

THE TWO EUROPEES

N. W. BARBER^{*}

There are two Europes: a pair of political entities that occupy the same territory, have identical membership, share almost all the same rules, and yet are divided by radically different understandings of the point of the European project. The first Europe is a fledgling state, a federal construct in which the Member States are non-sovereign regions within the polity. This vision is exciting: a Europe that can become a superpower, a Europe capable of rivalling America and China. The second Europe is a confederation of states, an international construct under the control of its sovereign Member States. This vision is also exciting: a form of confederation deeper and richer than any other in the modern world, a new form of that polity, a political unit built on the agreement of its constituent parts rather than the absolutism of a state constitution. One of the reasons for the success of the European Union lies in the avoidance of resolving the disagreement between these two visions. There is a sort of constructive ambiguity, a Grand Bargain, that permits people who subscribe to each vision to work together – aware that their disagreement might, one day, need to be fought out, but also aware that there is a great deal to be gained by postponing that moment of choice. Perhaps unintentionally, the Draft Constitutional Treaty undermined this compact, pushing Europe towards the first, state-focused, model. Worse still, once the Draft Constitution was rejected by France and the Netherlands (and looked likely to be rejected by other states in which a referendum was promised), much of the substance of the Draft Constitution was copied into the Lisbon Treaty, and became part of European Law. It seemed that the European elite was unwilling to accept the verdict of the people. The dramatic story of the rise, fall, and resurrection, of the Draft Constitution is particularly unfortunate in that many important elements of the Draft Constitution – the practically significant parts of that document – need not have been controversial. There was no need to choose between the two Europes in 2004; constructive ambiguity could have been preserved.

^{*} Parts of this paper draw on N. W. Barber, 'The Constitution, the State, and the European Union' in J. Bell and C. Kilpatrick eds, *Cambridge Yearbook of European Studies: Volume 8 2005-2006* (Oxford: Hart Publishing, 2006). With thanks to Maria Cahill and Steve Weatherill for their helpful comments.

This chapter examines the two visions of Europe and illustrates the ways in which these rival visions were accommodated through constructive ambiguity. It then looks at the Draft Constitution and identifies the ways in which that document shifted the balance between these two visions, so challenging the compact on which the development of the Union had depended. The chapter concludes by drawing some very cautious and very weak connections between the Draft Constitution and the Brexit vote in the United Kingdom. If the Draft Constitution was the zenith of the state-model of the Union, Brexit may be its nadir; a reaction, a terrible over-reaction, against the centralisation of constitutional power within the European project.

TWO VISIONS OF EUROPE

Max Weber famously described the state as ‘a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory’.¹ Attention is often focused on the invocation of force within this definition, but, given that force need only be exerted when the state’s authority is challenged, it could be argued that authority, not force, is the primary part of the definition.² A core characteristic of states is the interaction of claimed authority and raw power: states are *sovereign* entities. State sovereignty embodies an assertion of authority and, moreover, an assertion of authority that is, in some respects, effective.³ The claims that are characteristic of sovereignty have an assertion of finality at their core.⁴ Not only does the state purport to tell people how they ought to behave, it also asserts that the decisions of its institutions may only be legitimately challenged within its constitutional structures: the state, as a whole, has the final say about the rights and duties of its nationals and those within its territory. This sovereign claim is coupled

¹ M Weber ‘Politics as a Vocation’ in H H Gerth and C Wright Mills eds, *From Max Weber: Essays in Sociology* (Routledge, 1991), 78. I discuss the nature of the state at length in N. W. Barber, *The Constitutional State* (Oxford: Oxford University Press, 2011)

² As Weber recognised: M Weber, *Economy and Society* (G Roth and C Wittich eds, California University Press, 1978), 903-904.

³ I discuss the principle of sovereignty at greater length in N. W. Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018), chapter 2.

⁴ F H Hinsley, *Sovereignty* (2nd ed, Cambridge University Press, 1986), 22-26.

with a requirement of effectiveness. For the state to exist in the world – and for the political ordering to be characterised by sovereignty – these claims must be effective to some extent. Whilst the claims of sovereignty are absolutes, the effectiveness of these claims is a matter of degree; no state is able to completely control conduct within its borders. Sovereignty, then, lies at the intersection of authority claims and power; it is a particular type of authority claim that has some practical power behind it.⁵

Federations are states. In a federation a single constitution divides power between the centre and the regions.⁶ All of the levels of government, the federal and the local, exercise delegated powers.⁷ These powers are conferred by a constitution,⁸ which normally claims to derive its legitimacy directly from the people as a whole.⁹ In federations power is divided such that each level of government has the final decision about some matters.¹⁰ Arend Lijphart goes on to identify a number of secondary characteristics of a federal state.¹¹ Federal states normally have written constitutions that are difficult to amend, a constitutional court that can police the boundaries between the regions and the centre, and a bicameral legislature, one chamber of which represents the regions.

Confederations, in contrast, are not states. Most political scientists understand confederations as political entities in which the central government is subordinate to

⁵ M Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), 81-82.

⁶ See further Erin Delaney's contribution to this volume.

⁷ D Elazar *Exploring Federalism* (Tuscaloosa, University of Alabama Press, 1992) 39-41. See also R L Watts 'Comparing Forms of Federal Partnerships' in D Karmis and W Norman (eds) *Theories of Federalism: A Reader* (Basingstoke, Palgrave Macmillan, 2005).

⁸ Watts, note 7 above, 240.

⁹ J Weiler, 'Federalism without Constitutionalism: Europe's *Sonderweg*' in K Nicolaidis and R Howse (eds) *The Federal Vision* (Oxford, Oxford University Press, 2001) 56.

¹⁰ See generally, A Lijphart *Patterns of Democracy* (New Haven, Yale University Press, 1999) chapter 10; K C Wheare *Federal Government* 4th ed. (Oxford, Oxford University Press, 1963) 33; D MacKay *Federalism and the European Union: A Political Economy Perspective* (Oxford, Oxford University Press, 1999) chapter 2.

¹¹ Lijphart, note 8 above, 186-191.

the regional governments.¹² In a confederation the centre and the regions lack the unifying constitution of a federation: the centre has its own constitution, and each of the constituent states has its own, underived, constitution. In Daniel Elazar's telling phrase, these are 'communities of polities'.¹³ Confederations, unlike federations, are not states because the confederation, in contrast to its constituent states, does not claim the monopoly of the legitimization of force, nor does it claim to possess supreme authority over people within its territory. Its authority is derivative, and the states may limit or remove the powers it possesses. Furthermore, the raw power of a confederation to enforce its decisions largely depends on the actions of its constituent states; it relies upon national enforcement structures to execute its decisions. In short, a confederation does not make the type of claims that are characteristic of a state: it does not claim sovereignty and could not, in any event, make good on such a claim.

Even if it is sharp in theory, the line between federations and confederations is blurred in practice. Whilst the existence of a single constitution in a federal state in contrast to the multiple constitutions of confederal entities provides a sharp theoretical division, this may not be of great practical significance.¹⁴ A constitution is not merely a legal document; it is the whole assemblage of rules that define the structure of the state. Some of these rules are legal, some are not. Sometimes the legal rules of the constitution fossilize, leaving an impression in the constitution once the effective rule has disappeared. The fossilization of legal rules coupled with the emergence of new conventions may allow a state to move from one form of government to another, even without explicit constitutional amendment.¹⁵ A confederation might grow into a federation as the boundaries between the competences of the centre and the states became more rigid. The relationships between the confederation's separate constitutions could become regulated by conventions – and, through these

¹² Wheare, note 10 above, 33; C Hughes, 'Cantonalism: Federation and Confederacy in the Golden Epoch of Switzerland' in M Burgess and A Gagnon, *Comparative Federalism and Federation*, (Toronto, University of Toronto Press, 1993), 155.

¹³ Elazar, note 7 above, 93, 50-54.

¹⁴ Ibid. 11.

¹⁵ See Wheare's discussion of various constitutions which have shifted in nature over time: Wheare, note 10 above, chapter 2.

conventions, the distinct constitutions may combine into a single constitutional entity. The question of whether a given political entity is a confederacy of states or a strongly federated state may be impossible to answer in some instances.

(i) *The First Europe: Europe as State*

Some of the founders of the European Union envisaged that it would, over time, become a state.¹⁶ Both Jean Monnet and Altiero Spinelli, key figures in the creation of the European project, were explicit their desire to create a federation.¹⁷ Monnet believed that the logic of integration would propel Europe ever closer; that gradually, perhaps over a long period of time, economic union would lead to a political union, which would eventually bring a federation in all but name.¹⁸ Spinelli was more direct, pushing for an explicitly federal structure from the start. Indeed, Spinelli was the animating force behind the 1984 Draft Treaty, a document that Andrew Duff describes as aiming to ‘pitch forward the constitution in a federal direction’.¹⁹ Spinelli’s Draft Treaty did not become part of the European legal order, but it had a significant impact on Europe’s constitutional development, with many of its ideas re-emerging in later treaties. It was also one of the documents that fed in to the deliberations of the Convention that drew up the Draft Constitution.²⁰

There are aspects of the European legal order, aspects present before and after the Draft Constitution, that echo Monnet’s and Spinelli’s aspirations for statehood. Most obviously, perhaps, the jurisdictional claims made by the Court of Justice of the European Union resemble the claims that we might expect to find the supreme court of a state advancing.²¹ The Court of Justice not only claims that European Law has

¹⁶ D. Dinan, *Europe Recast: A History of the European Union* 2nd ed (London: Palgrave, 2014), 10-13

¹⁷ Erin Delaney’s contribution to this volume provides a powerful account of the federalist thought at the start of the European project.

¹⁸ M. Burgess, *Comparative Federalism: Theory and Practice* (London: Routledge, 2006), 228-229; Duff, 79-81

¹⁹ A. Duff, *On Governing Europe: A Federal Experiment* (Brussels: The Spinelli Group, 2017), 111.

²⁰ Ibid. 195-197

²¹ H. Lindahl, ‘Sovereignty and Representation in the European Union’ in N. Walker, *Sovereignty in Transition: Essays in European Law* (Oxford: Hart Publishing, 2003).

supremacy over conflicting rules of national law,²² it also claims that it, the Court, is entitled to provide definitive answers to all questions of European Law,²³ and, moreover, is entitled to determine what constitutes an issue of European Law.²⁴

These three supremacy claims are not quite enough to meet Weber's definition of statehood. The Court of Justice does not claim comprehensive jurisdiction over the territory of Europe, and so does not claim that all exercises of legitimate power are legitimated by European institutions; there remain areas in which Member States act autonomously. But the Court of Justice does assert the right to determine whether or not European Law – and, consequently, its own jurisdiction – applies in these areas. If the claims made by the Court on behalf of the Union were accepted, the Court would have the final say on the legitimacy of all laws and state actions within the Union – even if, in the exercise of this capacity, it concluded that decisions about the legality of the act lay at the level of the Member States. On some understandings of sovereignty, understandings that build on, but modify Weber's, this assertion of supremacy is sufficient to constitute an assertion of sovereign capacity; the Court of Justice, on behalf of the Union as a whole, is advancing authority claims that are characteristic of a state.²⁵

The supremacy claims made by the Court are, perhaps, the most obvious, and important, element of the state-model within the European project, but others can also be identified. The introduction of citizenship in the Maastricht Treaty, for example, brought in a concept formed within the state into the European legal order.²⁶ At least part of motivation behind the introduction of citizenship was to bolster the apparent

²² Case 6/64 *Costa v. ENEL* [1964] ECR 585

²³ Art. 234 (formally Art. 177)

²⁴ J. Weiler, *The Transformation of Europe* in J. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), 21. Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

²⁵ I discuss the reasons for modifying Weber's account in Barber, note 1 above, chapter 2, and its implications for sovereignty in Barber, note 3 above, chapter 2; see also L. Green, *The Authority of the State* (Clarendon Press 1990) 78–83.

²⁶ See generally, N W Barber 'Citizenship, Nationalism and the European Union' (2002) *European Law Review* 241.

legitimacy of the Union, to persuade the people of Europe that the commands of Community institutions ought to be obeyed.²⁷ Where citizenship is established, the authority claimed by the state, its assertion of sovereignty, is an aspect of a particular form of constitutional relationship between the individual and state institution. Where state members are citizens, rather than subjects, they share in the control of the state and, in part because of this shared control, have a broad duty of loyalty towards the state. Of course, the formal aspects of citizenship might be in place without those characterised as citizens acknowledging this role, but it may have been hoped by the authors of the Treaty that the formal introduction of European citizenship would bring with it the emotional attachment sometimes experienced by individuals who are citizens at the national level.²⁸

The introduction of citizenship in Maastricht may have also amounted to an attempt to recast the basis of legitimacy of the European Union. The second vision of Europe, discussed below, grounds the legitimacy of the demands of Europe in the agreement of its Member States: it is the decision of these states to create and abide by the institutional structures of the Union that renders authoritative the decisions made by those structures. In contrast, the introduction of citizenship points towards a model of Europe in which the legitimacy of its institutions is derived directly from its people.²⁹ The elements of control and responsibility, at the core of the concept of citizenship, circumvent the Member States.

In addition to the supremacy claims advanced by the Court and the citizenship provisions, there are a host of other features of the Union that can be interpreted in state-like manner.³⁰ There is the European Parliament, a body that is directly elected

²⁷ S. O'Leary *The Evolving Concept of Community Citizenship* (London, Kluwer, 1996), chapter one.

²⁸ J. Carens, *Culture, Citizenship and Community*, (Oxford: Oxford University Press, 2000), chapter 7; J. Weiler, 'To be a European Citizen: Eros and Civilization' in J. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999).

²⁹ At the core of Mancini's argument for a federal Europe is the claim that only a federation could bring the democratic structures needed to legitimate the Union: G. F. Mancini, 'Europe: The Case for Statehood' (1998) 4 *European Law Journal* 29, 40.

³⁰ See more generally, J. Pinder, 'The New European Federalism: The Idea and its Achievements' in M. Burgess and A. Gagnon, *Comparative Federalism and Federation* (Toronto: University of Toronto Press, 1993).

by the people of Europe, there is the Council which, looked at in a certain light, resembles the second chamber of a federal legislature, and there are the treaties, which resemble constitutional documents, establishing and constraining these institutions.

(ii) *The Second Europe: Europe as States*

The second understanding of Europe regards the Union as a confederation of sovereign states, who have agreed to act together for their mutual advantage. A powerful scholarly articulation of this vision can be found in the work of Joseph Weiler. Responding to calls for the European Union to move towards statehood, Weiler warned of the centralisation of power that this would bring, and questioned whether the move was necessary.³¹ For Weiler, a strength of the Union is that it rests on the interaction of states, both with each other and with European institutions.³² Weiler contends that the principle of what he terms ‘constitutional tolerance’ is a distinctive feature of the European system. Whereas in a federal state regions are command to obey, in Europe Member States accept the constraints of membership. As Weiler puts it:

‘The Quebecois are told: in the name of the people of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name of the peoples of Europe, you are invited to obey.’³³

In each case the continuation of the polity depends on discipline, but in Europe this discipline depends on a continuing and voluntary act of subordination. For Weiler, this is a profound and valuable form of structuring, one that maintains distinct constitutional identities whilst, at the same time, requiring these entities to cooperate, interact, and respect each other.³⁴

³¹ J Weiler ‘Europe: The Case Against the Case for Statehood’ (1998) 4 *European Law Journal* 43, responding to Mancini, note 29 above.

³² Ibid, 62.

³³ Weiler, note 9 above, 21

³⁴ Ibid, 19-21. See also Weiler’s writing on European Citizenship which expresses a similar idea: Weiler, note 28 above.

This vision of Europe is one that is shared by many institutional actors within the Member States. Member State courts, in particular, have lined up to reject the supremacy assertions advanced by the Court of Justice. The German Constitutional Court has, perhaps, been the most articulate of the dissenters. In *Solange I* that court rejected the supremacy of European Law as articulated by the European Court of Justice. The court insisted on its duty to protect fundamental constitutional rights contained within the German Constitution: supremacy of European Law could not be accepted until the European legal order had the capacity to protect these rights.³⁵ In the *Maastricht* decision, the Court rejected the Court of Justice's claim to have the final say over the meaning and scope of European Law.³⁶ Whilst accepting that it was bound by the German Constitution to implement European Law as best it could, the German Court stated that it would not accept surprising readings of the Treaty that had the effect of extending the Union's powers.³⁷

Many, perhaps most, Member State courts have followed the model set by the German Constitutional Court.³⁸ Most recently – but before the result of the 2015 General Election that made the Brexit referendum likely – the United Kingdom's Supreme Court followed suit. In *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* the Supreme Court asserted that there were some parts of the United Kingdom constitution that might be beyond the reach of European Law – that in the event of a conflict between at least some of these constitutional instruments and the demands of European institutions, domestic constitutional instruments would prevail.

³⁵ *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, [1974] CMLR 540

³⁶ *Brunner v. The European Treaty* [1994] CMLR 57. See M. Zuleeg, 'The European Constitution Under Constitutional Constraints: The German Scenario' (1997) 22 *European Law Review* 19 for energetic criticism of the decision, and M. Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?' (1999) 36 *Common Market Law Review* 351.

³⁷ *Ibid*, para 33, 48-49. The case law continues after the fall of the Draft Constitution: C. Wohlfahrt, 'The *Lisbon* Case: A Critical Summary' (2009) 10 *German Law Journal* 1277.

³⁸ See, amongst others: Italy: *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372; France: *Nicolo* [1990] 1 CMLR 173; W. Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe – Democracy – European Union' (2008) 14 *European Law Journal* 1. The Danish Supreme Court has recently handed down a strong decision following this line of cases: R. Holdgaard, D. Elkan, and G. Schaldemose, 'From Cooperation to Collision: The ECJ's *Ajos* Ruling and the Danish Court's Refusal To Comply' (2018) 55 CMLRev 275.

Equally importantly, echoing the German Constitutional Court, the United Kingdom Supreme Court made it clear that it was for the courts of the United Kingdom to decide on the scope and effectiveness of European Law, rejecting the jurisdictional supremacy claims made by European courts.

A further point worth making about the supremacy claims of the European Court of Justice is the practical weakness of European Institutions. Whilst the claims made by the Court are sweeping, the institutions of the Union are almost entirely reliant on Member States for the execution of their commands.³⁹ If European Law is effective because of the relationship officials and others within the Member States have with their domestic states and not because of their relationship with the Union, the Union fails to achieve the level of effectiveness characteristic of a sovereign entity. It may be this qualification that led Walter van Gerven to assert that the most important reason the Union is not a state is that its peoples do not wish it to gain statehood.⁴⁰ Even if people are doing as the European Union requires, they are not doing so solely *because* the European Union requires it.

The second model of Europe is also evident in the citizenship provisions. The original citizenship provision was introduced by the Maastricht Treaty in 1993 and simply asserted that nationals of Member States were European citizens. This was quickly modified by the Amsterdam Treaty in 1999 which included a provision making it clear that European citizenship complemented, and did not replace, national citizenship.⁴¹ Whereas the Maastricht provision seemed to track our first model of Europe, the modified provision was more equivocal. It could be read as a compromise, or, even, it could be construed as a re-assertion of state sovereignty, as an insistence that national citizenship comes first, and European citizenship is secondary. This would reflect the reality of the law on citizenship. Citizenship of the Union continues to be dependent upon citizenship of one of the Member States, and European Law does not require that Member States confer domestic citizenship on

³⁹ A. Moravcsik, 'The European Constitutional Compromise and the Neofunctionalist Legacy' (2005) 12 *Journal of European Public Policy* 349, 370.

⁴⁰ W. van Gerven, *The European Union: A Polity of States and Peoples* (Oxford: Hart Publishing, 2005), 37-39.

⁴¹ The Lisbon Treaty later changed 'complementary' to 'additional'.

individuals – though it may require Member States to allow residency to family members of European Citizens.⁴² Member States retain control over the conferral of citizenship, and what legitimacy the Union gains through the creation of citizenship remains mediated through those Member States.

As with the first model of Europe, many of the other features of the Union could be interpreted as tracking this confederal model. The Council consists of representatives of the Member States, the national balance of the Commission is carefully delineated, each Member State gets to appoint a judge to the Court. There is plenty of material that a dedicated confederalist could cite in a debate over Europe's true constitutional character.

THE GRAND BARGAIN AND THE DRAFT CONSTITUTION

Many scholars have noted that the Union stands between a federation and a confederation and possesses elements of each form of ordering.⁴³ This hybridity is partly accidental but is also, in part, the product of compromise, both explicit and tacit.⁴⁴ The citizenship provisions are an example of an explicit compromise; the text of the Treaty was amended to recognise the claims of the Member States. The dispute over the force of European Law is a tacit compromise: the European Court and the courts of the Member States both continue to advance rival supremacy claims but each side – normally – shows restraint. Steve Weatherill has issued a powerful warning to those tempted to fight for a single narrative about the location of constitutional authority within Europe. As Weatherill notes, this can only be achieved

⁴² Case C-135/08 Rottmann v Freistadt Bayern [2010] ECR I-1449, para. [48].

⁴³ For example, D Elazar 'The United States and the European Union: Models for Their Epochs' 55; Weiler note 9 above, 55-58; A Morvacsik 'Federalism in the European Union: Rhetoric and Reality' 176, 186. All of which are to be found in K Nicolaidis and R Howse *The Federal Vision* (Oxford, Oxford University Press, 2001). See also M Burgess, note 18 above, chapter 9.

⁴⁴ The compromises between these visions forms a theme of Andrew Duff's excellent book on the emergence of the Union: A. Duff, *On Governing Europe: A Federal Experiment* (London: The Spinelli Group, 2018).

by suppressing diversity, and comes at a cost: such a narrative was eventually imposed in the USA, but required the bloodshed of a civil war.⁴⁵

The ambiguity over the nature and future direction of Europe brings a significant asset. It permits adherents of the two, rival, visions of Europe to work together within the European project. This might be termed the ‘Grand Bargain’ of European integration. Whilst each side may profoundly disagree over the destination of the European project, they are able to agree on the vast majority of the substance of the current rules; there is agreement over the day-to-day legal obligations those within the Union are under. Each can interpret these rules within their very different models of Europe. Cass Sunstein has written of the value of incompletely theorised agreements within the law, where people agree with a proposition but may disagree over the reasons for endorsing that proposition.⁴⁶ The Grand Bargain may be an incompletely theorised agreement on a monumental scale: one of the century’s most ambitious political projects, balancing on radically different understandings of that project’s goal.

Sometimes constitutional ambiguity of this type is a liability. It may be that disputes become harder to resolve over time and postponing the moment of conflict will make that conflict more destructive. But sometimes the postponement of the moment of decision may avoid conflict entirely.⁴⁷ It could be that, one day, one of the two visions of Europe gains the support of the peoples of Europe: there is a clear winner between the two. Or it could be that the ambiguity could last indefinitely, perhaps reaching a point at which it is unnecessary to resolve the disagreement as each side has got what they wanted from the project.

⁴⁵ Steve Weatherill warns of the dangers of trying to impose a single narrative about the location of constitutional authority in Europe: S. Weatherill, *Law and Values in the European Union* (Oxford: Oxford University Press, 2016), 229-230.

⁴⁶ C Sunstein, ‘Incompletely Theorized Agreements’ (1995) 108 Harvard Law Review 1733. Compare J Rawls, ‘The Idea of an Overlapping Consensus’ in J Rawls, *Political Liberalism* (Columbia University Press, 1993).

⁴⁷ On the possible uses of inconsistency, see N. W. Barber, ‘Legal Inconsistency and the Emergence of States’ in H. P. Glenn and L. Smith eds., *Law and the New Logics* (Cambridge: Cambridge University Press, 2017)

(i) *The Draft Constitution as a Challenge to the Grand Bargain*

The Draft Constitution presented a challenge to the Grand Bargain in a number of respects. First, and most prominently, the decision to label the document a ‘constitution’ appeared significant. In order to avoid ‘semantic’ disagreements, Valéry Giscard d’Estaing announced in the opening session of the Convention that the end product would be labelled a ‘constitutional treaty’.⁴⁸ This might have appeared a compromise of sorts, but the decision to include ‘constitution’ in the title of the document produced by the Convention was no mere slip of the pen. The immediate origins of the Draft Constitution can be traced back to a speech delivered by Joschka Fischer in 2000.⁴⁹ Fischer’s vision for Europe was explicitly federalist; falling squarely within the first of our two models. He argued for a division of sovereignty between the Member States and the Union, with a European Parliament and a European Government exercising legislative and executive power within the new federation. The idea of a *constitution*, linked to the idea of a state, was part of the Convention project from the very beginning, and when the European Council, in Laeken, issued the declaration that laid the groundwork for the Convention, that declaration, it was said, read like a *constitutional* agenda rather than a mandate for classic treaty reform.⁵⁰ By labelling the resulting document a constitution, the Convention drew on this history, providing a clear and prominent link to Fischer’s federalist vision.⁵¹

In addition to this label, the Draft Convention also included what we might call the ‘dressings’ of a constitution, a range of decorative constitutional statements that made the document look more like a state constitution. The Constitution specified a flag, an anthem, a special day, and asserted a temptingly Hegelian motto

⁴⁸ P Norman *The Accidental Constitution* (Brussels, Eurocomment, 2005) 63-64.

⁴⁹ Dinan, note 16 above, 270-271; Norman, note 48 above, 12-13: Fischer called for a ‘lean federation’.

⁵⁰ P Maignette and K Nicolaidis ‘The European Convention: Bargaining in the Shadow of Rhetoric’ (2004) 27 *West European Politics* 381, 388; Norman, note 48 above, 20.

⁵¹ As Renaud Dehousse contends, it was the decision to label the document a ‘constitution’ that made the resulting referendums all but inevitable: R. Dehousse, ‘The Unmaking of a Constitution: Lessons From the European Referenda’ (2006) 13 *Constellations* 151, 151.

for Europe: 'Unity in Diversity'. These dressings were of little or no practical significance in themselves, but reinforced the impression the document was intended to amount to more than a mere international treaty.

Second, the resulting Convention provided a novel deliberative forum, inviting comparisons with the body that authored the American Constitution.⁵² The very structure of the Convention seemed to imply that it was trying to achieve something that could transcend an international treaty. The Convention included a representative from each of the Member States, thirty representatives from the national Parliaments, sixteen from the European Parliament, and two from the Commission. Representatives from the accession candidate countries were also able to take part in proceedings, and various other organisations were given observer status.⁵³ However, although considerable efforts were made to ensure different points of view were heard in the Convention, and efforts were made to engage people outside of the Convention, it was not an elected body, and its public profile was limited. Many of its representatives were appointed by the executives of the Member States, or by the Community Institutions.⁵⁴ And perhaps unavoidably, the process was dominated by the Chairman and Vice-Chairmen, who gave forceful direction to the debates and drafts.⁵⁵ To add a personal recollection, I do not recall the work of the Convention being given much prominence within the United Kingdom. I suspect that most people outside of the world of European politics and scholarship were unaware, completely unaware, that the Convention was taking place, and would have been surprised – to put it mildly – to hear that this body was intended to form a new constitution on their behalf.⁵⁶

⁵² M. Rosenfeld, 'The European Convention and Constitution Making in Philadelphia' (2003) 1 *International Journal of Constitutional Law* 373; R Badinter 'A European Constitution: Perspectives of a French Delegate to the Convention' (2003) 1 *International Journal of Constitutional Law* 363.

⁵³ P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford: Oxford University Press, 2010), 6-7.

⁵⁴ J Fossum and A Menéndez 'The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union' (2005) 11 *European Law Journal* 380, 403.

⁵⁵ G. Stuart, *The Making of Europe's Constitution* (London: Fabian Society, 2003), 14-26.

⁵⁶ Dinan, note 16 above, 274.

Third, the substance of the document reflected the state-model of Europe in some respects. Most obviously, the Draft Constitution contained a provision which purported to give European Law primacy over the law of the Member States. Article I-6 stated that:

The Constitution and law adopted by the institutions of the Union in exercising the competences conferred on it shall have primacy over the law of the Member States⁵⁷

After the fall of the Draft Constitution this provision was dropped, and did not find its way into the Lisbon Treaty.⁵⁸ How the courts of Member States would have reacted to the provision can only be a matter of speculation. Perhaps national judges would have concluded that the provision only gave primacy to decisions which European institutions reach within the scope of the competences conferred on them by the Draft Constitution, and that a national court need not, therefore, attribute primacy to purported laws made in excess of conferred jurisdiction. Perhaps a divide might have been drawn between the law of Member States and their constitutional rules; with European law taking primacy over national law, not over the national constitution.⁵⁹ But the inclusion of the primacy clause was a significant step, and, if the Draft Constitution had come into effect – particularly if it came into effect after a national referendum – it would have been hard for the courts of Member States to have retained, unmodified, their position on supremacy, discussed in the earlier part of this paper. The primacy clause amounted to a challenge to Weiler's principle of constitutional tolerance, a principle that rested on the continuing consent of sovereign states.⁶⁰

A further provision that nudged the Union towards a federal state, and one that did survive in the Lisbon Treaty, was Article I-60. This is now the notorious Article

⁵⁷ Official Journal C310 (16th December 2004)

⁵⁸ Craig, note 53 above, 146-151.

⁵⁹ P. P. Craig 'The Constitutional Treaty and Sovereignty' in C Kaddous and A Auer (eds) *Les Principes Fondamentaux de la Constitution Europeene* (Geneva, Bruylant, 2006).

⁶⁰ See J. Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40 *Journal of Common Market Studies* 563, 658-559.

50, which regulates the withdrawal of Member States from the Union.⁶¹ Whilst the provision might seem designed to placate Euro-sceptics, providing a path to exit from the Union, it is a provision that appears more federal than confederal. In a confederation a state can leave at any time. There is no need for a special process for exit; the confederation neither claims, nor possesses, the power to stop one of its sovereign constituent states from leaving. In a federation, in contrast, it is the national constitution that determines the capacity of regions to leave the federation.⁶² Some federations give some territories a right of exit, some create structures through which a right might be conferred, whilst others allow no space for this possibility – but, as Jean Monnet noted long ago, in a federation no region can leave by unilateral decision.⁶³ By including Article I-60 in the Draft Constitution, the Convention authored a document that purported to confer and regulate the Member States' right of exit.

Finally – though other provisions could also be examined – the Draft Constitution sought to introduce the Charter of Rights into European Law.⁶⁴ The Charter had been drawn up in 2000, but whilst it had been used by the Commission to review its legislation it was not yet legally binding.⁶⁵ The inclusion of the Charter in the Draft Constitution would have rendered it binding within European Law, though not applicable in national law that fell outside of this field. The Charter is a curious document.⁶⁶ It includes rights found within the European Convention on Human Rights, but expresses these rights in different terms. The Charter made it clear that where there was an overlap with the ECHR the rights in the Charter should be given the meaning and scope of those in the ECHR – but left open the possibility that the

⁶¹ C. Hillion, 'Accession and Withdrawal in the Law of the European Union' in A. Arnulf and D. Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015).

⁶² D. Haljan, *Constitutionalising Secession* (Oxford: Hart Publishing, 2014), esp. chapter 8; R. Weill, 'Secession and the Prevalence of Militant Constitutionalism Worldwide' (2019) *Cardoza Law Review* (forthcoming).

⁶³ Duff, note 44 above, 31-32

⁶⁴ Norman, note 48 above, 68-71.

⁶⁵ P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* 6th ed. (Oxford: Oxford University Press, 2015), 16.

⁶⁶ The original text is found in [2000] OJ C364/1

Union might provide more extensive protection.⁶⁷ It also creates new rights not found in that document. Some of these – such as the prohibition on cloning or the protection of personal data – reflected technologic developments since the drafting of the ECHR in the 1950s.⁶⁸ Others reflect a growing ambition for the role of rights within the state. For example, the European Charter included the right of elderly people to participate in social and cultural life,⁶⁹ the right to a free work placement service,⁷⁰ and the right to a paid holiday,⁷¹ amongst many other far-reaching rights.

It is worth noting that the version of the Charter included in the Draft Constitution did not include an important qualification later found in the Lisbon version, a qualification that sought to distinguish between ‘principles’ and other provisions in the Charter.⁷² These ‘principles’ can, it seems, only be relied upon to interpret acts or used as a basis on which to ground the legality of legislation. Though the legal effect of this provision is debatable, it seems that ‘principles’ cannot be relied upon as a ground to challenge legislation that would otherwise be valid or relied upon to require the production of new legislation.

Once again, the Charter pushed Europe towards the state-model. It mirrored the bills of rights commonly found within nation states, presenting Europe as the body with primary responsibility for their protection. Though the motivation to provide some form of rights protection at the Union level was understandable, it risked creating – and, after Lisbon, may well have created – constitutional confusion within the legal orders of Member States. All Member States were also signatories to the European Convention on Human Rights. All the Member States also had domestic bills of rights in some form, which more or less closely tracked the ECHR. Consequently, at the time of the Draft Constitution, Member States already had two

⁶⁷ Article 52(3)

⁶⁸ Article 8 and Article 3(2)

⁶⁹ Article 25

⁷⁰ Article 29

⁷¹ Article 31(2)

⁷² [2012] OJ C362/391, Article 52(5)

human rights systems operating within their territory – the domestic and the ECHR – the Charter added a third system where states laws fell within the reach of European Law. There are, then, three relevant documents and three relevant sets of courts, all tied in a complicated relationship of mutual recognition and interaction in each Member State. Whilst this might be seen as a benefit for those looking to protect rights, allowing them to pick and choose between a range of documents and a range of courts, the uncertainties it brings incur at least two costs. First, the range of action of political institutions becomes less clear. Bills of rights serve to limit, with greater or less severity, the capacity of the democratic part of the constitution to make decisions. Given the importance of democracy to the legitimacy of the state, these restrictions should be exceptional and, so far as possible, clearly defined. Having multiple, overlapping, bills of rights runs the risk that legislators will be uncertain about their scope of action, impairing the functioning of democracy. Second, and building on this point, bills of rights should speak to citizens: the document is an expression of *their* rights, a recognition of their place within the state. Bills of rights can help encourage people to identify with the state by providing a constitutional articulation of some of the features of state-membership. Ironically, one of the motivations behind the creation of the Draft Constitution was to make the Union more comprehensible to, and less remote from, its citizens.⁷³ But by creating confusion around rights there is a risk that the capacity of bills of rights to play this role will be lost, and the various rights instruments will come to be seen merely as technical instruments used by lawyers in their challenges to state action, and not as documents intended to be read by citizens.

That the Draft Constitution challenged the Grand Bargain was noted by academics at the time. Joseph Weiler warned that the adoption of the Draft Constitution would move Europe away from the ‘constitutional tolerance’ that grounded the relationship between the Member States and the Union.⁷⁴ Whilst Pavlos Eleftheriadis, though more positively disposed towards the project, asserted that the constitutional nature of the Draft Constitution would entail profound changes to the

⁷³ G. de Burca, ‘The European Constitution Project After the Referenda’ (2006) 113 *Constellations* 205, 206.

⁷⁴ J Weiler ‘A Constitution For Europe? Some Hard Choices’ (2002) 40 *Journal of Common Market Studies* 563.

Union's competences: national courts would be compelled to concede unqualified primacy to European Law, directives would be give horizontal as well as vertical direct effect, and the Charter of Rights would gain domestic legal force.⁷⁵

One of the most surprising things about the Draft Constitution was the extent to which it included provisions that were unlikely to have much practical effect whilst being virtually certain to stir opposition to the project. The title of the document, the constitutional dressings, the primacy clause, were all features that were likely to irritate supporters of the confederal model of Europe – and, of course, infuriate those Euro-sceptics who were opposed to the European project. These were very prominent parts of a very bulky document, set out in the first few pages. It was always likely that these would be features that would be seized upon in any subsequent debates over the adoption of the document.

In retrospect, the Draft Constitution provides a text-book example of a premature attempt to resolve a constitutional disagreement. With the exception of the Charter of Rights - which, for good or ill, was a substantial change worth arguing over – the other state-like aspects of the document were unnecessary. Their impact on the substance of European Law, those rules that shaped the conduct of the people of Europe, was likely to be slight. There was no pressing need, no crisis, that necessitated a choice between the two Europes at that moment. No broad social consensus had emerged that would have made the choice an easy one. By forcing the issue, the Convention challenged the Grand Bargain on which the development of Europe had rested to that point; and, by creating a conflict within the ranks of the supporters of the Union, risked weakening that project.

(ii) The Path to Brexit

Ideologically, Brexit stands as the extreme opposite to the Draft Constitution project. If the Draft Constitution was an attempt to push Europe towards federation, Brexit amounts to a push towards a radically loosened connection between the United Kingdom and the rest of the Member States. Any links between the Draft

⁷⁵ P Eleftheriadis 'Constitution or Treaty?' *Federal Trust Online Paper* 12/04.

Constitution and Brexit must be drawn with exceptional caution; the Draft Constitution was rarely cited, if at all, in the Brexit debates, and it is likely that for most voters in the United Kingdom it was a distant memory. But there are some aspects of the Draft Constitution story that may have played a part in shaping the public mood that led to the Brexit vote. Whilst the content of the Draft Constitution may have caused lasting concern to some – amounting to a manifesto for a Europe they disliked – it could be that it was the process by which the document was produced and the manner in which the European elites responded to its rejection that were its lasting legacies.

In terms of process, as was discussed earlier, the Convention did make a genuine effort to include different voices in the process and to reach out to the public during the formation of the Draft Constitution, but these attempts to engage were of limited effect. For many in Europe, it must have seemed that this radical change, a change that looked to some like the abandonment of Member State sovereignty in the creation of new federal entity, was both a surprise and a *fait accompli*. It was a surprise, in that there was no obvious need for the creation of a new constitutional order. Many people, I suspect, were unaware this process was being undertaken. Once produced, it was presented as a *fait accompli* in that there seemed to be no process that would enable people to object to provisions or call for modifications.⁷⁶ The Draft Constitution was presented as a package that the peoples of Europe were expected to accept as a whole.

These two elements may have combined to reinforce a sense that there is a gap between the elite of Europe and its people. The Draft Constitution was the product of a very small section of European society, and allowed people outside of that set little capacity to engage with its production. There is an echo here, perhaps, of the Brexit referendum. In the referendums on the Draft Constitution and in the Brexit referendum a very broad divide can be seen between those who had benefited from globalisation, often those with higher education qualifications and money, and those

⁷⁶ R. Dehousse, 'The Unmaking of a Constitution: Lessons from the European Referenda' (2006) 13 *Constellations* 151,158.

who are worried by globalisation, often the poorer part of society.⁷⁷ There is an irony in that the Draft Constitution aspired to help reduce Europe's democratic deficit, to draw people closer to the European project and improve democratic accountability.⁷⁸ But the manner of its creation and presentation may have achieved the opposite; giving the impression that Europe was an elite project, one that the rest of the people of Europe were expected to be grateful for, rather than participate in.

After the rejection of the Draft Constitution by the peoples of France and the Netherlands, much of that document was transferred into the Treaty of Lisbon.⁷⁹ The people of France and Netherlands were not given a second chance to vote on Lisbon. The Irish were, however, and rejected that Treaty in 2008 – but, a year later, voters were asked again and, with some assurances from the Union on the number of commissioners, Ireland's military neutrality, and abortion laws, voted for the Lisbon Treaty.

As Professor Weatherill argues in his contribution to this volume, the reintroduction of much of the substance of the Draft Constitution into the Lisbon Treaty is problematic. This is not a comment on the content of the transferred provisions; whilst this chapter has focused on the constitutionally controversial aspects of the Draft Constitution, there were many other provisions in that document that were far less controversial. Instead, it is the manner in which these provisions entered into the Lisbon Treaty that might cause concern. The Draft Treaty was rejected by the peoples of France and the Netherlands, but those voters nevertheless ended up subject to many of the rules in that document. As Professor Craig argues in his chapter, the reasons for the French and Dutch rejections may have turned on local political issues rather than a careful assessment of the merits of the Draft Constitution,

⁷⁷ On the Dutch referendum: R. Cuperus, 'Why the Dutch Voted No' (2005) 4 *Progressive Politics* 92, 101-102; on the French referendum: Dehousse, *Lessons*, 155-156; on Brexit: S. Hobolt, 'The Brexit Vote: a Nation Divided, a Divided Continent' (2016) 23 *Journal of European Public Policy* 1259, esp. 1265-1270.

⁷⁸ A point put powerfully by MacCormick: N. MacCormick, *Who's Afraid of a European Constitution?* (London: Imprint Press, 2005), chapter 1.

⁷⁹ Dinan, note 16 above, 308-310; Craig, note 53 above, 23-25.

but the resurrection of the Draft Constitution in Lisbon may have added to the impression that the European project is only weakly linked to the wishes of its people.

CONCLUSION

Could it have been different? Could the Draft Constitution have been a success? It could certainly have been produced in a manner that engaged more directly and fully with the peoples of Europe. There could have been greater opportunities for people outside of the Convention to engage with the process. As Professor Nicolaïdis argues in this volume, more use could have been made of the Internet, and more local meetings could have been organised. The style of the document should, perhaps, have been different: a shorter text that could be read and understood by the people it addressed might have proved more popular. But in the end, it was probably just not the right time for a challenge to be made to the Grand Bargain on which Europe's development rested. There was no need to choose between the two visions of Europe, and by attempting to force the choice, the Draft Constitution may have weakened the European project.