (54) - and from global fatalists who declare that there is simply no alternative. Yet he also, and more cautiously, distances himself from the early phase of deliberative democracy, of the critical theoretical responses of Habermas and Rawls, arguing that these responses were overly characterized by the suggestion of transcendence, and an orientation towards definitive consensus or agreement. Their mistake was to assume that the role of political philosophy was "to develop a comprehensive theory of justice or of procedures of public reasoning within which citizens themselves could reach agreement on definitive constitutional principles." (55) He claims their approaches have been called into question by the agonistic, negotiated form of political dialogue that is necessary for our contemporary pluralistic global political communities. Disagreement 'all-the-way-down' to constitutional essentials, to any overall framework of fundamental principles of justice, leads to a rejection of any pretensions to transcendental solutions: "[...] The orientation of practical philosophy should not be to reaching final agreements on universal principles or procedures, but to ensuring that constitutional democracies are always open to the democratic freedom of calling into question and presenting reasons for the renegotiation of the prevailing rules of law, principles of justice and practices of deliberation. Hence the first and perhaps the only universalizable principles of democratic deliberation is *audi alteram partem*, 'always listen to the other side', for there is always something to be learned from the other side." (56) [23] The contribution that this type of political method has made and can make is evident: "The major contribution of agonistic democrats has been to stress the manifest reality of partisanship, dissent, disagreement, contestation and adversarial reasoning in the history and present of democratic societies and the positive role it plays in exposing and overcoming structures of inequality and injustice,

fostering a critical democratic ethos and, *eo ipso*, creating autonomous citizens with bonds of solidarity across real differences. They have argued this against the non-adversarial, classless ideology of constitutional democratisation of the neo-liberal and third way defenders... and against the exclusionary and assimilative dangers of the consensus models of deliberation and the abstract and universal conception of public reason." (57) The features of agonism then are closely linked to new types of political systems, practices of governance and 'nodes' of democratic freedom that exist at different levels, and for different functions in the multi-level polities of contemporary society. Advocating research into globalisation 'from below', linked to a spontaneous "irruption of public autonomy in interstitial locations", (58) rather than the top-down imposition of global constitutional orders, Tully's work has many implications for the way in which organised and disorganised civil society is brought into and might influence processes of European integration. Its pertinence for understanding the process of constitution-building in the EU and the role of civil society needs further attention. [25] In the context of European constitutionalism agonistic democracy, with its focus on contestation and the irreducibility of reasonable disagreement, is complex and problematic, and perhaps counterfactual. There is a clear sense in which the process of European integration is about finding a consensus on values and common principles to provide frameworks for deeper and wider unity. The recent Charter of Fundamental Rights (59) is an example of the increasing desire to rationalise the values – social, economic and political, upon which Europe is unified. Agonism might be interpreted as serving to embed the impulses of cultural and political difference that European integration aims to overcome; in other words it turns the problem into the solution. (60) [26] There are several possible responses. Whilst Tully is keen to preserve the 'strange multiplicity of constitutional sites and ideas' (61) he is insistent not only on the need to combine the mutual recognition of diverse claims with a genuinely critical freedom, but also on the requirement to maintain a cosmopolitan communication between sites. In his metaphor of the 'Haidi Gwaii', he insists that we must not only come to terms with but also learn from each other's difference and diversity, for we are all living in the same boat together. (62) European integration clearly takes this metaphor a step further. Nevertheless, a characterisation of the EU that emphasises unity and neglects diversity is at least partially misleading. The very real cultural differences that exist not only between but within nation-states are translated and formally recognised at political, institutional and even constitutional levels in features such as subsidiarity, flexibility, differentiated integration, recognition of sub-state levels of governance, and less formally in terms of competing claims to ultimate authority. The 'semi-permanent' process of Treaty revision has been described as close to a 'constitutional conversation', (63) based on consent and continuity. The challenge is in meeting the requirements of both unity and diversity in the movement of postnational constitutionalism, a challenge which seems well served by a program of agonistic freedom. [27] Jo Shaw, amongst others, has taken the theoretical nub of Tully's work and used it extensively in analysing the development of a post-national constitutionalism in Europe based on process, procedure and negotiation. (64) She has recently drawn on his work explicitly in relation to the undertakings of the self-styled Constitutional Convention established by the Leaken Declaration, arguing that "any constitution needs to be the subject of continuous critical reflection and should be seen more as a set of interlocking processes rather than as a single one off event or document." (65) For her, postnationalism suggests "not abandonment of the anchoring of national constitutions, which are hardly likely to be swept away in a Euro-philic tide of enthusiasm for building a United States of Europe, but rather the reinforcement of a constitutional politics which is specifically non-teleological and accepts contestation and non-fixity as a way of life, not a deviant practice." (66) **V Experimental Democracy** [28] Also inspired by, yet partly disassociated from, the theory of Jürgen Habermas, Sabel and Gerstenberg in their account of "directly deliberative polyarchy" (67) argue that by accepting a fully pluralist account and focusing on difference and heterogeneity an institutional arrangement can be achieved which is not reduced or reducible to a demos at all. They first argue against the existing and, to some extent, established conceptions of constitutionalism advanced by Dworkin and Habermas. In relation to Dworkin's synthesis of constitutionalism and democracy on the basis of equality as the presupposition for a framework of rights which enables legitimate political authority to be exercised, they argue that such framework supposes a personification of the community or state through its articulation or resolution of controversy by judicial interpretation. Dworkin's Hercules, through a theory of law as integrity, is supposed to produce the best interpretation of the constitution within a particular political legal historical community. "A consequence of Dworkin's insistence on a moral reading of the constitution and his specification of the conditions making this possible seem to root the dialogic practice of constructivist constitutional justification in the factual existence of a sovereign (people) reminiscent of positivism." (68) [29] Against Habermas' construction of democratic constitutionalism through the discourse principle - which emphasizes actual agreement over a hypothetical contract model, is grounded in a procedural paradigm of law, and understands constitutionalism as the institutionalisation of a forum which allows deliberation to take place in fair and equal conditions - they argue that the commitment to constitutional patriotism that this institutionalisation requires also results in practice in a retreat to a 'personification' of the political community: "[T]he legitimacy conferring force of Habermasian proceduralism comes to depend on constitutional patriotism as an empirical warrant or moral *substratum* (italics). It alone bridges the gap between hypothetical consent and actual democratic practice. The practical pursuit of the idea of a universalising, political justification becomes contingent upon the community's concrete ethical character, as the substance of constitutional patriotism unavoidably involves identification with an actual historic community." (69) [30] Democratic experimentalism aims at a different path from the one taken by Dworkin and Habermas in that it rejects any 'pre-deliberative external certainties' and therefore any personification of political community. The aim of this approach is "to defend a radically internalist view of constitutionalism: to spell out the normative and institutional

infrastructure of a constructivist jurisgenerative process in which reasons and boundaries, rights and identities, actors and procedures, principles and practices, mutually transform and educate one another in the light of new experience." (70) [31] Their alternative approach, building on earlier work (71) and focusing on the opening of the boundaries of modern polities, celebrates the potential heterogeneity of responses that the transformation of political community entails as a radical re-definition of our democratic and constitutional ideals. "In a deliberative polyarchy local, or more exactly, lower level actors (nation-states or national organizations of various kinds within the EU, regions, provinces or sub-national associations within these, and so on down to the level of whatever kind of neighbourhood the problem in question makes relevant) are granted autonomy to experiment with solutions of their own devising within broadly defined areas of public policy." (72) Nevertheless such a solution does not entail insularity. These units in return "furnish central or higher-level units with rich information regarding their goals as well as the progress they are making towards achieving them, and agree to respect in their actions frameworks of rights of democratic procedure and substance as these are elaborated in the course of experimentation itself. The periodic pooling of results reveals the defects of parochial solutions, and allows the elaboration of standards for comparing local achievements, exposing poor performers to criticism from within and without, and making of good one (temporary) models for emulation." (73) [32] At the level of transnational institutions in the EU, Sabel and Gerstenberg pick up on the re-regulative activities of the committees known as comitology as a new form of governance, or institutional architecture, which shows that market freedoms have not triumphed unequivocally at the expense of public deliberation. Whilst recognising the issues of accountability associated with this method of governance, they consider the attitude exemplified in the work of Christian Joerges which looks at the development of comitology as an example of a 'forum of deliberative politics' which "by virtue of its feedback links to the Member States, ...can, in principle, take all social concerns and interests into account while, at the same time, links with science (as a social body) can be shaped so as to allow for the plurality of scientific knowledge to be brought to bear." (74) Their own approach, which is difficult to capture in this short analysis, seeks to steer a middle ground between the 'demos' and 'market' approaches by focusing on the ambiguity and constructive potential of language and meaning. "The very differences that obstruct understanding in the demos view, and disappear completely in the market perspective are the engine of understanding in a world of pervasive ambiguity... This reversal in the role of difference transforms makes it possible to speak of boundaries, interests and identities and even sovereignty without invoking the demos of the nation state." (75) This way of conceiving an understanding of action that deliberately takes on doubt and ambiguity as its starting point, and is open to a constant (re) inquiry of initial responses through experience and experimentation owes its conceptual and philosophical inspiration to American pragmatism. (76) [33] In a continuation of these ideas, Gerstenberg has recently presented an anti-personificationist framework of political and legal authority in the EU which focuses on a horizontal extension to fundamental rights, giving to private actors the role of constitutional interpreters in a decentred form of constitutionalism. (77) His notion of constitutional rights is "neither atomistic nor contingent upon the epistemic boundaries of a given culture, but jurisgenerative, participatory and solidarity-enhancing and in this sense conducive to European citizenship and Euro-democracy." (78) The attraction of this approach is that it turns the right-sceptic critique on its head, presenting a notion of rights "as stakes in an argumentative game, which for its own normative integrity requires us (whoever we are) to give voice to the other, without assimilating him or her, - which permits to express difference in the very endeavour of finding shared normative understandings." (79) [34] Using as an example the Bosman ruling of the European Court of Justice, Gerstenberg shows how the idea of the horizontal application of rights might exist whilst allowing private actors themselves to negotiate solutions to constitutional problems through mediation and co-operation. In Bosman, he argues, the Court itself refused to specify a definitive regime that should be implemented but suggested types of self-regulation that would conform to the principles at stake. "The Court self-consciously regarded its role as one of promoting self-regulatory experiments in private legal relations that will at the same time foster fundamental rights". (80) The goal of this "radically decentred, non-court-centric approach to constitutionalism" is that "interpretive conflict... is worked out in deliberative political forums where parties to a conflict with diverging normative outlooks and perceptions of social pathology are required to engage one another in a process of mutual learning and of collaboratively figuring out what indeterminate constitutional provisions mean under given circumstances." (81) **VI Concluding Remarks** [35] As I have only sketched a very rough outline of these two quite complex conceptual frameworks for constitutional democracy there is very little to be said in terms of any concluding remarks. Both models clearly provide much food for thought regarding the development of postnational constitutionalism in the European Union. They address some of the 'democratic' concerns of the constitutional sceptics in terms of the exclusionary potential, normative bias and fetishism of modern constitutionalism; yet do so by using, manipulating and transforming rather than abandoning the idea of constitutionalism itself. In terms of new structures of democratic governance and an inclusion of civil society they offer an intellectual and theoretical framework in which further research might be undertaken. In institutional terms they sound a note of warning over the project of a constitutional convention geared towards embracing a hierarchical or federal arrangement that approaches European statehood. [36] It is questionable however, by embracing pluralism 'at all levels' and rejecting in the case of agonistic democracy any definitive constitutional arrangement, and in the case of experimentalism any personification of political community, where the space is left for the substance of postnationalism in the EU. Given their quite different philosophical inspirations, there is a striking, almost paradoxical sense in which both approaches, in their rejection of top-down constitutional constructivism, tend towards an atomization of interests which leaves open the political and

cultural substance to postnationalism itself. Whereas the constructivist democratic experimentalism of Sabel and Gerstenberg quite explicitly reduces the cultural element in constitution-making, in Tully's case an emphasis on globalisation from below implies a kind of anti-personification of political community which is difficult to square with the idea of the cultural irreducibility in agonistic pluralism. (82) The resolution of this tension is not entirely clear. The question that might be put to both is "whether we can imagine a plural, dispersed, and multi-faceted public collectively addressing the problems of its self-organization as a collective actor." (83) Rejecting any specification of the substantive values of postnational community, or a shared constitutional patriotism, there is an absence of an identity or ethos for European constitutionalism, or a political imagination 'beyond constitutionalism', through which integration might develop. (84) One question for further thought and research then is whether the frameworks of 'agonism' and 'experimentalism' promise enough in terms of solidarity or social cohesion for a postnational constitutional association to work at all. (85)

(1) It should be emphasized that the papers presented at the conference, some of which I have quoted in this article, were very much 'work in progress' and therefore the views expressed should be considered as provisional.

(2) The Declaration establishing a Convention on the Future of the European Union, established in December 2001 in Laeken, and which continues its deliberations into 2003, includes a section entitled "Towards a Constitution for European citizens". It has sparked a good deal of media and academic interest. For an up-dated overview of the impression this self-styled 'Constitutional Convention' has made in the various national media, visit <http://conventionwatch.iue.it>.

(3) For an elaboration of this idea in terms of European integration, see Z. Bankowski and E. Christodoulidis "The European Union as an Essentially Contested Project" (1998) 4 *European Law Journal* 341.

(4) R. Kay, "American Constitutionalism" in L. Alexander (ed.) *Constitutionalism: Philosophical Foundations* (1998, Cambridge, CUP), 16-63 at 16.

(5) See N. Walker "The Idea of Constitutional Pluralism", (2002) 65 *Modern Law Review* 317-359 at 317, quoting P. Habermas, "Verfassungsentwicklungen in Osteuropa – aus der Sicht der Rechtsphilosophie und der Verfassungslehre," (1992) 117 *Archiv des öffentlichen Rechts* 169 – 211, at 270. Whilst noting, empirically, the expansion of constitutionalism, Walker's paper highlights the "unprecedented range and intensity of attacks that constitutionalism has also faced," in the recent conceptual and normative discourses.

(6) This is examined in some detail below.

(7) The problem of boundaries is an intriguing one, and has been the subject of much recent discussion. Quite simply democratic theory is 'paralyzed' when dealing with the determination of its own scope, a paradox that is not necessarily resolved if we assume a deliberative model of democracy, see H. Lindahl "Sovereignty and Representation in the European Union", in N. Walker (ed.) *Sovereignty in Transition* (forthcoming, Oxford: Hart). Arguably the paradox of democracy extends to its substance, given that as Michelman argues, it is "absolutely not possible to appoint democracy to decide what democracy is", F. Michelman *Brennan and Democracy* (1999, Princeton: Princeton University Press), quoted in Sabel and Gerstenberg, "Directly Deliberative Polyarchy: An Institutional Ideal for Europe", in C. Joerges and R. Dehousse (eds) *Good Governance in Europe's Integrated Market* (2002, Oxford: OUP) 289 - 343.

(8) This primarily refers to the supra-state level, although there is of course also a considerable amount of pressure to recognize sub-state entities such as regions in constitutional terms, which might be part of a 'postnational' settlement.

(9) See J. Weiler, "We Will Do, and Hearken" Reflections on a Common Constitutional Law for the European Union, in R. Beiber and P. Widmer (eds) *The European Constitutional Area* (Zurich: Schulthess, 1995).

(10) C. Sabel and O. Gerstenberg, "Directly Deliberative Polyarchy: An Institutional Ideal for Europe", in C. Joerges and R. Dehousse (eds) *Good Governance in Europe's Integrated Market* (2002, Oxford: OUP).

(11) O. Gerstenberg, "The Judicial Enforcement of Constitutional Essentials and the Role of Private Actors: The Case of EU-Constitutionalism", paper to *Law and (Dis)organised Civil Society Conference*, Florence June 2002.

(12) See R. Cotterrell, *Law and Community: A New Relationship?* (1998) *Current Legal Problems* 367-391 for an interesting examination of the changes to sociological conceptions of law and legal pluralism engendered by the recent transformations of political community. He notes that "if the image of the social remains law's familiar image of

imperium, difficult questions present themselves as to how law's hierarchy of authority is to be understood, including the relationship between national and transnational legal authorities and law-creating agencies and their jurisdictions" (388).

(13) See C. Offe, "Homogeneity and Constitutional Democracy: Coping with Identity Conflicts through Group Rights," *Journal of Political Philosophy* 6, no. 2 (1998) 113-141.

(14) See the speech of J. Fischer, given in the Humboldt University Berlin on 12 May 2000, and responses in C. Joerges, Y. Meny and J. H. H. Weiler (eds) *What Kind of Constitution for What Kind of Polity?* (2000, Florence, Robert Schumann Centre). V. Giscard D'Estaing, Chairman of the Laeken 'Convention', has also made comparisons to the Philadelphia Convention which gave birth to the US constitution.

(15) J. Habermas *So, Why Does Europe need a Constitution?*, Robert Schumann Centre, European University Institute, 2001 and "Why Does Europe Need a Constitution" (2001) 11 *New Left Review*, 5-26.

(16) Few openly advocate a European (super-)state. Although see F. Mancini "Europe: The Case for Statehood" (1998) 4 *European Law Journal* 29-42 for a notable exception.

(17) See, for example, *The Economist*, 28 October 2000. N. Walker makes this point.

(18) See G. Frankenberg, "Tocqueville's Question: The Role of a Constitution in the Process of Integration" (2000) 13 *Ratio Juris* 1 for a detailed analysis of the different links between constitutionalism and integration.

(19) J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996 Cambridge MA: MIT Press). For a concise summary of the resolution of the tension between constitutionalism and democracy, see "On the Internal Connection Between Democracy and the Rule of Law (1995) *European Journal of Philosophy*, 12- 20.

(20) See R. Schmalz-Braun, "Democratic Governance and Globalisation" (2001) 4 *Constellations* 554-568 at 556.
(21) *ibid*, 566-567.

(22) J. Habermas, *The Inclusion of the Other: Studies in Political Theory*, C. Cronin and P. de Grief, (eds) (1998, Cambridge: MIT Press) 158.

(23) *ibid*, 159.

(24) *ibid*, 161.

(25) For two interesting and different critical commentaries on the recent work of J. Habermas from the perspective of his own earlier work and critical project, see J. McCormick, "Habermas on the European Union: Normative Aspirations, Historical Assumptions, Empirical Questions", paper prepared for presentation at the conference, *Philosophy and Social Science* 200, Prague (12 May 2000) and D. Cook, "The Talking Cure in Habermas' Republic", (2001) *New Left Review* 135.

(26) See J. McCormick, *ibid*.

(27) See D. Cook, n 25 above.

(28) Accordingly, it might be considered that "constitutionalism as a metaphor for the apex of an internal legal order organised in a hierarchical manner to regulate 'external' society according to a similar 'top-down' command logic, is the crowning conceit of a legocentric model of social engineering" (N. Walker, n 5 above).

(29) See L. Cederman, "Nationalism and Bounded Integration: What it would Take to Construct a European Demos" (2001) 2 *European Journal of International Relations* 139-174 for an examination of the essentialist and constructivist opposition to a postnational movement. For him essentialism refers to the belief that "each ethnic core produces a political identity more or less straightforwardly", 142. A variant might be associated with the GFCC in the Maastricht decision, the court, arguably basing "democratic demos on a cultural-organic view of identity", see H. Lindahl, "European Integration: Popular Sovereignty and a Politics of Boundaries (2000) 3 *European Law Journal* 239-256 for a discussion of this.

(30) This expression comes from C. Sabel and O. Gerstenberg "Directly Deliberative Polyarchy: An Institutional Ideal for the European Union", n 10 above. It is examined in more detail below.

- (31) D. Grimm, "Does Europe Need a Constitution?" (1995) 1 *European Law Journal* 282-302.
- (32) Essentialism here refers the belief that cultural communities must always precede political and constitutional ones. See n. 29 above.
- (33) N. Walker, no 5 above, 322.
- (34) J. Weiler, "Federalism without Constitutionalism: Europe's Sonderweg" in Nicolaidis, K. and Howse, R. (eds) *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (2001, Oxford: OUP) 54-72.
- (35) See also J. Weiler, "Demo, Telos, Ethos and the Maastricht Decision" (1995) 1 *European Law Journal*
- (36) N. Walker, n 5 above, 324-331.
- (37) N. Walker, n 5 above, 324.
- (38) See E. Chistodoulidis, "Law and the framing of postnational civil society", paper to *Law and (dis)organised civil society conference*, (2002, Florence, EU).
- (39) *ibid.*
- (40) *ibid.*
- (41) N. Walker, n 5 above, 331.
- (42) This body of work is self-consciously inspired by the alternative enlightenment tradition of Foucault, and so in some sense departs at a fundamental level from the thinking of J. Habermas. See, for example, J. Tully, "To Think and Act Differently: Foucault's Four Reciprocal Objections to Habermas", in D. Owen and S. Ashenden (eds) *Foucault contra Habermas: Recasting the Dialogue Between Genealogy and Critical Theory* (1998, London: Sage).
- (43) N. Walker, n 5 above, 13.
- (44) For an interesting argument to this effect, questioning and refuting a necessary affinity, often assumed, between capitalism and the rule of law, see W. Scheuerman, "Globalisation and the Fate of Law" in D. Dyzenhaus (ed.) *Recrafting the Rue of Law* (1999, Oxford: Hart).
- (45) J. Tully, quoted in Walker, n 5 above, 330.
- (46) This is a reference from L. Siedentop, *Democracy in Europe* (2001, Columbia University Press) at 22.
- (47) C. Sabel and O. Gerstenberg, "Directly Deliberative Polyarchy: An Institutional Ideal for Europe", in C. Joerges and R. Dehousse (eds) *Good Governance in Europe's Integrated Market* (2002, Oxford: OUP).
- (48) O. Gerstenberg, "The Judicial Enforcement of Constitutional Essentials and the Role of Private Actors: The Case of EU-Constitutionalism", paper to *Law and (Dis)organised Civil Society Conference* (2002, Florence: EU).
- (49) C. Sabel and O. Gerstenberg, n 47 above, 7.
- (50) Also sometimes referred to as agonistic democracy and agonistic pluralism.
- (51) S. Benhabib recognising a trend of agonistic thinking in democratic theory, opposes it to both liberalism and republicanism and also the proceduralism of J. Habermas, see Introduction in S. Benhabib (ed.) *Democracy and Difference: Contesting the Boundaries of the Political* (1996, Princeton University Press). For other examples of the influence of this way of thinking see: C. Mouffe, *The Paradox of Democracy* (2000, London: Verso); I.M. Young, *Inclusion and Democracy* (2000, Oxford: OUP); J. Tully, *Constitutionalism in an Age of Diversity* (1995, Cambridge: CUP); J. "Tully, The Agonic Freedom of Citizens" (1999) 28 *Economy and Society* 161-182, N. Walker, *op. cit.* no. 3, 49.
- (52) J. Tully, "The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy" (2002) 65 *Modern Law Review*, 204- 208.
- (53) *ibid.*, 213.

(54) Tully draws on a distinction between the 'freedom of the Moderns', broadly associated with the rule of law and the 'freedom of the Ancients', broadly associated with democratic freedom and participation.

(55) *ibid*, 217.

(56) *ibid*, 218.

(57) *ibid*, 219.

(58) *ibid*, 220.

(59) For the full text of the Charter of Fundamental Rights of the European Union, visit http://europa.eu.int/comm/justice_home/unit/charte/index_en.html.

(60) I owe this point to N. Walker.

(61) See J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995, Cambridge: CUP).

(62) *Ibid*.

(63) See B. DeWitte, "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process," in P. Beaumont, C. Lyons and N. Walker (eds) *Convergence and Divergence in European Public Law*, (2002, Oxford: Hart).

(64) J. Shaw, "Postnational Constitutionalism in the European Union" (1999) 6 *Journal of European Public Policy* and "Process and Constitutional Discourse in the EU" (2000) 27 *Journal of Law and Society*, 4. Also in the EU context, Tully's ideas influence the work of R. Bellamy, see "The Right to Have Rights: Citizenship Practice and the Political Constitution of the EU" in R. Bellamy, and A. Warleigh (eds), *Citizenship and Governance in the EU*, (2001, London: Verso).

(65) J. Shaw, "Process, Responsibility and Inclusion in EU constitutionalism: The Challenge of the Convention on the Future of the Union", 4, paper in preparation for a Walter Hallstein 100th birthday commemorative volume, presented at *Law and (Dis)organised Civil Society Conference*, (2002, Florence, EUI).

(66) *ibid*, 5.

(67) See n. 47 above. See also J. Cohen and C. Sabel "Directly Deliberative Polyarchy" (1997) 4 *European Law Journal* 313-42, J. Cohen, "Reflections on Habermas on Democracy" (1999) 12 *Ratio Juris* 385-416 and O. Gerstenberg "Law's Polyarchy: A Comment on Cohen and Sabel" (1997) 4 *European Law Journal* 343-58.

(68) *ibid*.

(69) *ibid*. This resonates with the earlier discussion about the extent to which the empirical force of constitutional patriotism is historically accurate.

(70) C. Sabel and O. Gerstenberg, n 47 above.

(71) *ibid*.

(72) *ibid*.

(73) *ibid*.

(74) *ibid*.

(75) *ibid*.

(76) Charles Pierce, William James and John Dewey.

(77) O. Gerstenberg, "The Judicial Enforcement of Constitutional Essentials and the Role of Private Actors: The Case of EU-Constitutionalism", paper to *Law and (dis)organised Civil Society Conference* (2002, Florence, EUI)

(78) *ibid.*

(79) *ibid.*

(80) *ibid.*

(81) *ibid.*

(82) This is particularly striking in the face of Tully's earlier focus on the cultural aspect of constitutionalism in *Constitutionalism in an Age of Diversity*, n 61 above.

(83) See R. Schmalz-Bruns, "Democratic governance and Globalisation" (2001) 8 *Constellations*, 565.

(84) We are reminded of I. Ward's critique of the insufficiency of constitutionalism in the absence of a European political imagination. See I. Ward, "Beyond Constitutionalism: The Search for a European Political Imagination" (2001) 7 *European Law Journal*, 24-40. Bearing in mind Weiler's forceful critique (see paragraph 11 above) the substance of postnationalism need not and ought not be rooted in an 'organic' identity reminiscent of national integration. Weiler himself has examined the notion of civic demos in European citizenship. For an examination of a (Kantian) cosmopolitan identity see P. Eleftheriadis, "The European Constitution and Cosmopolitan Ideals" (2001) 7 *Columbia Journal of European Law*, 21-39.

(85) A concept which hasn't been examined in any detail here but which perhaps sits at a crossroads between the universal idea of abstract reason and the substantive interpretation of a particular community is the concept of rights, which has played a significant role in the construction of a European constitutional identity. It is worth noting that the recent drafting of a Charter of Rights Elaboration of the Charter of Rights itself shows how a more open, inclusive and media-responsive constitutional process might be generated- see G. de Burca, "the Drafting of the EU Charter of Fundamental Rights", (2001) 26 *European Law Review*, 126. In terms of European institutions the concept of rights provides an interesting test case for the balance between unity and diversity that is sought in a constitutional framework.