



The Theory of Constitutional Synthesis

A constitutional theory for a democratic European Union

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Abstract

This paper puts forward the main elements of the theory of constitutional synthesis as a constitutional theory of European integration. Constitutional synthesis is both a political philosophy of European integration (which dilucidates what kind of polity the Union is and what is its basis of legitimacy) and a theoretical framework capable of guiding constitutional adjudication in hard cases (such as the resolution of conflicts between European and national constitutional law). In essence, constitutional synthesis refers to a process in which already established constitutional states integrate through constitutional law, without losing their institutional structure and identity. We claim that there are three basic insights in constitutional synthesis. The first is that the constitutional law which frames and contributes to steer integration is characterised by the central role played by the constitutions of the participating states (by the regulatory ideal of a common constitutional law). The second is that the supranational legal order comes hand in hand with a supranational institutional structure which is only partially established at the founding, takes time to be rendered functional in a process where different national institutional cultures and structures try to leave their mark on the supranational level, and its structure is necessarily rendered more complicated as new institutions and decision-making processes are added up to handle new policies. The third is that while supranational law is one, there are several institutions that apply the supranational law in an authoritative manner. In the last section of the paper, we complete the exposition of constitutional synthesis by considering how it is placed and how it relates to other political and legal theories of integration.

Keywords

Constitution for Europe — constitutional theory — constitutional and institutional pluralism — Europeanization — Lisbon Treaty

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The imperfection of all modern government must (...) in a great measure have arisen from this simple circumstance, that the constitution, if such an heterogeneous mass deserve that name, was settled in the dark days of ignorance, when the minds of men were shackled by the grossest prejudices and most immoral superstition. And do you, Sir, a sagacious philosopher, recommend night as the fittest time to analyse a ray of light?

Mary Wollstonecraft
Vindication of the Rights of Man

Introduction: The core ideas behind synthesis

In this paper we put forward the key theoretical component of a constitutional theory for a democratic European Union, what we label as the *theory of constitutional synthesis*. In particular, we flesh out and substantiate the theory behind the claim that the constitutional law and politics of the European Union are more aptly described as an instance of *constitutional synthesis*.

In essence, constitutional synthesis refers to a process in which already established constitutional states integrate through constitutional law. This is a process where participant states establish a supranational political community (in the European instance, the three original Communities) in which they become integrated *without losing* their institutional structure and identity.¹

There are three basic insights behind constitutional synthesis. The first is that the constitutional law which frames and contributes to steer this process is neither revolutionarily established in a 'Philadelphian'

* This paper is forthcoming as a chapter in John Erik Fossum and Agustín José Menéndez, *The Constitution's Gift. A Constitutional Theory for a Democratic European Union*, Lanham: Rowman and Littlefield, 2011.

¹ Indeed, as is argued in more detail *infra*, postwar constitutions were written or amended so as to include clauses that made possible *and* mandated supranational integration. See references in footnote 8 of chapter 3. This duty to create supranational institutions would render possible the realisation of the constitutional Rechtsstaat and underlies the 'foundational', 'paradigmatic' judgments of the European Court of Justice (*Van Gend en Loos*, *Costa*, *Internationale*), and is now reflected in the explicit subjection of accession to membership and continued membership to compliance with fundamental rights standards. In that regard, see Article 7 of the new Treaty on European Union.

constitutional moment, nor the outgrowth or cumulation of 'Burkean' constitutional conventions and partial constitutional decisions *à la anglaise*. On the contrary, constitutional synthesis is characterised by the central structuring and legitimising role played by the constitutions of the participating states (*seconded* to a new role as part of the collective constitutional law of the new polity),² or what is the same, by the regulatory ideal of a common constitutional law, which is progressively recognised as the constitution of the new polity, and whose normative consequences are fleshed out and specified as the process goes further. To put it differently, instead of a revolutionary act of constitution-making or the slow growth of constitutional conventions, constitutional synthesis is launched by an act which implies the secondment of national constitutions to the role of common constitutional law. This makes synthetic founding much more economical in political resources than revolutionary founding, at the same time that it is much quicker than evolutionary founding. The price to be paid is that instead of an explicit set of constitutional norms, the founding Treaties reflected a scattered set of norms, while the bulk of the common constitutional law remains implicit, *a regulatory ideal* to be fleshed out as integration proceeds. The second is that the supranational legal order comes hand in hand with a supranational institutional structure. But the latter is only partially established at the founding, takes time to be rendered functional in a process where different national institutional cultures and structures try to leave their mark on the supranational level, and its structure is necessarily rendered more complicated as new institutions and decision-making processes are added up to handle new policies.

² The idea of a supranational constitutional law which is the result of seconding national constitutions was hinted at by the European Court of Justice (ECJ) in Case 11/70 *Internationale*, par 4 when claiming that the lack of a written bill of rights in the primary law of the Union came hand in hand with an unwritten principle of protection of fundamental rights, which was filled in by reference to the 'constitutional traditions common to the Member States' properly spelled out in the context of European integration ('the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'). In doing that, the Court was following a line of reasoning pioneered by Pierre Pescatore, 'Fundamental Rights and Freedoms in the System of the European Communities' *American Journal of Comparative Law* 18 (1970): 343-51. On the technical aspects of legal synthesis, it must be stressed that a critical comparative approach has underpinned the case law of the ECJ since its very inception. See Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law', *International and Comparative Law Quarterly* 52 (2003): 873-906. On the constitutional aspects of the idea of constitutional synthesis, see Agustín José Menéndez, 'The European Democratic Challenge', *European Law Journal* 15 (2009): 277-308.

This entails that constitutional synthesis can be described as the combination of normative synthesis and institutional development and consolidation, two processes that have very different inner logics. While normative synthesis exerts a centripetal pull towards homogeneity, institutional consolidation is a more complex process with strong built-in centrifugal elements — it serves as the conduit through which the constitutional plurality of the constituting States is wired into the supranational institutional structure. The third is that the regulatory ideal of a single constitutional law comes hand in hand with the respect of national constitutional and institutional structures. This entails that while supranational law is one, there are several institutions that apply the supranational law in an authoritative manner. The peculiar combination of a single law and a pluralist institutional structure results from the fact that there is no ultimate hierarchical structuring of supranational and national institutions, and is compounded by the pluralistic proclivities of institutional consolidation at the supranational level.

The key intuitions behind constitutional synthesis can be explored with the help of the spatial metaphor of the constitutional field.³ Before the on-start of European integration national constitutions were separate from each other (akin to different islands); with the unleashing of the process of European integration they willingly placed themselves in a common constitutional field. They not only acquired a collective identity

³ Our use of the concept of 'constitutional field' intends to visualize, provide a metaphorical device to understand more clearly what we intend by a process of constitutional synthesis. While we find the whole body of literature that we refer to in this note inspirational, we find more suggestive the way organisational sociology uses the notion of the field. Here organisational field has been characterised by 'those institutions that, in the aggregate, constitute a recognised area of institutional life'. P. DiMaggio and W. W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields', *American Sociological Review* 48 (1983): 147-60, at 148. The field is made up of a set of organisations that are interconnected and structurally similar. A characteristic feature of the organisational field is that it is marked by strong isomorphic pressures. On the other hand, the notion of legal field has also been introduced in the study of the EU but then drawing on Bourdieu's notion of field. See Pierre Bourdieu, 'The Force of law: Towards a Sociology of the field of law', *The Hastings Law Journal* 38 (1987): 805-53; Michael Rask Madsen, 'Transnational Fields: Elements of a Reflexive Sociology of the Internationalisation of Law', *Retfærd* 29 (2006): 34-41. See also the special issue of *Law and Social Inquiry*, 32 no. 1, (2007); Pascal Mbongo and Antonin Vauchez, *Dans la Fabrique du Droit Européen* (Bruxelles: Bruylant, 2009); and Antonin Vauchez 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union', *International Political Sociology* 2, no.2 (2008): 128-144.

(as members of this field) but also started to look to each other. Constitutional synthesis is thus a path to end *constitutional autarchy* and engage in amicable openness and cooperation. This cannot but slowly and steadily transform the very identity of the participating constitutions (through horizontal processes of mutual learning and adaptation); in the process this alters the identity of the participating states.⁴

We elaborate and specify the theory of constitutional synthesis by reference to five core elements, which we consider sequentially in this section, namely: a) the regulatory ideal (Section I), distinguishing between normative synthesis and constitutionally protected institutional pluralism; b) the set of preconditions that render this peculiar and complex form of constitutionalism possible (Section II); c) the peculiar blend of constitutional dynamics involved in the process, including the limits to synthetic integration, emanating from the character of the structure and its vulnerability to changes in the external socio-economic environment (exogenous limits) and complex internal dynamics (endogenous limits, such as pluralism, resistance to integration, and diverging patterns of socio-economic and political development) (Section III); d) the mechanisms through which the structure of the synthetic polity takes shape, including notably replication, adaptation and experimentation (Section IV). In the last section of the paper, we complete the exposition of constitutional synthesis by considering how it is placed and how it relates to other political and legal theories of integration (Section V).

⁴ This process transforms the very attitude of national political and legal systems towards foreign institutions and foreign laws. See for example Basil Markesinis, *Engaging with Foreign Law* (Oxford: Hart Publishers, 2009).

I. The regulatory ideal: Integration through a common constitutional law; or placing national constitutions in a common constitutional field

The regulatory ideal of synthetic constitutionalism is the establishment of a common constitutional law,⁵ or what is the same, the institution of a new constitutional order that is anchored in the fundamental norms of the states that participate in the process of integration.

This regulatory ideal becomes relevant when a specific constellation of circumstances takes hold. Firstly, state constitutions must open themselves to integration beyond national constitutional borders by acknowledging the limits of constitutional autarchy. Despite the cosmopolitan underpinnings of constitutional thought in the American and the French revolutions, the form of constitution that states adopted was made subject to the structural logic of the territorially demarcated, and formally sovereign, nation-state.⁶ The fundamental law of the state was not only the constitution of a *nation-state*, but of a *self-sufficient* and normatively *closed* nation-state.⁷ Indeed, before 1945, with the sole and very partial exception of the Weimar Constitution,⁸ European constitutions were markedly *insular*, and the primacy of the constitution

⁵ The theoretical framework of reference is to be found in Francisco Rubio Llorente, 'Constitutionalism in the Integrated States of Europe', Jean Monnet Working Paper 98/5. Available at <<http://centers.law.nyu.edu/jeanmonnet/papers/98/98-5-.html>>; Peter Häberle, *Pluralismo y Constitucionalismo, Estudios de la Teoría Constitucional de la Sociedad Abierta* (Madrid: Tecnos, 2002); and Pedro Cruz, *La Constitución Inédita* (Madrid: Trotta, 2004).

⁶ This led to the paradoxical result that while the primacy of the Constitution was relativised by denying or at least seriously constraining its legal bite, the fundamental law was regarded as a key element of closure of the national legal order, symbolically representing its self-sufficiency and consequently closure to the external world. On the cosmopolitan underpinnings of republican ideals, see Pierre Bouretz, *La République et l'Universel* (Paris: Gallimard, 2002) particularly on the right to vote, see Michel Troper 'The Concept of Citizenship in the Period of the French Revolution', in Massimo La Torre (ed.), *European Citizenship: An Institutional Challenge* (Hague: Kluwer, 1998), 27-50.

⁷ On the 'national' transformation of the United States, see Bruce Ackerman, 'The Living Constitution', *Harvard Law Review* 120 (2007): 1737-1813.

⁸ See Article 4 of the Weimar Constitution: 'The generally recognized principles of the law of nations are accepted as an integral part of the law of the German Commonwealth'. And then Article 148 gears civic and professional education towards both German national culture and international conciliation, while Article 162 crucially commits the commonwealth towards the international regulation of the legal status of workers, and the promotion of a standard minimum of social rights.

tended to be equated with the primacy of the *national* constitution. Secondly, state constitutions must reaffirm their commitment to social integration through democratic constitutional law, to democratic self-government mediated by constitutional law. On that basis, the commitment must be projected also to integration beyond constitutional borders if the very idea of democratic constitutionalism is not to be lost in translation, so to say. The commitment to liberal constitutionalism was uneven and essentially weak in the interwar period; the sobering experience of two tragedies in one generation created the conditions under which Europeans embraced a 'negative' revolutionary zeal.⁹ Thirdly, political circumstances must render expedient the democratic constitutionalisation of inter-state relationships either through an explicit act of democratic constitution-making *or* through the slow growth of constitutional conventions among mutually influencing states. In the former case, it may well be the case that a constitutional big bang would not succeed or might result in a constitutional backlash. Democratic constitutions rely on socio-economic preconditions which may or may not be entrenched *across* borders. In the latter case, the need for common institutions, decision-making processes and norms might be urgent, and cannot be left to be worked out over time. That was the situation in which Western Europeans found themselves in the aftermath of the war. Bar from the immediate period after the war, the democratic constitution of a federal Europe seemed beyond reach. And at the same time, mere resort to intergovernmental cooperation such as under the League of Nations seemed the secure path to a third war.

In a setting marked by the recognised need for constitutional integration *beyond the state* and by national unwillingness to rescind constitutional sovereignty by becoming straightforwardly absorbed in a larger supranational unit, integration could only be constitutionally licensed insofar as the primacy of each national constitution was ensured *at the same time* that the process of integration was effectively started. Is that not the constitutional equivalent of squaring a circle?

Not if one considers the potential of the regulatory ideal of a common constitutional law. If we found the polity and the legal order by establishing a common constitutional law, by 'seconding' national constitutions to the collective (and thus shared) role of common

⁹ Carl Friedrich, 'The Political Theory of the New Constitutions' in Arnold J. Zurcher (ed.), *Constitutions and Constitutional Trends Since World War II* (New York: New York University Press, 1951) (second edition 1955), 13-35.

constitution,¹⁰ national constitutions remain the supreme law of the land in each participating state. And still, national constitutions acquire a new role as part of the collective of national constitutions embedded in the new supranational constitution.¹¹ This offers an economical way of launching a process of integration. But there is more to it. The establishment of a new legal order framed by common constitutional law, by the pre-existing national constitutions, offers an alternative solution (albeit, as we will see in Section V, temporary and provisional) to the legitimacy characteristic of revolutionary constitution-making, and to the progressive acquisition of democratic legitimacy characteristic of evolutionary constitutionalism. This is so because the new constitution is formed by national constitutional norms, and consequently can draw on the democratic legitimacy that they were invested with in their national constitutional processes (whether they were revolutionary or evolutionary). In particular, by constructing the new supranational legal order according to this constitutional key, the validity of each and every legal norm of the new supranational order depends on its supranational constitutionality, to be assessed by reference to supranational constitutional law. But that constitutional law is indeed defined by reference to the collective of national constitutional norms. As a result, the democratic legitimacy of national constitutional norms is transferred to the supranational constitutional law, and then radiated to all the norms of the supranational legal order, when interpreted and constructed according to the basic principles of the supranational constitutional law (i.e. the constitutional law common to the states that form the new polity). This provides the supranational

¹⁰ In terms of the legal dogmatics triggered by the case law of the European Court of Justice, the constitutional law of the new legal order has always been grounded on the collective of national constitutions, a fact which the Luxembourg judges are keen to refer to with the rather misleading phrase of 'common constitutional tradition'. The proper construction of this term refers back to constitutional synthesis; the idea of a common constitutional tradition implies that each national constitution has come to play a double constitutional role: individually, as the higher law of the national legal order; collectively, as part of the fundamental law of the European Union. One could say that national constitutions 'wore a double hat' well before any official ever imagined doing so. The analogy refers to the Lisbon Treaty's High Representative of the Union for Foreign Affairs and Security Policy because the office holder has to wear two 'hats', namely to preside over the Foreign Affairs Council and to serve as Vice President of the Commission. (Article 18).

¹¹ See Pedro Cruz, *La Constitución Inédita* (Madrid: Trotta, 2004); Rainer Arnold, 'The European Constitution and the Transformation of National Constitutional Law' in *A Constitution for Europe: The IGC, the Ratification Process and Beyond*, eds. Ingolf Pernice and Jirí Zemánek, 1-11 (Baden-Baden: Nomos, 2005).

polity with a measure of democratic legitimacy in the absence of a constitution-making act or an extensive process of constitutionalisation.

How this applies to the European Union is something that we consider at length somewhere else.¹² But as a means of illustration of what at first may seem a very speculative and too abstract concept, let us consider the synthetic founding of the European Union.

The founding Treaties of the Communities (the 1951 Paris Treaty and the 1957 Rome Treaties) should be construed as the opening move in a process aimed at realising the mandate to integrate enshrined in post-war national constitutions. At the same time they should be seen as unleashing a process of supranational integration *beyond mere intergovernmental cooperation* but without an explicit act of constitution-making, which would have backfired at that stage. The foundational act formalised in the founding Treaties of the Communities did not only result in the creation of a new political community, but also in a new legal order, *because this was a process of integration through law*. While the form of the act was that of an international treaty, even a cursory glance would show that the Member States had not only agreed to a considerable transfer of competences, but also to create a new institutional structure, a specific decision-making process, and a system of sources of law. For such a bold process of integration through law to be in compliance with national constitutions, it would have to be regarded as capable of realising the mandate to integrate which was explicit in most national constitutions; it would also have to be framed *by constitutional law*, so that the primacy of the national constitution could be rendered compatible with integration. And that was so because national constitutions started to play a double constitutional role, because they were transferred or projected *as a collective* to the role of common constitutional law of the Communities.

A synthetic understanding of European integration implies that the founding Treaties resulted in the creation of a new polity and a new legal order, but this did not entail multiplying political or legal entities. In the same way that the European Union was not something radically different from the collective of its Member States, Community law was not something radically different from the legal order of its Member States. The 'constitutional' parts of the founding Treaties are to be regarded as a partial explication of what the common constitutional law

¹² See chapter 3 of *The Constitution's Gift*, Lanham: Rowman and Littlefield, 2011.

entails in a process of integration. But most of the constitutional law of the Union is not new; it results from the secondment of national constitutions to the collective role of fundamental law of the Union. Metaphorically speaking, European constitutional law can indeed be said to be old wine in a new bottle. But creating the new bottle and inserting old wine into it from many sources would provoke chemical reactions that would change the composition of the wine, especially in the long run (in particular, as one might say post-war history proves, reducing toxicity and hangover).¹³

II. The ‘double’ constitutional pluralism characteristic of constitutional synthesis and the two subcomponents of constitutional synthesis

The image of the constitutional field renders clear that what is eventually created is not a sovereign state, at a higher supranational scale. Instead, synthesis produces a system of tightly interlocked yet distinctive constitutional orders that authorise a common supranational legal structure *which is to come into existence through the process of integration*.

The fact that the synthetic constitutional path is one where participating states retain their separate existence, and their separate constitutional and institutional identity implies that constitutional synthesis is a peculiar breed of pluralistic constitutional theory. On the one hand, it *is not* pluralistic to the extent that it endorses the monistic logic of law as a means of social integration through the *regulatory ideal of a common constitutional law*, in the terms discussed in Section I. The integrative capacities of law (its role as complement of morality in the solving of conflicts and the coordination of action by means of determining in a certain manner what the common action norms are) require law to be as conclusive as possible. Were law to be as inconclusive as morality, it would not add much to our practical knowledge and it would not be capable of operating effectively as a means of social integration. Both autonomy and the motivational force of law require that we assume that law gives one right answer to all the problems to be solved through it. Legal argumentation breaks down if we assume that one and the same

¹³ See Joseph Weiler, ‘Federalism Without Constitutionalism: Europe’s Sonderweg’, in *The Federal Vision*, eds. Kalypso Nicolaidis and Robert Howse, 54-70, (Cambridge: Cambridge University Press, 2003), and see Tony Judt, *A Grand Illusion?* (New York: Hill and Wang, 1996).

case can have different, even contradictory solutions. That may be the case *empirically*, but from an internal perspective of law that cannot be endorsed as part of the social practice of integration through law. Democratic legal systems are further pushed into this peculiar form of 'monism' by the normative requirements of the principle of equality before the law.¹⁴ On the other hand, constitutional synthesis is pluralistic in a double sense. For one, the regulatory ideal of a common constitutional law coexists with the actual plurality of national constitutional laws. As we will see in Section IV, the constitutional moment in synthesis only results in the endorsement of a regulatory ideal and bits and pieces of the set of common constitutional norms. Most constitutional norms remain *in nuce*, or better put, in several drafts, as many national constitutions participate in the process of integration. Only slowly (and not without setbacks and backlashes) the regulatory ideal of a common constitutional law is fleshed out in *actual* common constitutional norms (and in general in common legal norms). Further, the regulatory ideal of a common constitutional law comes hand in hand with a pluralistic institutional setting. Instead of a hierarchically structured institutional setup, a synthetic polity is characterised by the existence of a plurality of institutions legitimately claiming to have a relevant word in the process of applying the 'single' constitutional legal order. That is indeed the *correct* intuition behind pluralistic constitutional theories of European integration.¹⁵

Indeed, constitutional synthesis has not led (and is not expected to lead) to Member States losing their autonomous political and legal identity (which has been coined in the European constitutional jargon as the national constitutional identity).¹⁶ This is so *thanks to*, and not *despite of*,

¹⁴ On this, see Alexander Somek, 'Kelsen Lives', *European Journal of International Law* 18 (2007): 409-51. A critique to pluralistic theories of European law in Agustín J. Menéndez, 'Is European Law a Pluralist Legal Order?' in *The Post-Sovereign Constellation*, ARENA Report 4/2008, eds. Agustín José Menéndez and John Erik Fossum, 233-314 (Oslo: ARENA, University of Oslo).

¹⁵ See especially Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), 121ff. This 'moderate' pluralism under international law was analytically clarified by Catherine Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty' in *European Law, Law and Philosophy* 16 (1997): 377-420. See also Menéndez, *supra*, footnote 13 for a contrast between constitutional synthesis and constitutional pluralism.

¹⁶ The term 'national constitutional identity' entered the European debate in the famous ruling of the German Constitutional Court Solange I, 1974 WL 42441 (BverfG (Ger)), [1974] 2 C.M.L.R. 540, par. 22: 'Article 24 of the Constitution must be understood and construed in the overall context of the whole Constitution. That is, it

integration. The constitutional pluralism that comes hand in hand with constitutional synthesis is rendered possible and stabilised by the new institutional structure and the growing substantive convergence between national constitutional orders.¹⁷ Constitutional synthesis could be seen as the political and legal counterpart to the common market of old (not the single market of the Single European Act!) in the objective of rescuing the nation-state;¹⁸ in our view, it is more proper to consider it as a means of reconfiguring and redefining the state, at the very minimum detaching state from nation; and perhaps even getting rid of the idea of the sovereign state completely.¹⁹

This 'double' constitutional pluralism of constitutional synthesis reveals that when considered in depth, we can distinguish two different sub-processes within synthesis, which correspond to the logic of integration of constitutional norms and of constitutional institutions. The relationship between these two processes is far from easy because they follow different logics, and still they affect each other (and heavily for that matter).

does not open the way to amending the basic structure of the Constitution, which forms the basis of its identity, without a formal amendment to the Constitution, that is, it does not open any such way through the legislation of the inter-State institution' (my italics). It was then propelled to the supranational level in Maastricht (resulting in Article 6.3 of the Treaty of European Union, where the principle of respect of national identities in general terms was affirmed). And in the Constitutional Treaty and in the Treaty of Lisbon, this principle was spelled out by reference to constitutional identity. On the academic debate following the Constitutional Treaty, see Armin Von Bogdandy, 'The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe', *International Journal of Constitutional Law* 3 (2005): 295-315; Michel Rosenfeld, 'The European Treaty-constitution and Constitutional Identity: A View from America', *International Journal of Constitutional Law* 3 (2005): 316-31; Jan Herman Reestman and Leonard F.M. Besselink, 'Constitutional Identity and the European Courts', *European Constitutional Law Review* 3 (2007): 177-81. In more general theoretical terms, see the interesting reflections of Gary Jeffrey Jaconsohn, 'Constitutional Identity', *The Review of Politics* 68 (2006): 361-97.

¹⁷ Cf. Neil D. MacCormick's writings on European constitutional pluralism, partially collected in *Questioning Sovereignty* (Oxford: Oxford University Press 1999).

¹⁸ Alan Milward, *The Rescue of the European Nation-State* (London: Routledge, 1992).

¹⁹ William E. Scheuermann, 'Postnational Democracies Without Postnational States? Some Skeptical Reflections', *Ethics & Global Politics* 2 (2009): 41-63; Hauke Brunkhorst, 'Reply: States with Constitutions, Constitutions Without States, and Democracy - Skeptical Reflections on Scheuermann's Skeptical Reflection', *Ethics & Global Politics* 2 (2009): 65-81.

Normative synthesis concerns the process through which the common constitutional law is fleshed out. Its logic is exclusively *normative*. Constitutional synthesis claims that through the foundational act, both the polity and its legal order are constituted. As we have claimed, the democratic legitimacy of this foundation without democratic constitutional politics is ensured by transferring the collective of national constitutions to the supranational constitution. What we add now is that from founding onwards, the *logic* of the process of normative synthesis is one of rendering explicit what is already implicit in the regulatory ideal of a common constitutional law. Thus, as we will see in Section V, the intertwined processes of transformative and simple constitutionalisation. The internal normative code of constitutional law entails that the more the process advances, the more the breadth and scope of the supranational system would tend to grow, the more normative space the supranational constitutional law would tend to occupy. Unless, quite obviously, this *expansion* is checked or interrupted, as we will consider in Section V.C. But the *inertial* trend is one towards normative homogeneity, wired into the normative code of law as a means of social integration (in the terms we have discussed at the beginning of this section, resulting from the irrepressible 'monistic' proclivity of law).

Institutional consolidation concerns the outgrowth and consolidation of the institutional structure of the supranational polity. Its logic is not exclusively *normative*. Institutions are mainly about law, but not exclusively about law. Institutions are organisations infused with value. They occupy buildings, make use of objects with empirical existence, and are represented by very material (when not venial) beings. Institutional organisations cannot be brought into existence by a normative regulatory ideal; they have to be created, staffed and funded and develop their own institutional identity. In a constitutional union of already established constitutional states, this process is complicated by three factors. Firstly, constitutional synthesis presupposes the combination of a single constitutional order with a pluralistic institutional structure, to the extent that supranational and national institutions are not hierarchically organised or ranked. Secondly, constitutional synthesis at the regional-continental level of government (i.e. in between global organizations and nation-states) tends to proceed in a far from crowded institutional space. In contrast to the constitution of a nation-state, which de facto relies on an existing institutional structure, constitutional synthesis requires creating new institutional structures. This usually entails that institution-making proceeds in a fragmentary fashion, that the synthetic polity starts with bits and pieces

of an institutional structure instead of with a complete one. Thirdly, the derivative character of the synthetic polity implies that the *institutional void* is only formally a *void*, as the creation of supranational institutions consists in the *projection* of national institutional structures and cultures to the supranational level. But because such structures and cultures are much more idiosyncratic than national constitutional laws, the probable result is that the creation of supranational institutions is the site of a contest between different national institutional structures and cultures.

On such a basis, the *homogenising* logic of normative synthesis contrasts with the manifold pluralistic proclivities proper of institutional consolidation. That tension is aggravated over time. A crisis emerges indeed when the relationship between the two processes is polarised. As normative synthesis proceeds, it fosters some institutional convergence. But the synthetic process can also feed institutional pluralism and conflict; thus produce a constellation incapable of solving institutional conflicts among levels of government. This seems to us is the basic structure of the legitimacy crisis of the European Union since the late eighties. The radical transformation of the jurisprudence of the European Court of Justice on economic freedoms is nothing but a polarization of the *homogenising* effect of Community law through the horizontal application of its constitutional principles, which is hard to correct in the absence of a clear line of checking and balancing in the increasingly pluralistic European political order. This would pose a serious threat to the effectiveness of Community law if national institutions would start articulating their disagreement (and eventually disobedience) on the basis of alternative understandings not so much of national constitutional law, but of European constitutional law itself. This might explain why many Community lawyers reacted so angrily to the Lisbon judgment of the German Constitutional Court.

III. Preconditions for synthetic constitutionalism

Constitutional synthesis entails the integration of separate constitutional systems through a common constitutional law. As indicated, it is geared to the establishment of a single constitutional law; however, it is anchored both to what remains a plurality of national constitutions (the unitary element being a regulatory ideal, which is realised into a set of actual common norms as the regulatory ideal is steadily and slowly fleshed out from the set of different national constitutional legal orders) and to a plurality of institutions (resulting from the lack of a hierarchical ordering of supranational and national institutions, from the somewhat

fragmented institutional structure being created at the supranational level, and from the unavoidable projection of bits and pieces of different national institutional traditions into parts of the progressively emerging supranational structure). This coupling of the ideal of a common constitutional law to a pluralistic set of constitutional norms and institutions does away with a basic technique of societal stabilisation and integration which is characteristic in national legal and political orders; namely the coupling of a single constitutional order with a single and hierarchically (or at least competentially) organised institutional structure. In terms of coercive resources, Community law cannot rely on an uncontroversial coupling of its norms and institutionally exerted coercion. The much discussed 'un-coercive' character of Community law is obviously wrong. The fact that Union law is effectively executed by what for all purposes are national administrations does not set the Union apart from systems of 'executive' federalism, as indeed Germany is one example. What is peculiar in the European case is this *double pluralism*, normative and institutional.

This immediately raises the issue of the specific structural conditions (concerning both the *environment* in which the constitution sets itself and the *design* of the constitution)²⁰ under which such a demanding and potentially unstable political form can be launched and can obtain the measure of stability necessary for the process of synthesis to proceed. Indeed, given the inherent tension between law's unitarian proclivity as a means for social integration,²¹ any form of constitutional pluralism is a demanding structure, both in institutional and in legitimacy terms.²² That is also the case with constitutional synthesis. And doubly so because it comes hand in hand with both a collective of constitutional norms *and* institutions interpreting and applying them, as we have shown. In the following we consider the fundamental preconditions for constitutional synthesis, which do not only reveal the peculiarity of the process of European integration through constitutional law, but also

²⁰ See Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009). Previous literature on the issue has been dominated by economic analyses of constitutional law.

²¹ A powerful (re)statement in Somek, *supra*, footnote 13.

²² On the demanding character of pluralism, see MacCormick, *supra*, footnote 16 chapter 7 ("Juridical Pluralism and the risk of constitutional conflict") In more general constitutional terms, see Gustavo Zagrebelsky, *La Virtù del Dubbio* (Bari: Laterza, 2007), especially at 50 and 105. This observation makes it natural to consider both (a) the preconditions for synthetic constitutionalism, as done in this subsection, and (b) the limits to synthetic constitutionalism, as done in subsection E *infra*.

how the complexity of a constitutional union of constitutional states was offloaded by relying on the institutional structures and substantive contents of national constitutional law.

For constitutional synthesis to get off the ground, at least three conditions must be met, namely: a) that there is a high degree of interconnection and interdependence between the polities that have embarked on integration; b) that there is social and legal recognition of this interconnection and interdependence and willingness to adapt to it; and c) that the entities share a basic set of structural and substantive constitutional principles, including compatible institutional and decision-making setups.

1. High degree of interdependence

It is the existence of a high degree of interconnectedness and interdependence between a number of polities that constitutes the first precondition for any process of constitutional synthesis.

Highly interdependent and mutually affected states that do not share a set of common institutions and decision-making processes are prone to inefficiencies, tensions and overt conflicts. In a setting where polities interact but their interaction is not governed by a proper institutional and legal framework, each polity is likely to take decisions that affect citizens of neighbouring polities (including non-citizen residents and what have later come to be understood as second-country and third-country nationals²³) who will be bound by, but have no formal say in such decisions (because they are foreigners, they are deprived of political rights).

Such a structure contains both *efficiency* and *democracy* deficits that can only be overcome by some form of supranational integration. In the European case, the two World Wars (1914-18, 1939-45; from a European-wide perspective two civil wars whose consequences were exported worldwide)²⁴ made painfully clear that social integration decoupled from (sufficient) institutional and legal integration could have

²³ See Rainer Bauböck 'Why European Citizenship? Normative Approaches to Supranational Union', *Theoretical Inquiries in Law* 8 (2007): 453-488, for the differentiated rights these categories of citizens have in the EU.

²⁴ Salvador Madariaga, *Victors Beware* (London: Cape, 1946) on the concept of European civil war.

enormously destructive effects, in both practical and normative terms.²⁵ But barring a political will to integrate interdependence will simply continue to persist (unless its very destabilising effects lead to changes).²⁶ There are thus both *prudential* and *normative* reasons to transcend such a state of affairs.²⁷

²⁵ See Tony Judt, *Postwar* (New York and London: Penguin Press, 2005), chapter 1 ('The Legacy of War').

²⁶ Cf. the British Federalist literature, which is the 'missing link' between the democratic thought about the Commonwealth and European integration. See Lionel Robbins, *The Economic Causes of War* (London: Jonathan Cape, 1939); William Beveridge, *The Price of Peace* (New York, Norton, 1945); Barbara Wootton, *Freedom under Planning* (Chapel Hill: University of North Carolina, 1945); and her 'Socialism and Federation', now reprinted in *The Sinews of Peace*, ARENA Report 7/09, Raul Letelier and Agustín José Menéndez, 579-95 (2009) John Pinder (ed.), *Altiero Spinelli and the British Federalists* (London: I. B Tauris, 1999) (compiling texts of Beveridge and Robbins along the Manifesto de Ventotene); W. B. Curry, *The Case for Federal Union* (Harmondsworth: Penguin, 1939) (several times reprinted during the phoney war). On the Italian federalist literature, see Luigi Einaudi, *La Guerra e l'unità europea* (Bologna: Il Mulino, 1986) (a new edition of a compilation of texts written during the First World War and in the interwar period); Altiero Spinelli, *From Ventotene to the European Constitution*, anthology edited by Agustín José Menéndez, RECON Report 1 (Oslo: University of Oslo, 2007); and Altiero Spinelli, 'L'Europa non cade dal cielo', (Bologna: Mulino, 1960). The connection between prudential and normative considerations underpinned Polanyi's arguments in *The Great Transformation* (New York: Rinehart & Company, 1944).

²⁷ John Rawls, *Theory of Justice* (Cambridge (MA): Harvard University Press, 1971), 334: '[T]he most important natural duty is that to support and to further just institutions. This duty has two parts: first, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, *we are to assist in the establishment of just arrangements when they do not exist*, at least when this can be done with little cost to ourselves'. In Morgenthau's classical argument in *Politics among Nations*, a world state is claimed to be needed in order to ensure peace and order (p. 525). While the functional approach of the European Communities is felt to be 'promising' (and European integration in general 'revolutionary' in terms of method, p. 555: 'The European Communities are, in other words, an attempt at fusing a superior power with an inferior one for the purpose of creating a common control of their pooled strength'), the world state is unattainable under present 'social, moral and political conditions' (p. 563). On the normative underpinnings of Morgenthau's thinking, see William Scheuerman, *Morgenthau* (London; Polity, 2009), especially 132-4. We are quoting from the sixth edition of *Politics Among Nations* (New York: MacGraw-Hill, 1986). The strength of Keynes' argument in *The Economic Consequences of the Peace* (London: MacMillan, 1920) derives from the combination of these prudential and normative considerations.

2. Awareness of mutual interdependence

The second precondition for constitutional synthesis is a social and legal awareness of mutual interdependence, coupled with a will to deal with its negative normative and practical implications. There must be a proper social and political endorsement of the need to transcend beyond anarchic or intergovernmental forms of cooperation.²⁸ Such an endorsement must be solidified; to furnish synthesis it has to be translated into proper legal provisions that render the opening up of national constitutions to supranational cooperation possible.²⁹

As we discussed in the introduction, awareness of interdependence and will to integrate was reflected in the European case both in innovative constitutional clauses which created the conditions under which national legal and political orders could be rendered open and cooperative; and in the manifold integration initiatives launched in the first decade of the post-war period. It must be stressed that these clauses not only rendered integration possible; they also *mandated* it.³⁰ By linking the continued

²⁸ The endorsement of the European project by European citizens was not articulated in electoral terms, but rather obvious in the early fifties. See for example the very informative Gérard Herberichs, 'Is There No European Opinion?', *American Behavioral Scientist* 3 (1959): 3-9. The default positive attitude towards integration was partially reinforced by the experience of resistance and (perhaps even more decisively) by the pro-European (and anti-communist) construction of the memory of resistance. On the resistance movements, the opus magnum is Walter Lipgens (the multi-volumed *Documents in the History of European Integration* (Berlin and New York: De Gruyter, 1988)). See also the collection of French documents in H. Michel and B. Mirkin-Guetzevitch (ed.) *Les idées politiques et sociales de la résistance* (Paris: PUF, 1954), 389ff. A critical analysis of the actual influence of resistance movements on European integration in Pieter Lagrou, *The Legacy of Nazi Occupation* (Cambridge: Cambridge University Press, 2000), especially chapter 14.

²⁹ See references in footnote 32.

³⁰ See Ingolf Pernice and Franz Mayer, 'La Costituzione Integrata dell'Europa', in *Diritti e Costituzioni nell'Unione Europea*, Gustavo Zagrebelsky, 43-68 (Bari: Laterza, 2003), at 59: 'La partecipazione all'intergrazione europea diviene essa stessa una condizione essenziale di esercizio (effettivo) della sovranità nazionale di ogni Stato Membro'. Recently reminded to us by the German Constitutional Court in its Lisbon's ruling. Available at

<http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html>. See especially paragraph 221 'The constitutional state commits itself to other states which are standing on the same foundation of values of freedom and equal rights and which, like itself, make human dignity and the principles of equal entitlement to personal freedom the focal point of their legal order. Democratic constitutional states can gain a formative influence on an increasingly mobile society, which is increasingly linked across borders, only by sensible cooperation which takes account of their own interest as well as of their common interest. Only those who commit

realization of national constitutional values (of the effective supremacy of the constitution as the fundamental law of the land) to supranational integration, these clauses turned national constitutions into the constitutional raw material of a common constitution. Or to put it differently, they obligated national constitutions to situate themselves within a common constitutional field. The clauses also obligated democratic institutions to engage in a process wherein the collective of national constitutions would serve as the guiding framework for a process of supranational integration.³¹

3. High degree of constitutional affinity

But political will, awareness, and a properly demarcated constitutional path are not enough. Because constitutional synthesis is a form of pluralistic constitutionalism, the third precondition is a high degree of constitutional affinity among the integrating polities. Integration through a common constitutional law can only be launched if the structural and substantive contents of the constitutions of the integrating polities are sufficiently similar,³² because such affinity furnishes an

themselves because they realise the necessity of a peaceful balancing of interests and the possibilities provided by joint concepts gain the measure of possibilities of action that is required for being able to responsibly shape the conditions of a free society also in the future. With its openness to European integration and to commitments under international law, the Basic Law takes account of this'. Openness to European law is perhaps to dry a translation, as the neologism seems to point to a warmer relationship with hints of normative preference. See footnote 10 to the Italian translation by Jörg Luther. Available at <http://www.cortecostituzionale.it/informazione/file/Traduzione_sentenza.pdf>.

See also Agustín José Menéndez, 'The European Democratic Challenge', *European Law Journal* 15, no. 3 (2009): 277-308, at 287.

³¹ On the unfolding of the process through the ratification of the founding Treaties, see Assamblée Commune du Communauté Européene du Charbon et de l'acier, 'Le Traite CECA devant les parliaments nationaux', Luxembourg, Février 1958, and the dossiers compiled in ena.lu (Paris: http://www.ena.lu/ratification_ecsc_treaty-2-36456; Rome: http://www.ena.lu/signing_rome_treaties-2-26527).

³² Following basic Kantian insights, a huge literature has observed (and tested) the tendency of democratic countries to solve conflicts in a peaceful manner. [Immanuel Kant, 'Perpetual Peace: a Philosophical Sketch', in *Political Writings* (Cambridge: Cambridge University Press), 93-130; Michael W. Doyle, 'Kant, Liberal Legacies and Foreign Affairs', *Philosophy and Public Affairs* 12 (1983), 205-35 and 323-53 and James Bohman and William Rehg (eds.), *Perpetual Peace Essays in Kant's Cosmopolitan Ideal* (Cambridge: The MIT Press, 1997); a long-term empirical discussion in John R. O'Neal and Bruce Russett, 'Kantian Peace', *World Politics* 52 (1999): 1-37]. This seems to be related to a firmer commitment to international cooperation in general [cf. Kurt Taylor Gaubatz, 'Democratic States and Commitment in International Relations',

integrative pull absolutely essential in the absence of the combination of a single constitutional order and a hierarchically organised set of institutions, in terms discussed at the beginning of this section.

There are very good normative and empirical reasons to affirm that only democratic constitutional states will be inclined, and be capable of integrating through constitutional law (they will also be the ones more pressed to integrate once they realize that democracy in one country is simply impossible, pragmatically and normatively, once a certain degree of interdependence is reached). In the European case, the long period of internecine war had created the conditions for greater constitutional affinity by 1945, at least among continental Western European states. All Member States had experienced different forms of political extremism, social and economic collapse, widespread abuse by the authorities and different forms of foreign invasion.³³ This fostered a return to what Carl Friedrich aptly labelled as 'negative' revolutionary constitutionalism.³⁴ Furthermore, this affinity extended to substantive social factors. The six founding Member States of the Union embraced a rather similar form of

International Organization 50 (1996): 109-39]. Supranational integration seems to be more likely among states with a homogeneous political regime; and very especially, among new democracies [on the latter, see Karen Remmer, 'Does Democracy Promote Interstate Cooperation? Lessons from the Mercosur Region', *International Studies Quarterly* 42 (1998): 25-51]. In its turn, the more integrated an international organization (something which seems conditional on its Member States being democratic), the more the awareness about the democratic shortcomings of the institutional setup and decision-making procedures of the organization [Eric Stein, 'International Integration and Democracy: No Love at First Sight', *American Journal of International Law* 95 (2001): 489-534].

³³ The traumatic experience of the Second World War had made clear that democratic constitutional ideals and principles could not be ensured through closed and self-referential nation-states. European federalists may have failed to make their case against the nation-state; but the nation-state that was rescued through European integration was very different from its interwar predecessor. As noted, the European Member State of the European Union was an open and cooperative state, whose constitutional identity required it to open itself up to supranational integration. The effects of such an opening could be amplified through substantive similarities, such as the fact that they were all welfare-states in-the-making. In that regard, the British case stands out. The British state did not only survive the war basically unscathed, but with its highest ever democratic legitimacy. In the immediate postwar period, the building of the British welfare state launched an episode of unsurpassed nation-making. Insofar as the United Kingdom became interested in European integration it was because the postwar period also bore testimony to the collapse of the imperial project, which revealed the shaky grounds on which the postwar consensus had been built.

³⁴ Friedrich, *supra*, footnote 9.

Sozialer Rechtsstaat (contrary to what had been the case in the aftermath of the First World War) if not in its institutional hardware, at least in its basic normative principles. This initial affinity was further reinforced by the establishment of constitutional and legal mechanisms that helped foster convergence of the substantive contents of national constitutions³⁵ (especially, the European Convention of Human Rights, and after a ‘gap’ of almost two decades, the European Court of Human Rights).³⁶

IV. The peculiar blend of constitutional dynamics characteristic of constitutional synthesis

It is possible to distinguish three different types of constitutional dynamics: constitution-making, transformative constitutionalisation and simple constitutionalisation.³⁷ And we further argued that the variants of constitutionalism typical of nation-states (revolutionary and evolutionary constitutionalism) could be defined by reference to particular combinations of constitutional dynamics. Finally, we suggested that contrary to *sui generis* theories of European integration, the dynamics of European constitutional law was not indefinitely ‘peculiar’, but could be analysed by reference to the same patterns of constitutional transformation that were characteristic of national constitutionalism. What was different was the mix of constitutional dynamics peculiar of the Union.

³⁵ See the so-called ‘Birkelbach’ report of the European Parliament (“Report by Willi Birkelbach on the political and institutional aspects of accession to or association with the Community, European Parliament, 19 December 1961, available at http://www.ena.lu/report_willi_birkelbach_political_institutional_aspects_accession_association_with_community_december_1961-020006013.html. On socialisation processes in the European Union, see Cris Shore, *Building Europe* (London: Routledge, 2000); Gerard Delanty, *Inventing Europe* (Houndsmills: Palgrave, 1995); Gerard Delanty and Chris Rumford, *Rethinking Europe* (London: Routledge, 2005).

³⁶ On the complex history of the European Convention of Human Rights and the European Court, with a very sophisticated analysis of its (intended) role in the Cold War and its (unintended) role in de-colonisation, see A. W. Brian Simpson, *Human Rights and the End of Empire* (Oxford: Oxford University Press, 1999); Mikael Rask Madsen, ‘France, the United Kingdom and the Boomerang of the Internationalization of Human Rights’, in *Human Rights Brought Home*, eds. Simon Halliday and Patrick Schmidt, 57-86, (Oxford: Hart Publishers, 2004), ‘From Cold War Instrument to European Supreme Court’, *Law and Social Inquiry* 32 (2007): 137-59; Antonin Cohen and Mikael Rask Madsen, ‘Cold War Law: Legal Entrepreneurs and the Emergence of a European Legal Field (1945-1965)’, in *The European Way of Law* Volkmar Gessner et David Nelken, 175-202, (Oxford: Hart, 2007).

³⁷ On this see *The Constitution's Gift*, supra, n. 12, chapter 1.

This paper provides the groundwork for this line of reasoning. In particular, we flesh out the specific way in which constitutional synthesis is a path to the forging of a democratic constitution alternative to both revolutionary and evolutionary constitutionalism, or what is the same, which combination or mix of constitutional dynamics is proper to synthesis. In concrete, we sustain that constitutional synthesis proceeds according to a three-fold pattern. First there is (A) a founding constitutional moment, the synthetic constitutional moment (paraphrasing the very apt Ackermanian terminology developed in the context of revolutionary constitutionalism), in which the constitutional norms of all participating states are projected to the role of collective constitutional law, and are complemented by the laying down of bits and pieces of the set of constitutional norms and institutional structures of the new polity; this reveals the key advantage of constitutional synthesis, its economic character in terms of political resources being needed to launch constitutional integration through synthesis; this is followed by the unleashing of (B) simultaneous processes of transformative and simple constitutionalisation, through which the constitutional nature of the polity and its legal order comes to the fore as the concrete normative implications of the regulatory ideal of a common constitutional law are clarified; but as time passes (C) the vulnerabilities of synthesis stemming from its deep pluralism are exposed, a process triggered by significant changes in the environment of the synthetic polity (what we may be labeled as exogenous limits to synthesis) and by the tensions internal to the synthetic model (what we characterize as endogenous limits to synthesis).

It is perhaps appropriate that we reiterate again that our theory is essentially interpretative and re-constructive and thus we are trying to offer a framework of understanding of the founding and the development of the European Union. So our theory is indeed a result of moving back and forth between theory and constitutional history.

A) The synthetic constitutional moment

As is the case with integration through revolutionary constitution making, constitutional synthesis is launched by an explicit decision. But contrary to what is the case in the revolutionary tradition, the 'constitutional moment' does not come hand in hand with deliberation and decision-making on the literal tenor of the new fundamental law. Synthetic constitutionalism is more economical in political resources. It suffices that the parties agree to start a process of integration through constitutional law (entailing, as we saw, that the collective of national

constitutional laws is projected to the supranational constitutional law) *and* that the process is conceptualised in democratic terms for the process to be democratically legitimate. This is so because under such conditions, the ‘synthetic constitutional moment’³⁸ corresponds to the institutional realization and embodiment of the mandate to integrate that is thus enshrined in the national constitutions.

This is not an institutionally speaking open mandate. The mandate underlines the need to sustain the constitutional core and affinity among the integrating entities. This also of course applies to the character of the supranational *institutional* arrangements, including how the democratic principle is institutionalised and substantivised. As will be made clear in the below, supranational representative and responsible government is that arrangement that best ensures both the vertical and the horizontal dimensions of synthesis.³⁹

The founding Treaties of the European Communities launched an ‘ever closer Union’ to be realised in respect of, and also through, national constitutional law. In retrospect, with the benefit of hindsight and through relying on a historically reconstructive approach, we can conclude that the idea that was struggling to be expressed in the innovative language of the Treaties was that of synthetic constitutionalism.

Constitutional synthesis is especially enticing because it economises political resources by creating the conditions under which it is legitimate to create a new polity and legal order by relying on the ‘constitutional’ foundations of already established constitutional states (i.e. on national constitutions and their democratic legitimacy). Democratically speaking, there is no need for an initial political mobilization of the kind that is characteristic of revolutionary constitution making. It is clear that intense political debate on the contents and structures of the constitution

³⁸ The concept of a ‘synthetic constitutional moment’ contains an intentional echo to Ackerman’s ‘constitutional moment’. The difference between the two should be clearly established. The synthetic constitutional moment corresponds to the ‘new constitutional beginning’ in which a new supranational order is established. This is however NOT preceded by a legitimising revolutionary constitution-making process. A similar legitimising role is played by the regulatory ideal of a common constitutional law. On the constitutional moment, see references in fn 26.

³⁹ The vertical dimension refers to the ‘uploading’ of institutions from the Member States to the EU-level whereas the horizontal dimension refers to the Member State level. Synthesis speaks to both simultaneously.

is a necessary element of democratic constitutionalism. It is also clear that supranational constitutional integration – to be democratic – also requires that citizens conceive of themselves as part and parcel of a wider imagined community. The problem facing Europe after World War II was the inability of most Europeans to consider themselves as part of a wider European community (even if they at the same time felt that some form of integration was needed to avoid a new disaster). Task number one was instead to restore amicable relations among former combatants.⁴⁰ In this circumstance, there was a clear absence of a default stabilising collective identity. Further, any effort to launch an intense political debate as a prelude to a constitutional ‘big bang’ would most likely have backfired very badly.⁴¹ European resistance movements were then also very conscious of the fact that the window of opportunity for constituting a European federation would be closed literally months after World War II had come to an end.⁴² The interesting point about constitutional synthesis is that it renders democratic constitution making possible under such apparently inhibiting circumstances. As we will show integration through constitutional law in a setting of well-established constitutional polities comes with procedural-democratic safeguards that render a stabilising collective identity less important *at the outset*. The genius of constitutional synthesis is that it combines democratic experimentation (democratic constitution making at the supranational level) with familiar state-based democratic procedural safeguards. The peculiar circumstances of constitutional synthesis suggest that there is no need for an intense political debate in the *initial up-stream*. In other words, constitutional synthesis offers a way out of the impasse by pointing to a procedure where democratic legitimacy can be assured without an initial constitutional big bang, allowing the process of constitutional integration to start, and creating the conditions under which the new common constitutional identity can be imagined (and

⁴⁰ Indeed, the actual establishment of European institutions unleashed not only a process of mutual learning about different normative and institutional traditions, but also of reconciliation through integration, if one wishes, of persons who were literally shooting each other during the War. That could well had been the case of, for example, Carl Roemer and Massimo Pilotti on the one hand and Jacques Rueff on the other.

⁴¹ The realisation that the federal path was difficult to follow once the nation-states had consolidated after the European zero hour was very noted by the Federalist literature in the last months of the war and the first of the postwar. See Altiero Spinelli,

⁴² That was perhaps further proven by the failure of the European Defence Community (EDC) in 1954.

consequently solidarity bonds be forged). This in no way rules out the need for popular sanction; the more integration proceeds towards a self-standing constitutional construct the greater the need for popular sanction.⁴³

B) Transformative and simple constitutionalisation

Constitutional synthesis reduces the political resources needed to launch the process of constitutional integration, but at the price of leaving implicit the constitutional nature of the polity and of its legal order, and of leaving unexplored the actual normative content of the regulatory ideal of the common constitutional law. This explains why in constitutional synthesis the synthetic constitutional moment is followed by a combination of transformative and simple constitutionalisation.

a) Transformative constitutionalisation

Because it does away with the explicit process of constitution-making, synthetic constitutionalism resembles in some respects *evolutionary* constitutionalism. The transformative constitutionalisation of the legal order is a necessary part of the evolution of a synthetic polity. The key difference lies in the fact that in constitutional synthesis, transformative constitutionalisation is not so much about the actual content of constitutional norms (which is *programmed*, so to say, by the regulatory ideal of the common constitutional law) but about the full internalisation by institutional legal actors and citizens in general of the constitutional nature of the polity and of the legal order that is being created. The emergence of a pattern of 'substantive' transformative constitutionalisation, or what is the same, changing the content of the constitutional norms of the synthetic polity without regard for the regulatory ideal of the common constitutional law and without resort to explicit constitution-making is indeed an indicator of a crisis in the process of synthetic constitutionalism, something which is clearly not true in evolutionary constitutionalism.

⁴³ As correctly affirmed in the Lisbon Judgment of the German Constitutional Court, *supra*, footnote 29, paragraph 262: 'The constitutional requirements placed by the principle of democracy on the organizational structure and on the decision-making procedures of the European Union depend on the extent to which sovereign responsibilities are transferred to the Union and how great the extent of political independence in the exercise of the sovereign powers transferred is. An increase of integration can be unconstitutional if the level of democratic legitimisation is not commensurate to the extent and the weight of supranational power of rule'.

It is important to add that transformative constitutionalisation was especially important in the European case because the European Union was a pioneering synthetic polity. This is what accounts for the specific complexities of a process such as that of accepting the structural principles of primacy and direct effect, or the late and controversial affirmation of the protection of fundamental rights as an unwritten general principle of Community law.⁴⁴

b) Simple constitutionalisation

The definition of the constitutional law of the synthetic polity through reference to the regulatory ideal of a common constitutional law implies that while we must assume that the synthetic constitutional order is created at the synthetic constitutional moment, its normative density is rather low. This is so because the synthetic constitutional moment only brings to us the regulatory ideal of a common constitutional law and some bits and pieces of the common constitutional law (in the European case, as reflected in the Treaties).

Synthesis thus presupposes that the specific normative contents of the regulatory ideal of a common constitutional law are then distilled out from the set of national constitutions in a process that is different from that characteristic of both revolutionary and evolutionary constitutionalism, even if it shares some common traits with the latter.⁴⁵ It is different from the former because it proceeds comparatively. Instead of one constitutional text, one set of constitutional debates and a 'constituted' political process, the evolutionary constitutionalisation of the synthetic polity proceeds by exclusive reference to the national constitutions of the participating states (there are several, not one constitution; but in contrast, the constitutional debates and the 'constituted' ordinary political process are of less help, precisely because they are too many). In contrast to evolutionary constitutionalism, the simple constitutionalisation under constitutional synthesis does not proceed organically.⁴⁶ It is not based on an exploratory trial-and-error

⁴⁴ See Joseph H. H. Weiler, 'The Transformation of Europe' *Yale Law Journal* 100 (1991): 2403-2483; Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001).

⁴⁵ Because the regulatory ideal needs to be fleshed out in concrete cases, it is not surprising that Courts played a key role in the process.

⁴⁶ Constitutional synthesis is different from evolutionary constitutionalism in the sense that there is always an agent (be it the legislature or the judiciary) behind the process of fleshing out the concrete implications of the regulatory ideal of a common constitutional law. Constitutional conventions may be distinguished in European

process, but is framed by the collective of national constitutions. As a consequence, the synthetic constitution cannot be said to evolve so much as it is *fleshed out* and *distilled* from national constitutions.

Constitutional synthesis still implies that there is a clear and fundamental reference to *popular authorship* as the ultimate legitimating principle of synthetic constitutional law, a feature typical of revolutionary constitution-making. The regulatory ideal of a common constitutional law makes it possible for such a reference not to have to be mediated to the supranational people as such, but to the *peoples* who authored national constitutions and who are in the process of collectively building a supranational constitutional entity (key here is the transfer, the process whereby national constitutions lend democratic legitimacy to the supranational constitution). Furthermore, the constitution is the result of a process of progressive evolution, but there are always clear *positive constitutional norms* (the national constitutions) that serve as the reference for each and every decision in the progressive constitutionalisation of the fundamental law. This places synthetic constitutionalism at odds with the inductive process of evolution and renders it similar to revolutionary constitutionalism, only that popular authorship is indirect in the synthetic notion, as national constitutional norms are legitimised and seconded as supranational constitutional norms.

c) Exogenous and endogenous constraints: vulnerability of synthesis to external shocks and inner tensions

The process of constitutional synthesis is highly susceptible to the many tensions, upsets, and conflicts that emanate from within and without the common constitutional field. Some of these are so-to-speak intrinsic to the field (such as the fact that a field is made up of a range of legal systems and is therefore necessarily diverse); thus we may talk about limits that are intrinsic to any process of constitutional synthesis. In addition, there will be limits that are specific to the European case, but not necessarily to constitutional synthesis, as such; they result from essential but contingent facts.

Community law, but the process of concretisation of solidarity in social security arrangements, or on the protection of fundamental rights is one which has been undertaken, respectively, by the European legislature (with the Council of Ministers having the last legislative word) and by the European Court of Justice.

A first set of constraints stems from the fact that synthetic constitution-making is especially vulnerable to 'exogenous' shocks caused by radical changes in that part of the political and socio-economic environment that is external to the 'integrating' polity. This vulnerability is mainly the result of the low institutional robustness of a synthetic polity when compared to nation-states, whether forged in a revolutionary or in an evolutionary manner. External shocks reveal the extent to which the synthetic polity lacks political resources (in the form of coercive, economic, or even cultural means) to absorb the shock and to create conditions under which a return to stability is possible (and quick).

Second is the extent to which the process of constitutional synthesis *as it unfolds in Europe* can spur resistance to further integration. One relevant factor is that the more the process of synthesis advances, the greater will be the 'institutional temptation' to put forward autonomous conceptions of Community law that are out of synch with what can be understood as a common constitutional law. On the one hand, that is the background for the legitimacy crisis of Community law *as emancipated* from national constitutional law by the European Court of Justice. The case law of the Luxembourg judges since the late seventies has *de facto* emancipated the Community economic freedoms from national constitutional standards. Economic freedoms used to be characterised as *operationalising* the principle of non-discrimination on the basis of nationality. As such, they were essentially enjoyed by non-nationals, who were now to receive the *same* treatment as nationals. But what this treatment consisted of was still to be defined by reference to each national constitutional and ordinary legal order. Since its rulings in *Dassonville* and *Cassis de Dijon*, later extended to other economic freedoms, the Court has re-characterised economic freedoms as part and parcel of the overall status of European citizenship. But contrary to what may be considered, this has not resulted in politicising Community law, but in curtailing the links between national and European constitutional law. Economic freedoms are now enjoyed by all Europeans (including nationals against their Member States), and are infringed by *any kind of obstacle* to their actual or potential exercise.⁴⁷ Such emancipation comes at the price of a

⁴⁷ See Agustín José Menéndez, 'When the Market is Political. The Socio-economic Constitution of the European Union Between Market-making and Polity-making,' in Letelier and Menéndez, *supra*, footnote 25, 39-61; 'More human, less social: The jurisprudence of the ECJ on citizenship' in Azoulai and Maduro (eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishers, 2009), 363-93. See also Alexander Somek, 'The Argument from Transnational Effects I: Representing Outsiders through Freedom of

reduced measure of *transferred* democratic legitimacy via the common constitutional law.⁴⁸ Because in Europe the emancipation has been led by the Court of Justice, there may be a day of democratic reckoning (a first instance of that was the public reaction to Viking and Laval,⁴⁹ institutionally enshrined in the Lisbon judgment of the German Constitutional Court).⁵⁰ On the other hand, the lack of a complete institutional structure implies the opposite risk, namely, that synthesis may result in national opportunistic moves *cloaked* in constitutional discourse. Or what is the same, that national political or judicial institutions may try to reinforce their strategic options by producing legal opinions which define the common constitutional standard in ways amicable to their own interests.

A third possible constraining element is that the more the integration advances, the greater will be the need to adapt national constitutional structures and the greater the challenge to national constitutional identity. The more that integration expands, the more diverse the Union will be. Here size and numbers matter: the greater the number of new entrants, and the larger their size, the greater the institutional shock because every increase in membership entails a reconfiguration of the Union's constitutional structure.⁵¹ Further, the more that integration

Movement', *European Law Journal* 16 (2010): 315-44. A draft of the second part of the article can be consulted at: http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1397245_code650352.pdf?abstractid=1397245&mirid=3.

⁴⁸ As already indicated, the authority of supranational constitutional law is anchored in the fact that it reflects the regulatory ideal of a common constitutional law. However, the successful unfolding of the process of concretisation of the contents of that common constitutional law is bound to result in constitutional tensions. The more the process of concretisation successfully advances, the more there is a risk of the supranational constitutional law being perceived and eventually becoming 'emancipated' from national constitutional laws. This may result in short-term gains in the authoritative status of Community law, but cannot but undermine in the long-run the democratic legitimacy basis of Community law, crucially dependent as it is on the legitimacy radiated by national constitutions as the deep constitution of the Union.

⁴⁹ Case C-438/05, *Viking*, [2007] ECR I-10779; Case C-341/05, *Laval*, [2007] ECR I-11767; Case C-346/06, *Ruffert*, [2008] ECR I-1989. Paragraph 59 of the Conclusions of AG Maduro is especially revealing.

⁵⁰ Lisbon judgment, *supra*, footnote 29.

⁵¹ As Stefan Collignon has argued and showed from an economic standpoint, new rounds of enlargement result in major benefits accruing to new Members, but increasingly less to already existing Members, as the institutional and substantive

advances, the more the tensions between substance and procedure are revealed, and the more they make the normative shortcomings apparent (the snowballing democratic deficit). And the more integration advances, the more the different institutional claims to legitimacy will clash (national governments sitting on a dubious indirect democratic legitimacy, the Commission at a loss once there is another institution that embodies the supranational will and interest i.e. the EP; the European Parliament is trapped in a downward spiral due to the gap between its legitimacy credentials and its lack of consequent power, the ECJ is torn between its aspiration to emancipate European constitutional law from national constitutional law, and the democratic foundation of Community law on common constitutional law).

A fourth constraining category is direct political resistance to synthetic constitutional integration. This takes many forms. One is explicit rejection of the Union as a constitutional project, and a concomitant unwillingness to frame discussion of treaty reform in constitutional terms. Another is unwillingness to adapt national procedures to serve the process of synthesis. Synthesis implies a gradual harmonisation of national constitutional amendment procedures. Thus, unwillingness to harmonise national constitutional amendment procedures will clearly stymie the process of synthesis. A third form is seen in how national administrations contain their compliance with Union law.⁵²

One final constraining factor consists in the fact that actors and analysts have not understood the process as one of constitutional synthesis, certainly not in the sense of a constitutional theory that is able to account for and to justify European constitutional integration. This lacunae has produced diversity in outlooks, heightened uncertainty about process dynamics and results, and given impetus to resistance. It follows that the lack of a proper theoretical explanation of the key innovative features of European constitutional law has major implications.⁵³

Field endogenous factors (such as for instance diversity and different orientations to each other and to the outside world), as well as field exogenous factors (such as structural shocks) affect the shape and

capacities of the existing Union are increasingly compromised beyond a certain threshold of membership.

⁵² Lisa Conant *Justice Contained – Law and Politics in the European Union* (Ithaca: Cornell University Press, 2002).

⁵³ Indeed, the absence of a compelling theory is wrongly taken as conclusive evidence to the effect that Community law is undemocratic or even unconstitutional.

pattern of integration. Increased field diversity through admission of new Member States sets new limits to synthetic integration. The same applies when shocks or transformations increase the range and character of constitutional models, traditions or visions in the field. Both forms of diversity may have external roots but become embedded in and reconfigure the shape of the field. That is well-illustrated by the neo-liberal turn in the eighties, which represents the incorporation of a new and different conception of the underlying socio-economic constitution. Its fissiparous effects were amplified in the nineties through the disjuncture between monetary and economic policy under the structural pressure of German reunification. Similarly differentiating and fissiparous effects had external sources such as reorientations in American foreign policy first under Nixon and now recently under Bush II. The list of constraining factors can be extended as will become apparent when we consider more concretely how the process of constitutional synthesis has unfolded in the two latest rounds of European constitution making, Laeken and Lisbon.

Constitutional synthesis is a path to the establishment of a democratic constitution that forms an alternative to both revolutionary and evolutionary constitutionalism. But even if all these three constitutional roads may lead to the Rome of a democratic constitution, it must be observed that each of them has different structural implications. The revolutionary path results in a constitution with an intense democratic legitimacy; not only does the process of constitution-making release civic energies and political commitment, but the symbolism of the written constitution is capable of performing a key integrative role in society. Having said that, the revolutionary path has become so closely associated with the *national* constitution that it is hard to apply to the supranational level, but may actually be an obstacle to the democratic constitutionalisation of supranational relationships. And once an evolutionary constitution has become entrenched it provides political stability even in the direst of circumstances. However, its development presupposes not only a firm hold on political power, but also a pre-political common culture. Furthermore, stability comes at the price of the defence of the status quo, including different types of injustices. Consequently, it does not provide by itself much of a guarantee that constitutionalisation will naturally gravitate towards democratic order. And finally, synthetic constitutionalism combines economy of political resources with speed in the process of integration. But synthetic polities are rather vulnerable to external shocks given their 'double' constitutional pluralism and the very success of constitutional synthesis

results in the development of factors limiting integration from inside, so to say.

V. Institutional development under synthesis: replication, adaptation and experimentation

As bears repeating, in Europe constitutional synthesis combines the regulatory ideal of a common and single constitutional law with a pluralistic institutional structure. This entails that synthesis proceeds simultaneously albeit quite differently in the *legal-normative* and in the *institutional* dimensions. Constitutional synthesis of course comes with institutional presuppositions, which refer back to the basic institutions that sustain national constitutions. But synthesis does not imply that such a complete set of institutions would be grafted onto the European level; in institutional terms, synthesis is a far more open-ended process, as we saw in Section II. The main structuring factors are on the one hand the regulatory ideal and on the other the frail organisational structure (field) that ties the Member States together.

This implies that we have to pay explicit attention to the institutional development under synthesis; this is also because synthesis offers little assurance that the institutions will end up fully reflecting the synthetic impetus.

On institutional development, note first that the establishment of the Union came hand in hand with the establishment of (only) some supranational institutions, but the relationship between supranational and national institutions was not subject to hierarchical integration; contrary to what is the case in national or federal systems, there is no hierarchical structuring of institutions, not even as a residual or backup rule to solve conflict.

Second, the 'completion' of the Union's institutional structure (both in the sense of adding new institutions and of 'completing' those created by the founding Treaties) unfolded in the constitutional field and was driven by (at least) three processes or mechanisms, namely: a) replication, copying central principles and institutional elements from the national institutional structures to the European level (which accounts for example for the establishment and consistent empowerment of the European Parliament and the Court of Justice); b) adaptation, guided for instance by the pressure to apply the same national constitutional principles in an original fashion given the

peculiar functional needs of the supranational polity (which explains for instance the structure of the Union's law-making process); and c) experimentation, which is unavoidable given the unprecedented character of constitutional synthesis (painfully exemplified in the EU by the so-called comitology committees and other related structures).

Third, that the step by step nature of the setting up of the European institutional structure results in a further source of internal pluralism, as different bits and pieces of the institutional structure respond not only to constitutional synthesis, but to various sets of influences. Thus, while the European Court of Justice was institutionally established through what was essentially the transfer of French institutional culture to the European level, the setup of the Commission was a more fragmented process, and depended on the institutional culture dominant within each Directorate General. Similarly, the system of European Central Banks was dominated by a transfer not only of substantive principles, but also of institutional culture from the German system. The ad hoc institutional arrangements of the open method of coordination mainly reflect the predominance of the ideological movement of New Public Management, which had made inroads first and foremost in British institutional structures (but also Scandinavian ones). This process has been constitutionally fuelled by the fragmentation of the process of integration, first through the narrow remit of *sectoral integration* in the Coal and Steel and Euratom Treaties, by the unleashing of parallel areas of integration subject to international law arrangements (ex TEC 220), and then by the pillar structure.

Fourth, the imperfect manner in which the process of constitutional synthesis gets institutionally embedded accounts for a good number of the tensions and limits that the *universalisation of European constitutional law encounters*. It is indeed a further source of constitutional pluralism.⁵⁴

⁵⁴ The European Union was forged as a congeries of organizations. But this organizational structure is adapted to and gives distinct shape to the Union's legal-constitutional system. In contrast to the state (including the federal state) the Union's structure is marked by absence of explicit conferral of constitutional authority to the overarching federal level. This sets the EU apart from federations where federalization entailed a new status for the member states. See Andrew Glencross, *What Makes the EU Viable* (London: Palgrave Macmillan, 2009), 27, with reference to Carl Schmitt 1992, 'The Constitutional Theory of Federalism', *Telos* 91 (1992): 26-52, at 55. Instead the constitutional structure is carried by all the component legal-constitutional chaperons (high or supreme courts in all member states and at the Union level). This is what we call the constitutional field. We draw on the notion of

Since the Union's inception, there has been strong *pressure* to upload⁵⁵ familiar institutional arrangements to the EU-level. There has been 'synthesis through replication'. The process had an element of reflexive replication because it unfolded not through the mere uploading of elements from one uniform structure but rather from a range of national arrangements located within a common organisational field. Given that a field will only form insofar as the constitutive entities share certain commonalities, the structural and substantive norms that these entities share in common are natural candidates to become part of the institutional structure and substantive contents of the supranational constitution.

Institutional replication manifests itself in concrete organisational examples such as the European Parliament, as well as a judicial organ with compulsory jurisdiction such as the European Court of Justice.⁵⁶ They were not merely to be formally similar; those many pushing for replication have also wanted them to be operationally similar. And even if they were set up at the supranational level, the general expectation has been that their overall location within the EU's overall institutional structure would resemble that of the constitutional state. The normative template was set early on; it guided a more gradual and reflexive process whereby the institutional specifics were gradually worked out. This helps explain why the European Parliament has steadily gained new powers through *constitutional conventions* later codified in successive rounds of Treaty amendment.⁵⁷ It also helps explain the general acceptance of the powers and competences that the European Court of Justice has assumed and vindicated through its own activities.⁵⁸ Further, the fact that the legal-institutional systems at the European and Member State levels are interconnected, with the Courts also procedurally tied together, ensures that there are strong *isomorphic*

organisational field to underline the peculiar manner in which the constitutional dimension is organisationally embedded.

⁵⁵ On the Parliament, Berthold Rittberger, *Building Europe's Parliament – Democratic Representation Beyond the Nation-State* (Oxford: Oxford University Press, 2005). See in more detail references in chapter 3. II, section 4.

⁵⁶ Berthold Rittberger notes, in his analysis of the formation of the European Parliament, that: 'the model of representative, parliamentary democracy is the template which guides political elites' responses to the perceived legitimacy deficit.' See Rittberger, *supra*, footnote 53.

⁵⁷ See *ibidem*.

⁵⁸ See Alter, *supra*, footnote 42, and Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004).

pressures on all participating courts.⁵⁹ In other words, there are strong (coercive, mimetic and normative) pressures on the institutions in the European field to become more similar over time through processes of copying, emulation, mutual adjustment, and mutual learning.

The above examples show that there are strong unifying pressures in the field. At the same time, the field is diverse, with internal and external tensions. This suggests that in many cases attempts at mere 'uploading' of national structural or substantive constitutional norms would be misplaced, improper, or inadequate. The diversity and complexity of the field often unleashes processes of search for which norm should be defined as the 'common' one, with the result being some form of innovation on the national. Or a process of copying could make actors realise that the constitutional *problématique* was simply different up the governmental scale; thus it was necessary to modify existing ones to suit the new circumstances. An organisational field sustains an element of national difference and divergence and is highly susceptible to differentiating shocks or *punctuated equilibria*,⁶⁰ which hit national constitutional systems.

In Europe, institutions, decision-making processes and material norms have at times had to be rethought, the underlying principles figured out, and the result operationalised at the European level in its own peculiar form. We see this clearly with decision-making procedures which for a long time mixed intergovernmental and supranational principles but have gradually converged around a distinct system of supranational

⁵⁹ Indeed, the fleshing out of the right of access to a Community Court by the European Court of Justice in the late eighties and nineties (which we consider in Chapter Three) put considerable isomorphic pressures on national courts. See for example Eduardo García de Enterría, *La Batalla por las Medidas Cautelares. Derecho Comunitario Europeo y Proceso Contencioso-administrativo Español* (Madrid: Civitas, 2006). That is perhaps the main immediate implication of the judgment of the ECJ in C-50/00 P Unión de Pequeños Agricultores (2002) ECR I-6677. See Filip Ragolle, 'Access to justice for private applicants in the Community legal order: recent (r)evolutions' *European Law Review* 28 (2003): 90-101. Denning's incoming tide (H. P. Bulmer Ltd v J. Bollinger SA [1974] Ch 401 at 418) is indeed raising.

⁶⁰ This term draws as it is from evolutionary biology refers to a situation where a long evolution is suddenly punctuated by rapid specialization. See Stephen Krasner Sovereignty: An Institutional Perspective, *Comparative Political Studies* 21 (1988): 66-94. The analogy to the field is where a shock or upset reorients the members in different directions.

representative government.⁶¹ Even the European Parliament is no replica of national parliaments; it is a weak copy because it is a case of gradually adapting the notion of representative government to the supranational level. Even more pronounced, innovation in the institutional shape given to basic constitutional principles helps to account for the institutional identity of the Council of Ministers and of the Commission. Indeed, the Council of Ministers is to be regarded as the *constitutional alternative* to the diplomatic conference. Democratic accountability is structurally fostered not only by rendering the institution permanent (and thus opening the way to the forging of controlling institutions at the national level), but foremost by the design of the decision-making process. The consultative or co-decisive role of the European Parliament does not only contribute *directly* with a modicum of democratic legitimacy to the final decision,⁶² but also *indirectly* renders possible, even if far from certain, national parliamentary control of national government⁶³ (especially if national parliaments develop means of acting co-ordinately or even collectively in that regard - a development that

⁶¹ General normative production (i.e. law-making) proceeded under the founding Treaties through the *standard* Community method, which was based on Commission's right of initiative, Parliament's and European and Social's Committee right of consultation, and the prerogative of final decision-making by the Council acting unanimously. There were in addition several specialised law-making procedures. Over time, law-making has been transformed so as to increase the decision-making powers of the European Parliament. This has resulted in the progressive affirmation of two different definitions of the European legislative *volonté générale*. One that proceeds through the aggregation of national wills (and which roughly corresponds to the classical Community method just described). The other that defines a supranational legislative will, a mixture of a majoritarian aggregation of national wills expressed in the Council and a majoritarian European will forged in the European Parliament (that is the underlying grammar of co-decision). However, it must be noticed that the evolution has proceeded through adding new phases in the legislative procedure, something has diminished the capacity to take effective decisions. On this, see Fernando Losada y Agustín José Menéndez, 'Toma de Decisiones en la Unión Europea. Las Normas Jurídicas y la Política en la Formación del Derecho Europeo' in *El Consejo de Estado y la Integración Europea*, ed. Francisco Rubio Llorente (ed.), 335-467, (Madrid: Consejo de Estado y Centro de Estudios Políticos y Constitucionales, 2008), and above all Anne Elizabeth Stie, *Co-decision: The Panacea for EU democracy*, ARENA Report 1/2010 (Oslo: ARENA, University of Oslo).

⁶² Simon Hix, Abdul G. Noury and Gérard Roland, *Democratic Politics in the European Parliament*, Cambridge: Cambridge University Press, 2007.

⁶³ Ben Crum and Eric Miklin, 'Reconstructing Parliamentary Sovereignty in Multilevel Polities: The Case of the EU Services Directive', Paper prepared for the Workshop 'Inter-Parliamentary Relations in Europe' at the 2010 ECPR Joint Sessions in Münster (D), 22-27 March, 2010.

may or may not be sparked by the innovations introduced in the Treaty of Lisbon).⁶⁴

But the forging of a common constitutional law may give rise to problems that national constitutional states have not faced. Indeed, synthesis also implies a certain degree of experimentation, given the pioneering role of European integration in this alternative, 'third way' constitutional tradition. In cases where national constitutional norms are unsuitable to the task at hand, either because the problem is radically different at the supranational level, or because the effort to establish a viable common position simply produces results nobody will accept, the obvious solution is experimentation. This is illustrated by the development of procedures of *regulatory decision-making* in the form and shape of comitology committees. The Treaties contained a reference to the form of regulatory instruments (indeed, *regulations* and *directives*), but those instruments were actually defined as statutes in a material sense. There was thus a gap not only in the system of sources of Community law, but also in the set of law-making procedures. Replication seemed inadequate to attend to the functional needs of European integration. In particular, it did not seem a brilliant idea (and probably keeps on not being so) to assign statutory regulatory development to the Commission as a supranational administrative body, as it lacks the knowledge-basis necessary to write the said statutory regulations. Replication was dysfunctional; there was a need to innovate or better experiment, as was indeed the case with comitology committees. The production of regulations was to be led by the Commission, but checked by representatives from the Member States, who could also contribute local and technical knowledge to the process. If understood within the matrix of the democratic system of sources of law, comitology is to be regarded as having added to the democratic legitimacy of Community law, creating means and procedures through which the said legitimacy could be achieved even when *implementing* the essential elements of statutes through regulations.⁶⁵

⁶⁴ The structure of inter-parliamentary cooperation is unique in the EU and has taken on the shape of an organizational field. In that sense we are talking about the possibility of further solidifying this field. See Ben Crum and John E. Fossum, 'The Multilevel Parliamentary Field -A Framework for Theorising Representative Democracy in the EU', *European Political Science Review*, 1,2 (2009): 249-271.

⁶⁵ See Christian Joerges, "Deliberative Supranationalism: Two Defences", *European Law Journal* 8 (2002): 133-51; Agustín José Menéndez, "The European Democratic Challenge", *European Law Journal* 15 (2009): 277-308.

Institutional development under synthesis thus proceeds through replication, adaptation, and experimentation. And still, because the process is reflexive, the sum total is bigger than the parts, in the sense that these acts of ‘putting in common’ institutions and fundamental laws have a major transformative potential. They require reconsidering the normative ties reflected in political and legal life on a larger scale, because the very political and constitutional link between citizens was enlarged by creating common decision-making institutions and procedures, which produced common action norms. This necessarily implies a partial re-founding of all national legal orders, in the sense that the validity of all national legal norms is now to be subjected to the condition of being in compliance with the principle of non-discrimination.⁶⁶ This is the result of expanding the breadth and scope of the general right to equality of nationals underpinning all national constitutions to all Europeans, whether nationals or not of the Member State in which they are economically active.⁶⁷ Accordingly, the European Union’s Member States have been profoundly reconfigured, to the point that neither the supranational nor the national institutional and constitutional structure can be understood without taking the other properly into account.⁶⁸ Europeanisation has in that regard meant an end to the understanding of the nation-state as an autarchic polity in empirical and normative terms, but is further proven from the perspective of the dynamics of institution-building.⁶⁹

⁶⁶ Article 7, first paragraph of the original text of the Treaty of European Community: ‘Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’ On the principle of non-discrimination as expression of a general right to equality, see Joined Cases 124/76 and 20/77, *Moulin Pont-à-Mousson*, [1977] ECR 1795, especially par. 16 and 17: ‘This does not alter the fact that the prohibition of discrimination laid down in the provision cited is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law’. See also Takis Tridimas, *The General Principles of EC Law* (Oxford: Oxford University Press, 2000), chapter 2; Anthony Arnall, *The European Union and its Court of Justice* (Oxford: Oxford University Press, 2006), 201-3.

⁶⁷ Indeed, Joseph H. Weiler, ‘Europe’s Sonderweg’ in Nicolaïdis and Howse (eds.) *The Federal Vision* (Cambridge: Cambridge University Press, 2001), 54-70. ‘Thou shall not oppress the stranger’, *European Journal of International Law* 3 (1992): 65-91.

⁶⁸ See Helen Wallace, ‘The Impact of the European Communities on National Policy-Making’, *Government and Opposition* 6 (1971): 520-38; see also Johan P. Olsen *Europe in Search of Political Order* (Oxford: Oxford University Press, 2006).

⁶⁹ See for example Adrienne Héritier, Dieter Kerwer, Christopher Knill, Dirk Lehmkuhl, Michael Teutsch, Anne-Cecile Douillet, *Differential Europe: The European Union Impact on National Policy-making* (Lanham: Rowman and Littlefield, 2001).

VI. Constitutional synthesis distinguished from other political and legal theories of integration

In this paper we have fleshed out the basic intuitions behind constitutional synthesis, and described the normative and institutional dynamics through which it unfolds. But in the same way as the Union was not created on a blank slate, constitutional synthesis has not been crafted in a theoretical vacuum. In this final section we consider the five political and legal theories of integration which have been more influential on our thinking. And still, it seems to us for the reasons mentioned below that constitutional synthesis offers a better and more coherent theoretical alternative. But if that is so, we would like to stress, it is because it captures what seem to us as fundamental insights of these theories.

A) Wessels's fusion

The most similar-sounding approach to constitutional synthesis is naturally the *fusion theory*, foremostly associated with Wolfgang Wessels.⁷⁰ The said author argues for the need to analyse European integration as a process of *gradual fusion*. The point of departure is the challenge of managing growing state interdependence. Within this context national governments and administrations have become intensely included in the entire EU policy cycle. The integration process brings about a fusion of public instruments from several levels (state and EU) – as part of a broader vertical and horizontal process of Europeanisation of national actors and institutions. The upshot is a Union marked by overlapping competences and administrative and political interpenetration across levels, which makes it quite different from a state-type entity.⁷¹ Fusion results from rational state actors searching for a viable ‘third way’ in-between intergovernmentalism and federalism. This manifests itself in the EU’s legal-constitutional structure

⁷⁰ Wolfgang Wessels, ‘An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes’, *Journal of Common Market Studies* 35, no.2 (1997): 267-299; see also Wolfgang Wessels and Dietrich Rometsch, ‘Conclusion: European Union and National Institutions’, in *The European Union and Member States: Towards Institutional Fusion?*, eds. D. Rometsch and W. Wessels, 328–65, (Manchester: Manchester University Press, 1996).

⁷¹ This mode of thinking has roots in the German federal-inspired co-operative federalism literature. Consider the large German literature on *Politikverflechtung*, which was initially discussed in relation to the EU by Fritz Scharpf ‘The Joint-Decision Trap: Lessons from German Federalism and European Integration’, *Public Administration* 66 (1988): 239-78.

which takes on aspects of both a constitution and a treaty (although it seems to us that the theory does not clarify the relationship between the two).⁷²

Fusion theory is quite different from the theory of constitutional synthesis. It has a different analytical focus: it is about institutional interaction and policy-processes, not constitution making. It is process-oriented and is particularly concerned with understanding the dynamics of European integration. In that sense it yields valuable information on how the multilevel EU's complex institutional structure operates, but is not clear on its constitutional implications. Fusion theory does not focus on how the EU's legal-political institutions were formed, neither does it pay much attention to their institutional-constitutional identity. It is therefore silent on the core aspect of synthesis, namely the manner in which national constitutional arrangements have become integrated in the aggregate European constitutional order.

B) Pernice's Multi-Level Constitutionalism

Ingolf Pernice's theory of *multilevel constitutionalism* is the theoretical approach that comes the closest to the theory of constitutional synthesis.⁷³ Pernice rightly underlines that the European legal system had constitutional character from the outset and further that this was authorised by the national constitutions, but in contrast to the theory of constitutional synthesis, he does not establish what this authorisation entails in constitutional and democratic terms. Pernice does point to the close interdependence that exists between European and national law, an interdependence that is also manifest in the institutional structure, where Member States and their constitutions are increasingly Europeanised through the development of the EU system: '(T)he constitutions of the EU Member States, no less than these states themselves, have undergone some important mutations. In addition to their character as founding instruments of the states, they have become foundational components of the European multilevel constitutional system.'⁷⁴ This system, multilevel constitutionalism underlines, is

⁷² Wolfgang Wessels, 'Keynote Article: The Constitutional Treaty - Three Readings from a Fusion Perspective', *Journal of Common Market Studies* 43 (2005): 11-36, at 14-15.

⁷³ Pernice, *supra*, fn 29; of the same author, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?', *Common Market Law Review* 36 (1999):703-50; and 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', *Columbia Journal of European Law* 15 (2009): 349-407.

⁷⁴ *Ibid* (2009), at 374.

ultimately an instrument for the citizens. During the process of European integration citizens have conferred upon themselves a new political status as citizens of the European Union. In accordance with this, the theory of multilevel constitutionalism seeks to devise a democratic constitutionalism that is adequate to the complex and unprecedented European setting.

Multilevel constitutionalism and constitutional synthesis have roughly the same point of departure: national constitutions authorising European integration. But multilevel constitutionalism does not develop how this structures the relationship between European and national law. Instead, the theory offers a vague account of pluralism and the absence of hierarchy between the two. Further, instead of placing the accent on how the member state constitutions condition the Union (through constitutional synthesis), the accent is on how the Union conditions the members. The development of the Union (a *sui generis* type of organisation) contributes to transform the Member States in a world wherein state sovereignty is undergoing profound changes. We see this in the strong emphasis on experimentation which is held up as the main mechanism in forging the Union's legal order – a system that has emerged through a process of 'trial and error'.⁷⁵ Constitutional synthesis, as we have seen, places more emphasis on transfer of constitutional norms and principles, which not only render possible the development of a uniform legal order, but also helps to understand the normative standards that condition behaviour and inform the structure.

Multilevel constitutionalism is also a theory of democratic constitutionalism with normative purport, but where the normative standards are not made explicit. Thus, it is not clear in what sense citizens can claim ownership to this structure. The theory offers no conception of what democratic citizenship entails; thus there is no clear standard to establish under what conditions European citizens can understand themselves as authors of the law, in substantive and procedural terms. In effect, the status of citizenship under Lisbon (deficient in representation, transparency and accountability terms) is said to qualify as multilevel constitutionalism. The closed and secretive manner in which the Lisbon Treaty was forged (more akin to a governments', not citizens' constitution, and with citizens as mere ignorant bystanders) can also apparently be reconciled with multilevel constitutionalism. The theory can thus be accused of seeking to

⁷⁵ Ibid (2009), at 372.

legitimate a particular institutional-constitutional structure. In contrast, the theory of constitutional synthesis underlines the *conditional legitimacy licence* that national constitutions confer on the Union through the integration clauses, which solves the problem of democratic standards. Multilevel constitutionalism thus starts with a correct intuition, and although it provides a number of important insights, it ultimately fails to deliver on this.

C) Moravcsik's liberal intergovernmentalism

Andrew Moravcsik's concern is to explain *why* the EU has emerged, i.e. why states have ceded sovereignty and permitted the emergence of a truly unique international institution.⁷⁶ Moravcsik's innovative Liberal Intergovernmental theory (LI) was devised to explain treaty-making/change as a series of great bargains.⁷⁷ He concludes that the EU is '*a limited, multi-level constitutional polity*'.⁷⁸ Since Maastricht this *material* constitution has developed into a stable constitutional settlement; recent reform efforts have been mere tinkering, including the ill-fated Laeken which was based on a misguided embrace of democratic constitutionalism. The European constitutional settlement is democratically legitimate because the EU is ultimately a con-federal

⁷⁶ Andrew Moravcsik, *The Choice for Europe* (London: UCL Press, 1998), 1.

⁷⁷ In numerous publications, he has sought to explain the emergence of the EU. In his major work he devises a three-step liberal-intergovernmental approach, which consists of state preferences, interstate bargaining and institutional choice. The conclusion with regard to European integration is that it 'exemplifies a distinctly modern form of power politics, peacefully pursued by democratic states for largely economic reasons through the exploitation of asymmetrical interdependence and the manipulation of institutional commitments.' Cf. *Ibid*, at 5. See also Andrew Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community', *International Organisation* 45, no. 1, (1991): 19-56; Andrew Moravcsik 'A Liberal Intergovernmental Approach to the EC', *Journal of Common Market Studies* 31, no. 4 (1993): 473-524; Moravcsik, A., 'Is there a "Democratic Deficit" in World Politics? A Framework for Analysis'. *Government and Opposition* 39, no. 2 (2004): 336-363. Moravcsik, A., 'The European Constitutional Compromise and the Neofunctionalist Legacy', *Journal of European Public Policy* 12, no. 2 (2005a): 349-386. Moravcsik, A., 'Europe Without Illusions: A Category Error', *Prospect Magazine* 112 (2005b): 1-5. Available at: <<http://www.prospect-magazine.co.uk/pdfarticle.php?id=6939>>. Moravcsik, A., 'What Can We Learn from the Collapse of the European Constitutional Project?', *Politische Vierteljahresschrift* 47, no.2 (2006): 219-41. Moravcsik, A., 'The European Constitutional Settlement', in *Making History: European Integration and Institutional Change at 50*, eds. K. McNamara & S. Meunier, *State of the European Union* 8, 23-50 (N.Y.: Oxford University Press, 2007).

⁷⁸ *Ibid*, 2007, 23.

arrangement whose democratic quality remains anchored in the democratic Member States. The EU also complies with standards of legitimate governance - more attuned to non-majoritarian regulatory bodies than to majoritarian representative-democratic ones because it has a limited remit of action and basically deals with low-salience issues.

LI shares with constitutional synthesis an emphasis on the central role of the Member States in the forging of the Union's constitutional arrangement. But the two perspectives have different analytical foci (government executives versus national constitutions), and offer very different readings of the character and status of the constitutional construct, as well as of the constitutional character and salience of this process.⁷⁹ The LI approach lacks proper intellectual tools to capture the normative and symbolic dimension of the constitution.⁸⁰ Moravcsik casts Laeken as a misguided and out-of-place constitutional attempt whereas our position is far closer to that of Pernice who argues that "without really changing it in substance, the Constitutional Treaty allowed understanding a little more of what the EU really is and does."⁸¹

D) Weiler's constitutional tolerance

Joseph Weiler starts from the notion that the EU has developed a stable constitutional settlement which departs from the state structure: 'European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power.' This construct's veritable Grundnorm is according to Weiler, the notion of *constitutional tolerance*.⁸² Weiler notes that, 'in the Community, we

⁷⁹ Moravcsik establishes issue salience through examining whether citizens consider the issues that the EU is presently handling to be of importance to them. For this to work for Laeken, it must be made clear that these issues are of such a character as to render a constitutional project unfeasible. We will show in Chapter 4 that the project was neither considered unfeasible nor unimportant to citizens.

⁸⁰ Moravcsik's conception of issue salience follows international relations' high-low politics distinction, but this distinction is vulnerable to issue-redefinition or reframing: low-politics issues such as measurement systems can take on high symbolic salience, consider the 'metric martyrs'. Their role is discussed in Glyn Morgan, *The Idea of a European Superstate - Public Justification and European Integration* (Princeton: Princeton University Press, 2007).

⁸¹ Pernice, *supra*, fn 71 (2009), at 371.

⁸² See Joseph Weiler, 'To Be a European Citizen: Eros and Civilization', originally published in *The Journal of European Public Policy* 4 (1997):495-519; *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999); 'Editorial: Does the European Union Truly Need a Charter of Rights?', *European Law Journal* 6 (2000): 95-97;

subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to be bound by precepts articulated, not by 'my people', but by a community composed of distinct political communities: a people, if you wish, of 'others'.⁸³ Tolerance is seen to generate voluntary acceptance and non-discrimination but Weiler is not clear on how far this can carry a constitutional arrangement. He correctly identifies non-discrimination as a key factor in the determination of the Union's normative identity. But non-discrimination does not lead to a constitution of tolerance, but rather to a constitution of equality, to integration through constitutional law (which, however, becomes a problem when it is instrumentalised at the service of a process of partial and limited integration, where the universalistic force of constitutional law is put at the service of values which undermine the very idea of integration through constitutional law). Weiler's notion of constitutional tolerance captures the frail character of what we label as the Union's constitutional field but Weiler's perspective provides an inadequate account of the forces that keep the field together (which constitutional synthesis offers).

E) Joerges' theory of conflicts

Joerges' theory of European law as a sophisticated system of conflicts of law depicts Community law as a constitutional discipline of conflicts between co-existing legal orders. The key intuition is that Community constitutional norms should be characterised as the norms that establish (and frame) the conditions under which supranational conflicts are to be solved through the mutual recognition of national norms.⁸⁴ This can be

'European Democracy and the Principle of toleration: The Soul of Europe', in *A Soul for Europe* vol. 1, eds. F. Cerutti and E. Rudolph, 33-54, (Leuven: Peeters 2001); 'Federalism Without Constitutionalism: Europe's Sonderweg', in *The Federal Vision*, eds. Kalypso Nikolaïdis and Robert Howse, 54-71 (Oxford: Oxford University Press, 2001), 'A Constitution for Europe: Some Hard Choices?', *Journal of Common Market Studies* 40 (2002): 563-580.

⁸³ Ibidem, p. 568.

⁸⁴ Christian Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline', *Duke Journal of Comparative and International Law* 14 (2004): 149-196; Christian Joerges and Florian Rödl, 'On the social deficit of the European Integration Projects and its perpetuation through the ECJ Judgments in Viking and Laval', RECON Working Paper, 2008/06. Available at: <http://www.reconproject.eu/main.php/RECON_wp_0806.pdf?fileitem=5456225>.

Rainer Nickel (ed.) *Conflict of Laws and Laws of Conflict in Europe and Beyond Patterns of Supranational and Transnational Juridification*, RECON Report 7. Available at:

said not only to be a reelaboration of the core insight of the *Cassis de Dijon* line of jurisprudence, but a very concrete definition of constitutional pluralism in the European Union. Community law must prevail in so far, but only in so far as, such primacy is necessary to organise the co-existence of national legal orders effectively; such primacy is not unconditional and must indeed be graduated by reference to the 'regulatory interest' of national legislation in each specific case.⁸⁵

The theory has also been developed by reference to concrete institutional setups and decision-making processes. The true *conflictual* template of drafting conflicts' community norms is to be derived from the practice of comitology. And that is because comitology recruits different forms of knowledge and renders the final norms cogniscent of local conditions; at the same time that its institutional design, renders comitology committees into sites that foster a *deliberative* style of interaction. Judicial adjudication also used to hold promise, even if after Viking and Laval, Joerges has become much more critical of constitutional adjudication, perhaps pointing to a further development of the theory in terms of its institutional implications.

However, Joerges' theory does not make up a complete constitutional theory, but provides key insights (albeit within a more limited frame) into fundamental aspects of the European Constitution. He rightly focuses, and in doing so illuminates, institutional structures and decision-making processes which are beyond (or perhaps below?) the radar of traditional constitutional theories in a manner not well enough picked up by the broader community of social scientists. Still, his explicit denial of the democratic foundation of the legitimacy of the European Union sets his theory at odds with constitutional synthesis.

Indeed, he only foresees a remedial function of European institutions, curbing the democratic deficit of a system of sovereign nation-states. And while that latter insight is key in the development of our own theory of constitutional synthesis, it seems to us that the constitutional

<<http://www.reconproject.eu/main.php/RECONreport0709.pdf?fileitem=29736995>>
. (including Joerges' own chapter, 'Integration through Conflicts Law: On the Defence of the European Project by means of Alternative Conceptualisation of Legal Constitutionalisation', 531-61); 'Sozialstaatlichkeit in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation', *German Law Journal*, 10 (2009): 335-60.

⁸⁵ Joerges and Rödl, *supra*, footnote 82.

practice of the European Union has in empirical terms long transcended the stage at which conflicts theory could be a normatively sound reconstruction of European integration. The depth and breadth of normative synthesis entails that a mere conflictual approach cannot solve the key legitimacy problems underlying the transformative interpretation of economic freedoms, or the flawed design of the imperfect monetary Union. Finally, constitutional synthesis offers a rather different diagnosis of the sources of complexity in the European constitutional system. While Joerges sees most of the time outcomes as unstoppable processes of social differentiation, constitutional synthesis detects tensions deriving from the tension between the growing realisation of the regulatory ideal of a common constitutional law and the thinness of supranational politics.

Conclusion

In this paper we have fleshed out the constitutional theory we employ somewhere else in *The Constitution's Gift*⁸⁶ to reconstruct the constitutional history of the European Union (with special emphasis on the last two rounds of fundamental reform, the so-called Laeken and Lisbon processes), to solve some of the most fundamental problems in European constitutional adjudication, and to contrast the European and the Canadian 'post-national' experiences. We defined constitutional theory as a path to forge a democratic constitution, to integrate a polity through democratic constitutional law, alternative to the forms of constitutionalism characteristic of nation-states, namely revolutionary and evolutionary constitutionalism. The key element in the theory is the regulatory ideal of a common constitutional law, or what is the same, the assignment of a dual role to national constitutions: as single national fundamental laws and as parts of the synthetic collective constitutional law. We then claimed that constitutional synthesis is characterised by matching the regulatory ideal of a common and thus single constitutional law with two forms of constitutional pluralism, namely, the non-hierarchical amalgamation of supranational and national institutions, and the institutional pluralism resulting from the progressive creation of supranational institutions in which national institutional structures and cultures contrast each other. This led us to characterize constitutional synthesis both by reference to its constitutional and its institutional dynamics. On what concerns the

⁸⁶ *Supra*, footnote 12.

former, synthesis tends to follow a sequence formed by a synthetic constitutional moment, where a 'thin' decision is taken to transfer the collective of national constitutions to the supranational constitution, intertwined processes of transformative and simple constitutionalisation, through which the constitutional nature of the polity and of the legal order are revealed as the contents of the common legal norms are fleshed out by reference to the regulatory ideal of a common constitutional law, and which tends to lead to different forms of crisis, triggered by the proclivity of the synthetic polity to be destabilised by external shocks, and by the internal tensions associated to the synthetic form. On institutional dynamics, we distinguish between processes of replication, innovation and experimentation. These processes fill gaps in the institutional structure, and shape the contest among national institutions and cultures. We finished by contrasting constitutional synthesis with five theories of European legal and political integration from which we have derived key insights, with affinities to or insights of relevance to constitutional synthesis.

It is on this basis that we propose the theory of constitutional synthesis as the best possible account of the European experience. It combines attention to context, to core institutional-constitutional choices, and to the specific trajectory of the European constitutional development.