

Essay: What Constitution for Europe. Can a Gathering of Assorted Musicians Create a Harmony?

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Welche Verfassung für Europa? Thomas Bruha, Joachim Jens Hesse & Carsten Nowak (Eds.); Nomos Verlagsgesellschaft (Baden-Baden); € 50,--

Morag Goodwin

[1] The bewildering number of articles and books which concern or touch upon the European constitutional debate (1) remind one, at times, of a children's orchestra in which each child plays as loud as possible (more in order to hear themselves than to make themselves heard) and without listening carefully to the parts of others. The result is, simultaneously, an inharmonious cacophony of individual instruments to the skilled listener; an encompassing and confusing wall of sound to the amateur. Refined only slightly, the crude and unoriginal analogy (2) is not far off the mark in describing the community of scholars working in the field of European constitutionalism: it is rare to find a commentator willing to grasp the score as a whole; most choosing, instead, to focus only on their section. Interdisciplinary research seems to be just as often proclaimed as it is ignored. While it would be both undesirable and impossible to have (keeping with musical metaphor) everyone singing from the same song-sheet, an orchestra can accommodate a wide variety of sounds and parts before it descends into the sort of tuneless noise one associates with so many school orchestras.

[2] Perhaps in recognition of the noisy state of the constitutional debate, the Europa- Kolleg, Hamburg, held an interdisciplinary colloquium in November, 1999, under the title *Welche Verfassung für Europa?* ("What Constitution for Europe?"). (3) The colloquium brought together scholars from the fields of law, political science and economics. The resulting book contains fourteen essays, considering various aspects of the constitutional debate from the perspective these disciplines. The question, to which those gathered at the colloquium addressed themselves, is suggestive of how far the debate has come in the last twenty years. In 1983, the Europa- Kolleg held a similar seminar concerning the European constitutional debate, then entitled "*Eine Verfassung für Europa*" ("A Constitution for Europe"), which, according to the introduction to the present collection, resulted in the strong endorsement of a European constitution. Indeed, one of the contributors to the new volume begins his essay by noting that conventional wisdom is converging around the opinion that Europe needs a constitution, certainly an over-simplification of the debate, but an over-simplification that would nevertheless appear to have some basis in truth, best demonstrated by calls from the Euro-sceptic community, notably by *The Economist*, for a constitution. (4) The meeting in 1999 was meant to build upon the consensus of the earlier colloquium concerning the necessity or desirability of a European constitution, focusing instead on the form and content a constitution should take and the process by which it should be developed. It is upon these aspects of the constitutional debate that the book focuses, and with the "European Constitutional Convention" convening this week under the leadership of former French President Valéry Giscard d'Estaing, the volume's topic is imminently contemporary and highly relevant.

[3] The book is divided into five sections. Section one acts as an introduction to the debate from the perspective of each of the disciplines. The second section, consisting of only one piece, examines the infamously contentious relationship between the German Constitutional Court and the European Court of Justice. The third section examines the discussion from the perspective of institutional reform and eastern enlargement. Section four considers a European constitution from an economic perspective and the development of global constitutionalism through worldwide economic cooperation. The final section is concerned with the shape of the constitution and the processes by which it might be developed. An appendix contributes the text of the Charter of Fundamental Rights and the 1999 Commission report examining the implications of enlargement. (5) The book does not aim to provide a comprehensive examination of the debate, nor does it claim to be an introduction to it. Rather, it is a simple collection of short pieces allowing well-known scholars in the field of European studies to make suggestions for the shape of further integration. It is reasonably well-balanced between the disciplines, although one might wonder why there is a section, section four, dedicated solely to economic matters, albeit not all written by economists, and an entire section (section two) for just one contribution. These, however, are minor points of criticism of this otherwise useful collection. This review will concentrate on the introductory section and the final section, which examine the possible forms and processes of European constitutional- creation. (6) Later, the book, as a whole is briefly considered in general terms.

The different orchestral sections: the state of the constitutional debate

[4] The three essays in the first section of the book, by Ingolf Pernice, Stefan Voigt and Joachim Jens Hesse respectively, are concerned with presenting the nature of the debate from the perspective of the three disciplines. All three provide somewhat stylised introductions to the state of the constitutional debate thus far. The brevity of the essay format and authors' desire to get on to the real task of discussing what form a constitution might take, no-doubt being responsible for this. However, it is worth commenting on the over-reliance of both Pernice and Voigt on the predominantly German 'no-demos' school in introducing the debate. (7) Indeed, many of the ideas in the book appear to be based upon, either agreement with or dismissal of Dieter Grimm's 'no-demos' theory, to the near-complete exclusion of other perspectives. This is no doubt because of the iconic status of both Kirchof and Grimm within Germany, and this compilation is almost entirely composed of German scholars. Still, opposing views are generally presented, if not named. Voigt, (8) in his comparison of an economic approach to the concept of a constitution with that of a legal perspective, asserts that, while an economic approach answers in the affirmative the question whether Europe already has a constitution, the definition of constitution used by lawyers would lead them to a contrary conclusion. This conclusion is based upon his assessment of the legal debate as being one in which Grimm's thesis is widely accepted. Pernice, however, sharply dismisses Grimm's approach, which holds that a constitution for Europe is currently excluded by the clear lack of a European *Volk* or *demos*. Pernice says this argument is "*akademisch und unergiebig*" ("academic and unproductive"). (9) Thus, Voigt's one-sided summary of the legal constitutional debate is surprising in light of the opportunity he presumably had to hear the papers of those such as Pernice at the colloquium, almost two years prior to publication, suggesting perhaps that inter-disciplinary work takes some practice.

[5] Pernice's vision for a European constitutional order is premised on the understanding that the discussion about whether Europe needs a constitution, or whether one is possible, is academic and unproductive simply because, in his opinion, Europe already has a constitution. For Pernice, the European Union already is a constitutional legal order, as proclaimed in the Court of Justice's celebrated *Van Gend en Loos* decision, (10) and thus the community treaties serve as a constitution, without a state and without a demos. His fear that any challenges to this position would lead to a destabilising of the Union leads to an interpretation of the question "What Constitution for Europe?" as being, rather, a question of the improvement of the existing constitution: "*die Demokratisierung, Konsolidierung, und Effektivierung*" ("making it more democratic, consolidated and effective") of the current treaty structure. (11) This practicality of approach is echoed by Hesse. (12) Hesse's attitude to the discussion is clear at the outset, the title of his essay itself proclaiming the intention of setting the debate: "*Vom Kopf auf die Füße*" ("Making the Ideas a Reality"). What he means by setting the debate on its feet is made clear in his condemnation of the constitutional debate as being far too orientated towards convictions, an approach he would replace with one which is explicitly functional and places the institutions and the actors at the centre of the debate. (13)

[6] The economists are, according to Voigt, equally uninterested in the grand vision approach to the constitutional discussion. Voigt takes the provision of public goods as the basis for his analysis of the institutional arrangement at the European level, an approach modelled on the theories of New Institutional Economics. In contrast to what he sees as the essentialist approach of the other disciplines, economists are presented as interested in behaviour; thus, whether one chooses to label the European institutional arrangements as a constitutional legal order is irrelevant. What is important from this perspective is whether such institutions cause people to behave differently. In Voigt's own words: "Incentives to act are structured by benefits and costs and not by giving names to that structure." (14) Therefore, the "crucial" aspect of constitutions is that they need to be self-enforcing, such that people acting in accordance with constitutional rules cannot make themselves better off by not complying with them. Constitutional economics, thus, is the search for institutional arrangements which constrain "utility-maximising" government representatives so that a maximization of their interests simultaneously leads to an increase in welfare for all. This approach leads one back to the consideration of a European public sphere, and hence, in part, to the existence of a European *Volk*. The demos reappears in this model because the goal a self-enforcing institutional arrangement depends upon the existence of a defined group, the "self" in the term "self-enforcing." Voigt, however, refuses to be drawn out on the question of the existence of a public sphere at the European level, simply commenting that national constitutions remain more enforceable, a rather unsatisfactory last note to his arguments.

[7] The legal scholar and the political scientist are not, however, as unwilling to present a vision of how a European constitution might be shaped. Hesse speaks of a bigger picture, despite his dismissal of those fond of expounding blueprints and grand visions. Pernice understands the Community treaties as forming a "*Komplementärverfassung*" ("complementary constitution") which work with national constitutions, an understanding which leads him to a Europe of a supranational "*Verfassungsverbund*" ("constitutional union"). This perspective is informed by the clearly stated belief that the European project should not be about creating a state, not even on a federal model. For Pernice, the Europe of Monet and Schuman is beautiful precisely because it surpasses the nation state, a point of view most closely associated with Joseph Weiler. (15) The *Verfassungsverbund* is to be achieved by the withering-away of the separate constitutional traditions at the national and European level, and the formation, in practice, of a single constitutional unit, a "*Doppelverfassung*" ("double constitution"). (16) Thus a *Verfassungsverbund* does not require a

homogenous European *Volk* but is a "constitution of diversity;" (17) a union of peoples in all their multiplicity, an understanding based very much upon Weiler's "Principle of Constitutional Tolerance." Pernice sees the creation of Union citizenship as implying that the citizens of Europe have already partly defined themselves as the legitimating subjects of the European Union, an understanding that does not necessarily hold true. One could contend that the indirect democratic nature of the treaty-revision process and the empirical data suggesting that little over half of the citizens of Europe actually define themselves as such, (18) place Pernice's contention in some dispute. Moreover, the understanding that a *de facto*, single constitutional unit could develop, and ensure that "*für jeden Fall trotz zweier formal autonomer Rechtsquellen stets nur eine rechtliche Lösung produziert wird.*" ("in every case, instead of two formal autonomous sources of law, only one legal opinion would be produced."), (19) can be seen as a similarly optimistic interpretation. The expectation of a harmony of opinion between national constitutional courts and the Court of Justice, upon the premise that the content of national constitutions are only understandable in the context of European rules and regulations and that the European order can only function on the basis of the democratic structure and the rule of law in Member States, is thrown into some doubt by the already difficult relationship between them. This is most famously demonstrated by the sparring between the German Constitutional Court and the ECJ, which Nicholayson examines in some detail in this volume. (20) Pernice answers such criticisms with the conclusion that the necessary cooperation and interaction already going on between the national and European levels in the administrative, political and legal spheres, is leading to a spontaneous development of a common European constitutional law just as it is leading to a common political culture. If this is the case, it is a development arguably still in its early stage, making a *Verfassungsverbund* a vision for the future rather than a description of the present state of things. This, however, appears to be a view that Pernice would not accept.

[8] Hesse, on the other hand, takes as his *Leitsätze* (guiding principles) that constitutional development is foremost a political process and that, on this basis, there is much to be learned (both normative and functional) from the experience of nation-states, even if it is merely as an example of what should be avoided. Hesse approaches the constitutional debate from a federalist perspective, holding that the constitutional discussion belongs within an active understanding of federalism, an approach taken by many of the contributors. Thus, any *Kompetenzordnung* (order of judicial competence) in Europe must be considered not just horizontally but also vertically. Using the *Bundesländer* (German Federal States) as his example, Hesse details the concerns over the effect the loss of competences to the European level raises regarding the cultural and economic identity of Member States and the regional units within them. In this regard, he considers it necessary to lay down a clearer division of competences in the various sectors at the European, national, regional and local level; recognising, thereby, the importance of "*Einheit in Vielfalt*" ("unity in diversity"), and using the German system as a basis for further integration. Hesse does not, however, consider the development of a formal constitution, and does not make clear whether this is due, like Pernice, to an understanding of Europe as an already constituted order. Rather, he concentrates on the shape of future integration, not through a grand scheme but in the details of possible policies such as agricultural subsidies and the further development of military co-operation. However, while the approach is a novel one, and interesting on for that reason, one cannot help but wonder whether an excessive concentration on the practical details of further integration simply serves to mask the "conviction-orientated" but vital questions about the legitimacy of a European polity, an issue which he does not address.

A new tune? Possible processes of constitutional creation

[9] Having described the state of the debate in each of the three disciplines, the three papers that follow the introductory essays, by a legal scholar and two political scientists, concentrate upon the practicalities of achieving a formally constitutionalized Union. In considering the form and process of a European constitution, Stefan Oeter views the debate through the lens of the "*Souveränitätsfrage*" ("sovereignty question"), the seemingly eternal question for lawyers in the constitutional discussion. (21) Accepting that Europe is a constitutionalised legal system, for Oeter the question of a constitution is really one of whether we desire the creation of a formal document and what the costs and benefits of this process would be. He acknowledges the widely-held fear, or indeed hope, that a formally constituted Europe, is a Europe in transition to statehood:

"Während für die eine Denkrichtung das integrierte Europa 'nicht sein kann, was nicht sein darf', nämlich ein Staat mit echter Verfassung, muß für die Gegenthese dieses Europa der Zukunft genau das 'sein können', weil es dies – in teleologischer Perspektive – 'sein muß'."

("Whereas for some thinkers an integrated Europe 'cannot be, what cannot be allowed', namely a state with a formal constitution, is for their opponents the Europe of the future that precisely 'can be', because it – from a teleological perspective – 'must be'.") (22)

He concludes that, while a Europe with a formal constitution will not automatically lead to statehood in the sense of a super-state, a formal constitution will lead to a federal Europe. It is this understanding that informs his cost-benefit analysis.

[10] Oeter, as Hesse, uses the German federal model as a basis for what a constituted Europe might look like. His examination of the federal vision of a constitutional Europe sees a constitution as creating a "new people," a sovereign power of which the European Parliament would become representative, with the Council as a mere second chamber. In this nightmare scenario for Euro-sceptics, Member States would lose their power of veto and the question of their individual international legal personality would become even murkier. Such would be the costs of a formal constitution, according to Oeter. But what if the peoples of Europe consider the price too high? It is difficult to gainsay Oeter's contention that the European public is not currently willing to pay so dear a price and he warns that such a revolutionary act as the creation of a new *Grundnorm* (basic order) without a clear majority in favour would be an act of construction. (23) Indeed, he notes that, not only is there no indication that the citizens of Europe desire further integration, but every suggestion is that a majority see Europe as part of the problem. Such a polity, lacking independent legitimacy, would be in constant danger and would be a disaster for the European project. This leads him to question the need for a formal constitution and to an examination of whether one actually needs to change the current treaty structure in the face of the challenges ahead. Moreover, Oeter presents other objections to a federal structure, namely that of their strong centralizing tendencies; the retention of consensus is necessary to prevent "*die Arroganz der Macht*" ("the arrogance of power"), (24) a feature he holds as common to federal systems, and a genuine danger considering the gravitational pull a structure with the wealth and power of the European Union would be able to exert. This danger is seen as acute for the multinational EU. No doubt, these are genuine concerns; however, Oeter fails to consider a different model of federalism, such as the heterogeneous and multinational Swiss Republic, which, although it may be relatively centralised, has nevertheless appeared to have developed means of preventing the secessionist claims Oeter so fears. Indeed, he has failed to even consider an EU polity that is not predicated on a federal model.

[11] However, in light of these concerns and the insight that what underlies the public's distinct lack of enthusiasm for Europe is the lack of transparency, Oeter sees the real problem as being not one of a formal constitution, but rather an internal problem, in which the solution would be to normalise the position of the European Parliament, creating a fully democratic body. One might question the possibility of a fully democratic parliament in which Member States retain their vetoes; or how expansion of the Union can be contemplated in a system predicated upon the necessity of retaining the veto, and Oeter does not attempt to address these issues. It is such an outlook that leads Oeter to reject a federal structure in favour of a *Staatenverbund* (union of states), a triumph of the status quo. But the real conclusion is that the debate about where sovereignty lies is irrelevant in the constitutional debate. Rather, Oeter's approach sees the constitutional debate as being about the internal ordering of institutions and the creation of a belief in the possibility that a formal constitution will ensure a better political process: constitutionalisation without a constitution (yet).

[12] Landfried, a political scientist, has a very different approach. (25) She sees the development of a *Verfassungsstaat* (constitutional state) as not only possible, but also desirable as the only means of overcoming the democratic deficit at the heart of the EU, an entity she condemns as a "*Zipfel Demokratie*" ("a corner of democracy"). (26) She concentrates, however, on the question of feasibility, using the 'no-demos' theory as a frame for her own ideas. Landfried conducts an empirical analysis of the European public sphere to counter Grimm's ideas, focusing especially on the numbers of non-governmental groups in Brussels, informing the reader that in 2000 there were 3,479 different interest groups ranging from think-tanks (as many as 46) and regional representatives (as many as 219) and press agencies (as many as 52) and representatives of individual companies (as many as 452). (27) She imparts the interesting fact that more people work in the Brussels lobbying office of Daimler-Benz than in the European-wide organisation *Vereinigung der Arbeitgeber- und Industrieverbände* (The Association of Employers and Industrial Unions), although she fails to state whether the lobbyists of Daimler-Benz are all included in her statistic that counted 452 private representatives and lobbyists, or whether they count as one, a point of no great significance but one which shows the problems of attempting to measure something as enigmatic as the public sphere in numbers alone. One can also be sceptical about whether commercial lobby groups, which make up the largest part of the 3,479-strong figure can really be understood as representing the European public; one might venture the opinion that the visible domination of business interests is a part of the legitimacy problem rather than of the solution.

[13] Her dismissal of the 'no demos' theory is also based upon the well-known arguments of Joseph Weiler, who has focused on the civic benefits of Union membership and the de-coupling of nationality and citizenship through a multi-faceted identity. Landfried holds, on this basis, that the dialogue of the European people that would necessarily attend the decision whether to adopt a European constitution would strengthen a sense of common identity, a contention Weiler himself may not be so bold in asserting because the experience of the Charter of Fundamental Rights would suggest that the process of bringing the public into the European debate is one which could take much longer than previously expected. Moreover, while using Weiler's language of identity, Landfried reaches a conclusion different from Weiler's "if it ain't broke, don't fix it" approach. (28) Landfried's *Verfassungsstaat* is to be based upon a federal model, with a directly elected European Parliament, although Member States would remain the basis of the federation. Moreover, her conviction ("*Eine klare politische Linie hat jetzt Priorität*" ("a clear political line now has

priority")) (29) regarding the necessity of a constitution leads her to view positively the calls by those such as Fischer and Chirac for a pioneering inner-circle to advance ahead of the remaining Member States, to form the "*Euro-Europäer*" ("the Euro-Europeans") (30) and appears to blind her to any consideration of the much-publicised dangers of a "two-speed Europe," dangers considered by other contributors, such as Pernice and Hesse, in their consideration of flexible integration as a means of moving forward.

[14] Wagner, another political scientist, also considers a European constitution from the perspective of the lack of democratic legitimacy of the current structure, but in a very different way than Landfried. (31) He sees the lack of a European *Volk* and, like Oeter, the dangers of centralisation that a constitution can create, as requiring that the Member States remain "*Herren der Verträge*" ("Masters of the treaties"). Wagner's approach is an eminently practical one. Although he feels the time has probably not yet come for a European constitution, as the debate concerning the necessity of a formal constitution is still raging, it is nevertheless worth asking the questions about the forms a constitution should take and about the processes that might lead to a constitution. (32) More particularly, his essay is concerned with the form a constitutional body should take.

[15] Wagner suggests two possible ways of forming a constitution-creating body at the European level. First, the people of Europe could elect fellow citizens to form an assembly. However, he rejects this idea not only on the basis that there is no European *Volk* and we could wait forever for one to form, but because such a process would see the Member States dislodged from their position as "*Herren der Verträge*" to become "*Objekte einer Föderativ-Verfassung*" ("objects of a federal constitution"), a demotion, as Wagner sees it, that they would never accept. The second possibility is the creation of a constitutional body consisting of one representative selected from each Member State (and presumably he would include candidate countries, although he does not specifically indicate this), chosen by the Member States themselves. They would be entrusted with drawing up a constitution which would need to be approved by both the European Parliament and the Council. Such a conservative vision is justified by reference to, in Wagner's words, "*die nachträgliche Abdankung*" ("the subsequent abdication"), whereby he uses an analysis of the federal structures in Switzerland, Germany and the United States to show that the power of the individual states, *Kantone or Länder* has been dramatically reduced from what was intended by the respective constitutional drafters in those nations. Thus, in these countries, the "*Herren der Verfassung*" have been caught up in a "*Strudel der Zentralisation*" ("whirlpool of centralisation"), a fear similar to Oeter's "*Arroganz der Macht*." (33) It follows that, in order to avoid the scenario in which national parliaments are consigned to irrelevance, it is the Member States themselves who must form any type of *europäische Hohe Verfassungsgrat* (HVR or European high constitutional council).

[16] However, this body will not consist of members of national parliaments, but will be made up of "*den höchsten politischen Vertretern der Unionmitglieder*" ("the highest political actors in the Member States"), a membership which he acknowledges will simply be the European Council or the heads of Government under another name. Such an uninventive proposal is justified by the assertion that the highest politicians in the land are the most qualified and competent to perform the constitutional task, being the best minds in the land. This fact would permit them to achieve agreement in a relatively short time and an efficient manner. His contention would suggest a lack of awareness of the calibre of politicians many countries tend to elect; while it is true that Germany generally tends to elect well-educated politicians, other countries are not always as fussy and one wonders, for example, whether the former British Prime Minister, John Major, could really be considered among the best minds in the land. Moreover, while efficiency in the drafting process is also to be maintained by Qualified Majority Voting (QMV), Wagner does not however attempt to reconcile the seeming anomaly of his fear of bypassing the individual Member States with a shift to QMV.

[17] More importantly, Wagner, like Hesse, does not address the problem of the lack of direct involvement of the peoples of Europe in his model, a significant flaw even if one does not accept the existence of a European *Volk*. Some of those who do not accept the existence of a European *Volk*, such as Landfried, value the constitutional project, hoping that it will go some way towards addressing this gap. He does not explain, for example, why a centralised Union directly elected by the peoples of Europe would be less democratic than his proposal, although he rejects the former. In this sense, one wonders why he did not attempt to combine his model with the more open process which accompanied the drafting of the Charter of Fundamental Rights, if it is indeed true that the Member States would never accept a directly-elected body. (34) Yet, he claims that his model of an HVR would see the peoples of Europe as "*Herren und Hütern*" ("masters and guardians") (35) of the constitution of their Union, a conclusion which is not as obvious as he suggests. Moreover, centralisation is automatically assumed to be a bad thing and Wagner makes no attempt to provide justification for his concerns, as Oeter does.

Grasping the whole score

[18] It is appropriate now to move from the particulars to the general and consider the book as a whole. On a practical level, there was a tendency towards repetition, particularly in the summaries of the state of the constitutional debate which all used to set the scene for their comments, but this is presumably inevitable in a collection of papers. It is also

necessary to comment upon the impact of the time delay from the colloquium to publication, a period of almost two years, a considerable period in the context of the dynamic and fast-moving European debate. This is particularly noticeable in comments on the Charter of Fundamental Rights, which although appended, is still, as far as the contributors were concerned, was in the process of being drafted. While this may not create serious problems as regards consideration of the Charter, as it is more the process rather than the content which is interesting in the constitutional context, the number of books on the market in this field necessitate a greater concern with keeping abreast of developments. (36) Also, the brevity of the essays in this volume, rather than perhaps the essay format itself, allow one only a sketch of the closer integration envisioned, and the lack of details ultimately leave one rather unsatisfied.

[19] There is a strong tendency throughout towards a Germanocentric outlook, not only with the many references to Grimm and the 'no-demos' school, but also in using the German federal system as the basis of many of the deliberations. Hesse considers this a reflection of the dominance of German academics and politicians in this particular debate. However, while this may be the case in the sovereignty-based constitutional debate, the constitutional discussion can be seen to have broadened in the last few years to involve constitutionalism as a process rather than an end in itself, and in which the Europe polity is increasingly considered through the concept of constitutional pluralism, a Europe, in Shaw's words, "constantly renegotiated through the doing". (37) While this approach appears to be predominantly Anglo-Saxon, Pernice did seem to be hinting at such arguments with his *Komplementärverfassung*; nevertheless, the book as a whole remains firmly stuck in the question of *Kompetenz-Kompetenz*, (38) even where the relevance of the *Souveränitätsfrage* to the constitutional debate is rejected, as by Oeter. This has powerful implications for the Union as a multinational and multicultural entity. Although nearly all the contributions recognised centralisation as a danger for the multinational character of the Union, and thus saw the benefits of a multi-layered system of European governance, (39) the issue was seen largely from a practical perspective of the difficulties of implementing common policies across a polycentric entity. A pluralistic approach was not viewed as a good in its own right. (40) The models of European constitutionalism thus presented were seen almost entirely from the perspective of practicality, representing a failure to grasp the opportunity the constitutional debate at the European level presents to renegotiate modern constitutionalism. (41) They were very much top-down visions, with no consideration of the exciting new conceptions of constitutionalism as a discursive process, as a form of intercultural dialogue, a process which arguably holds so much possibility for minority and disadvantaged groups within European society. The unwillingness to see the constitutional process as an opportunity for greater inclusiveness is arguably also reflected by the inclination to consider eastern Enlargement as a problem, necessitating constitutional reform, but not as a welcome occasion to increase diversity, a value proclaimed but clearly not taken to heart. This tone is also partly indicated by the framing of the question "What Constitution for Europe?," a usage of the term 'Europe' which is a notable and unnecessary irritant to central and eastern Europeans. (42) It is this failure to recognise that the constitutional debate has moved in new directions that is the fundamental weakness of the book.

[20] Despite these shortcomings, has the colloquium produced a new sound? Inter-disciplinary work is doubtlessly difficult to do well and the details in a number of the economic essays, for example, are difficult for the non-specialist to understand, although the general point being made can be grasped. A number of the essays and their presentation of concrete suggestions were both interesting and enjoyable. However, while the orchestra many have created a harmony of sorts, it could be seen as one in which the works of only a certain type of composer are played to the exclusion of all others, so that, although the value of these composers is undoubtedly considerable, the audience is much the poorer for the limited repertoire. In this way, the reader is poorer for the failure of the book to consider perspectives to the constitutional debate other than the traditional and to develop an inter-cultural constitutional understanding.

(1) I recognise the inappropriateness of calling the debate within the European Union a European debate, when at least half of Europe is excluded. However, this would seem to be the accepted practice and for the sake of ease I have followed it. The question of the chosen title of the book will, however, be considered later.

(2) The analogy of an orchestra to the European Union has been used many times, for example by Timothy Garton Ash, ("The European Orchestra" (2001) 3 *Hoover Digest*; accessed on-line at <http://www-hoover.stanford.edu/publications/digest/013/ash.html>) although not perhaps to refer to the academics and politicians who dominate much of the debate.

(3) Hereinafter, *WVE*.

(4) Stefan Voigt, "What Constitution for Europe? The Constitutional Question from the Point of View of (Positive) Constitutional Economics," *WVE*, 41. It remains, however, a simplification of the debate to suggest that most now

accept a constitution as a necessity, as this claim glosses over a wide variety of strongly held opinions, such as those that hold the European Union to be a constituted legal order without desiring a formal constitution, an opinion held notably by Weiler (see *The Constitution of Europe*. Cambridge: CUP, 1999) and Pernice (below).

(5) Richard von Weizsäcker, Jean-Luc Dehaene, David Simon, *Die institutionellen Auswirkungen der Erweiterung*. Bericht an die Europäische Kommission, 18/10/1999.

(6) The selected sections were chosen, respectively, for their general nature, best placed to allow consideration of the inter-disciplinary approach, and as best representing the areas to which it was hoped to bring new perspectives.

(7) For an introduction to the 'no-demos' thesis: Dieter Grimm, "Does Europe Need a Constitution?", (1995) 1 *European Law Journal* 282. For a reply: Jürgen Habermas, "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'", (1995) 1 *European Law Journal* 303. See also Joseph Weiler, "Demos, Telos, Ethos and the Maastricht Decision" (1995) 1 *European Law Journal* 219.

(8) Voigt, *supra* n. 6.

(9) Ingolf Pernice, "Die Verfassungsfrage aus rechtswissenschaftlicher Sicht", *WVfE*, 21.

(10) Case 26/ 62 [1963] ECR, 1-30.

(11) Pernice, *supra* n. 11, at 22.

(12) Joachim Jens Hesse, "Die Diskussion um eine europäische Verfassung: Vom Kopf auf die Füße zu stellen", *WVfE*, 63.

(13) Hesse, *supra* n. 14, at 65

(14) Voigt, *supra* n.6, fn 15, at 47.

(15) Weiler, *supra* n.6

(16) Pernice, *supra* n.11, at 27.

(17) *Ibid.*, at 30.

(18) In an Autumn 1999 Euro barometer survey, 52% identified themselves as European; figures in Christine Landfried, "Auf dem Weg zu einem europäischen Verfassungsstaat?", *WVfE*, at 273.

(19) Pernice, *supra* n.11, at 31.

(20) Gert Nicholayson, "Der Streit zwischen dem Bundesverfassungsgericht und dem Europäischen Gerichtshof", *WVfE*, at 91. See particularly *Brunner v. European Union Treaty* [1994] 1 *Common Market Law Review* 57 (the so-called *Maastricht* decision).

(21) Stefan Oeter, "Vertrag oder Verfassung: Wie offen läßt sich die Souveränitätsfrage halten?", *WVfE*, at 243. Jo Shaw has, interestingly, commented that much of the constitutional debate has in fact been a discussion about sovereignty, that constitutionalism has been viewed largely "through the prism of sovereignty and legal power." (Shaw, "Postnational Constitutionalism in the European Union" (1999) 6 *Journal of European Public Policy* 579, at 585).

(22) Oeter, *ibid.*, at 247.

(23) Bieber, too, warns of a situation in which the European institutions are both "Träger und ... Objekte der Integration" (Roland Bieber, "Verfassungsfrage und institutionelle Reform", *WVfE*, 111, at 114). Interesting in this regard, and also for Wagner's essay discussed below, is an excellent paper by Hans Lindahl, "Sovereignty and Representation in the European Union" (in N. Walker, *Sovereignty in Transition*. Oxford: Hart, forthcoming), in which his (indisputable) contention that every unit is necessarily a represented unity suggests that the enactment of a constitution must be an act of "seizing the initiative" of construction.

(24) Oeter, *supra*, n.29, at 257.

(25) Landfried, *supra*, n.24, at 265.

(26) Landfried, *supra*, n.24, at 275. The possibility of treaty revision along the lines of the recommendations made by the Robert Schuman Centre was considered and rejected on the grounds that a basic treaty will not make the Union more democratic. (Robert Schuman Centre, *Reforming the Treaties' Amendment Procedure: Second Report on the Reorganisation of the Union Treaties* (Robert Schuman Centre, 2000))

(27) *Ibid.*, at 269

(28) Weiler, "Fischer: The Dark Side" in C. Joerges, Y. Meny and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*. Florence: Robert Schuman Centre, 2000; available on-line at: <http://www.iue.it/RSC/symposium/>

(29) Landfried, *supra*, n.24, at 277.

(30) *Ibid.*, at 276.

(31) Helmut Wagner, "Gibt es einen Königsweg zu einer europäischen Verfassung?", *WVfE*, 281.

(32) Wagner sees it as essential that a constitutional creation process include not just the fifteen Member States, but also the candidate countries – a point which no other contributor makes, with the exception of the only east European in the volume, Hanna Suchocka. (Suchocka, "Reflexionen über die Idee einer europäischen Verfassung", *WVfE*, 149.)

(33) Wagner, *supra*, n. 42, at 293.

(34) Although, some, notably Walker, have expressed warnings about applying the Charter process to other areas of reform within the Union (paper given in the context of a departmental seminar "The Charter of Fundamental Rights" at the European University Institute, Florence, 21st November, 2001.)

(35) Wagner, *supra*, n.42, at 298.

(36) The literature is truly vast in all three disciplines. For a place to start: Weiler, *supra* n.6; G. de Búrca & J.Scott (eds.), *Constitutional Change in the European Union: From Uniformity to Flexibility?*, Oxford: Hart, 2000; Frank Ronge (Hrsg.), *In Welche Verfassung ist Europa – Welche Verfassung für Europa?* Baden- Baden: Nomos Verlagsgesellschaft, 2001.

(37) Shaw, *supra*, n.29, at 593. See in particular, among others: James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*. Cambridge: CUP, 1995; N. MacCormick, *Questioning Sovereignty: Law, State and Practical Reason*. Oxford: OUP, 1999 (esp. Chapter 7); N. Walker, "European Constitutionalism and European Integration" (1996) *Public Law* 266; J. Habermas, *Zeit der Übergänge*. Frankfurt: Suhrkamp, 2001, chapter 7.

(38) "Kompetenz- Kompetenz" refers to the competence to decide jurisdictional boundaries.

(39) See in this regard, G. Marks, F.W. Scharpf, P. Schmitter, W. Streek (eds.), *Governance in the European Union*. London: Sage, 1996; Alex Warleigh, *The Committee of the Regions: Institutionalising Multi-level governance?*, European Dossier Series. London: Kogan Page, 1999.

(40) The danger of failing to understand the importance of a 'politics of recognition' is well explained by Charles Taylor in A. Gutmann (ed.), *Multiculturalism*. Princeton: Princeton University Press, 1994.

(41) The recognition of modern constitutionalism as one inherently prejudiced to minority and disadvantaged groups within society and thus of the need to renegotiate a common understanding of the constitutional process is Tully's, *supra*, n. 53

(42) In this regard, see Suchocka in this volume, *supra*, n.44; also Wojciech Sadursky, *Charter and Enlargement*, 2001 (on file with the author).