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Professor J.H.H. Weiler

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EUROPEAN INTEGRATION: THE NEW GERMAN SCHOLARSHIP

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Neil Walker

Comment on:
Antje Wiener
Towards a Transnational Nomos
The Role of Institutions in the Process of Constitutionalization

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Max Planck Institute for Comparative Public Law and International Law

Abstract

This paper comments on Antje Wiener's analysis from the perspective of International Relations theory of the present state of European integration theory and practice. Wiener emphasizes the importance of the post-Maastricht "late politicization" phase, and argues that, while this phase places constitutionalism at the centre of the agenda, we should take for granted neither the centrality of dogmatic approaches within constitutional law to current developments nor the inevitability and desirability of the adoption of a written Constitution on the basis of the present Convention on the Future of Europe. Utilizing an intersubjective approach which stresses the dual quality of norms as both enabling and constraining, she cautions against placing too much faith in the capacity of a constitutional process to resonate adequately with the diversity of deep socio-cultural formations across Europe. The present paper acknowledges the strength of many of Wiener's arguments and the need for their fuller recognition within the legal academic community. It argues, however, that her theoretical approach does not necessarily rule out the adoption of a written Constitution for the European Union

Reconstituting European Integration in Theory and Practice: A comment on Antje Wiener

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I. INTRODUCTION

In the context of the present volume and the purposes it is intended to serve, Antje Wiener's contribution[1] throws up a doubly complex but also a doubly interesting set of challenges. If the main aim of the volume is to present German legal perspectives on European law and to place these national perspectives in a wider 'European perspective, then Antje Wiener - and her paper - rather confound the terms of that mandate. For Antje Wiener's paper is neither that of a 'lawyer' - rather she is a political scientist working within international relations (IR), albeit with a good knowledge of legal scholarship and dealing with themes such as 'citizenship' and 'constitutionalism' which have a deep resonance within legal scholarship - nor that of a 'German' - in the sense that, nationality aside, she lives and works in the UK, and, more importantly, works within a discipline (IR) which, unlike the intellectual traditions of (not just German) domestic constitutional law, configures itself in explicitly international or transnational terms, even if interesting local 'variations' remain. So my 'outsider's' perspective in the present case must perforce be that of an insider/outsider. I am an insider in the sense that I am a lawyer (albeit one with a strong interest in and commitment to cross-disciplinarity), but I am an outsider in the sense that, like all the other commentators, I am palpably not a German lawyer, but rather a European lawyer from beyond Germany. My starting position, therefore - my point of orientation - is not that of a European lawyer viewing how German European lawyers view themselves, but rather that of a European lawyer viewing how IR scholarship views legal scholarship, and as such my remarks focus not on the

[*] Neil Walker is Professor of European Law at the European University Institute in Florence/Italy. He can be reached at walker@iue.it.

[1] A. Wiener, *Towards a Transnational* Nomos*: The Role of Institutions in the Process of*

significance of national boundaries within a single discipline (law) but on the inter-disciplinary boundaries between law and IR *regardless* of the national perspective from which they derive.

In her thought-provoking and wide-ranging paper, Wiener considers three distinct but inter-related sets of question. First, she looks at different theoretical approaches to political behaviour and the role of institutions within political science in general and IR in particular, with special reference to the study of the European Union. Secondly, she stipulates and analyses three phases in the 'constitutionalization' of the EU, examining each phase both in terms of its historical dynamics and in term of the pattern and thrust of scholarly response. Thirdly, with particular (but not exclusive) reference to the third and latest phase - which she terms 'late politicization' she examines two particular contexts of institutional transformation - those of citizenship and the current constitutional process itself - through her own preferred approach to the relationship between institutions and behaviour - namely that which stresses the 'dual quality' of norms as recursively constituted and constituting.

In addressing these questions, Wiener makes many interesting points. For the purposes of the present seminar, however, two of the issues she addresses are of particular interest and urgency, not least because of the suggestive framework within which she locates and contextualizes these issues. The two issues and the framework in which she puts them will thus provide the focus of this short comment. The first issue concerns the appropriate methodology to explain, predict and possibly even fashion institutional change in the Euro-polity, looking to the age-old oppositions between structure and agency, institution and actor etc. As already noted, as well as reviewing the existing state of the paradigm in IR, Wiener also puts forward her own preferred theoretical model, to which we return in due course. The second issue, which is more of a sub-text within her paper than an explicitly drawn out argument, concerns the kinds of assumptions that lawyers make about these same questions and about the role of law as an explanatory variable and as an agent of change, and what lawyers might learn from the wider debates within political science.

Constitutionalization, *NYU Jean Monnet Working Paper Series, 2003*.

II. THE 'CONSTITUTIONAL TURN' IN THE THEORY AND PRACTICE OF EUROPEAN INTEGRATION

1. The 'Constitutional Turn'

The suggestive framework within which Wiener allows us to locate these issue is that of the current post-Maastricht historical phase of "late politicization" – an age in which European integration after its first phase of institution-building and "integration through law", and its second and consolidatory phase of "integration through policy" across an ever-expanding areas of EU policy sectors and communities, takes an explicitly 'constitutional turn' (p.23). The gist of this argument is that from the early 1990s the EU has faced unprecedented problems of legitimacy and co-ordination. Its deepening regulatory complexity and expanding policy range has required the European Union to revisit the adequacy of its institutional structures and its legitimating bases and has led to a much more visible and self-conscious debate not just about the appropriateness of the parts of the EU policy domain but also about the nature of the 'polity' whole. The post-Maastricht popular 'rebellions' in Denmark, Britain and, if to a lesser extent, in France and Germany, announced both a sharpening civic consciousness of the presence of the new Euro-polity beast and an emerging critique of its role and aspirations. There followed significant new investment by the political actors and institutions of the EU in debates about the democratic deficit, about fundamental rights and even about Enlargement (to the extent that the present Enlargement of the European Union to take in 10 new members by 2004 with others perhaps to follow by 2007 has been mobilised and presented as a conscious project in the re-legitimating of the European Union towards its original pan-European *telos*, and so is not explicable simply as a reaction to the massive geo-political ramifications of the end of the Cold War) in response to this new identity crisis. Yet, in their explicit recognition and controversial answers to the problems of polity legitimacy and co-ordination, these responses can also, paradoxically, be seen as reinforcing causes. Once the polity 'genie' was out of the technocratic, neo-functional 'bottle', it could not be forced back in, and the increasingly "breathless"[2]

[2] U. Haltern, Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination, *ELJ* 9 (2003), 14 et seq.

activity in self-legitimation by the political organs has merely served to highlight the formidable scope, the profound depth and the urgent priority of the new problems of legitimacy and efficacy. In turn, this has led, still at the level of public and political discourse, to a more pronounced emphasis on the constitutional character of the debate on the future of the Europolity - of which the post-Laeken process and Giscard D'Estaing's Convention on the Future of Europe is but the latest and most visible manifestation - with constitutionalism as a suitably all-embracing theme to cover the holistic nature of the polity debate and the capaciousness of the questions of institutional design and legitimacy that debate must address. And in some measure at least, this is reflected and matched in academic circles, with a greater stress on "interdisciplinary theoretical work bringing together law, political science and sociology and, if still much less established, cultural studies… to tackle the more substantial normative, functional, legal and political questions of European integration" (p17) accompanying and announcing the shift to more holistic reflection on the nature and prospects of the Euro-polity.

These tendencies towards a more holistic approach in both political and academic discourse have interesting implications for lawyers – implications that are hinted at in Wiener's paper if not fully articulated. On the one hand, the increasingly constitutional register of the political debate is clearly of concern to lawyers. Of course, constitutional analysis of their object of study is nothing new for European lawyers, and indeed this is reflected in Wiener's explicit use of the "constitutionalization' label to track her three-stage historical periodization of the EU. But whereas European constitutional analysis was traditionally viewed primarily as a 'thin' diagnostic exercise within legal science – a question of measuring the extent to which and manner in which developments in European legal doctrine and institutions matched up with familiar themes and patterns from national traditions (e.g. federalism, separation of powers, judicial review, Parliamentary democracy) or, alternatively, patented new regulatory forms for the new supranational configuration (e.g. subsidiarity, flexibility, comitology), [3] the development of a full-blown constitutional self-consciousness at the political level around the idea of an emergent

[3] On the historical progression from 'thinner' to 'thicker' forms of constitutional thinking about and within the EU, see e.g. J.H.H. Weiler, *The Constitution of Europe*, 1999, chs. 1-2.

Euro-*polity*, demands a much 'thicker' constitutional analysis.

Rather than about institutional diagnosis and tinkering, the new constitutionalism has become a vehicle, albeit of contestable significance, for thinking through very basic questions about the legitimacy and purpose of an entity which begins to rival the state in the extent of its claim to authority and jurisdiction. In this thick sense, constitutionalism is still about institutional analysis, and indeed institutional analysis becomes even more important to the extent that the indirect legitimacy and co-ordination through state-centred structures of the younger EU conceived (by some schools both of international law and international relations) in principal-agent terms as an international organisation becomes less persuasive as the EU develops autonomous polity status and its own institutions and doctrines increasingly have to bear the direct burden of regime co-ordination and legitimation. But constitutionalism is also now about the various other ways in which constitution-building contributes to polity-building. This may be through the mobilization of a self-legislating citizenry in a constitution-making process or event. It may be through the constitution's setting or reinforcement of basic values to define the mission of the polity and to contribute to its collective political identity. It may also be through the very *form*, (regardless of content) of the constitutional document, whether through the circular but not necessarily ideologically insignificant claim to polity status it implies (i.e. only a significant polity requires and merits a Constitution, which Constitution in turn affirms its polity status), or through the formal superiority and symbolic solemnity these claim to 'higher law' vests in its norms, or through the transparency of the communication of the basic organogram of the EU and the rights and duties of its citizens which its discrete and singular documentary status may encourage.[4]

Accordingly, what was once a discrete analytical tool of the European lawyer now becomes a central conceptual theme and a key register of normative possibilities in an age of explicit polity-building, one which increasingly attracts and demands the attention of a wide range of disciplines. And if other disciplines have good reason to pay attention to an explicitly constitutional register of debate, then constitutional

[4] For a more extensive discussion of these broader functions of constitutionalism, see N. Walker, Constitutionalizing Enlargement, Enlarging Constitutionalism, *ELJ* 9 (2003), 365.

lawyers must also pay attention to these other disciplines - to the questions they ask about the nature and potential of constitutional *praxis*, and to whether these questions can inform and illuminate their own analysis.

2. The Contribition of International Relations

Antje Wiener sets out at some length the contribution which may be made by one such other discipline, one which, moreover, it in its object of study (Europe) and macro-institutional level of analysis is clearly close to the concerns of European constitutional lawyers. She distinguishes between three main types of institutional analysis in her discipline – between rational choice institutional analysis, structural approaches, and intersubjective or interactive approaches. Rational choice and structural approaches tend towards opposite poles of the agency/determinism spectrum, the former treating institutions as the product of actors' interests, responsive to their desire to control information costs in contexts of strategic action and decision-making, mobilized in accordance with their pre-given interests, and always potentially reversible. Structural approaches, by contrast, see institutions as shaping not only strategic behaviour but also preferences themselves, a position which implies expanding the definition of institutions to cover not only the "hard" institutions supplied by legal and other organisational rules but also the "soft" institutions of "ideas, principled beliefs and social facts" (p.12) which make up, in March and Olsen's terms, the "logic of appropriateness" of any particular decision-forming and decision-making context. For its part, the intersubjective approach tracks the sociologically "constructivist turn" in IR theory, proceeding "from the assumption that political actions, identities and institutions are mutually constitutive."(p.13) Like the structuralist approach and unlike the rational choice approach, the intersubjective approach does not see interests and identities as pregiven prior to institutional involvement but as generated and adapted in institutional contexts. Unlike more emphatic structuralist approaches, however, the intersubjective approach takes a neo-Habermasian direction and stresses the creative space which remains to actors in institutional contexts, with particular attention to the importance of communication between actors as a way of vindicating, refining and operationalizing shared frameworks of reference and action.

While Wiener is obviously more attracted to the intersubjective or constructivist approach than either of its more monocular rivals, she remains critical of it to the extent that it tends to take for granted the "factity" of the social norms which structure and are reproduced in the context of intersubjective communication. In her own preferred approach - which in both its explanatory and normative orientation draws eclectically from a range of more socially penetrative and pervasive theories of intersubjectivity, including both Habermas's broader 'societal' theory of communicative action and Jim Tully's more agonistic approach to social relations[5] - the diverse socio-cultural origins of soft institutions and shared frameworks of action are stressed, and the successful articulation and transformation of normative meaning at 'hard institutional' sites is seen as crucially dependent upon the degree to which such meanings resonate with the wider socio-cultural background. In other words, one cannot bracket off the intersubjective communicative context from its wider socio-cultural environment and treat the latter as an inert and either stably reinforcing or largely irrelevant frame for such intersubjectivity. Rather, as in Anthony Giddens' theory of structuration,[6] the structuring role of that wider environment is always and only virtual and precarious; always and only both the medium and outcome of action; always and only in a process of reflexive reconstruction in which the context of supportive social facts for intersubjective action in institutional settings cannot be taken as given but rather must be actively (re)generated and sustained by reference both to the 'hard' rules and informal assumptions embedded in these institutions and to the broader societal roots of material interest and cultural identity. What is more, while the precariousness and provisonality of 'deep structure' is generally true of all 'societies', including reputedly relatively homogeneous national societies, it is even more emphatically the case in transnational societies such as the European Union, where whatever stability and path-dependency there is in the local reproduction of meaning is constantly remixed through transnational sites of exchange.

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[5] In a nutshell, the difference between Habermas's model and Tully's model, which share a strong normative commitment to dialogue as well as an explanatory emphasis on the importance of intersubjectivity, turns on the continuing, if now somewhat modified, orientation towards the ideal of freely accomplished consensus in Habermas, as opposed to the insistence in Tully on the inevitability and desirability of continuing normative diversity and the incorrigibility of disagreement. See, e.g. J. Tully, The Unfreedom of the Moderns in Comparison with the Ideals of Constitutional Democracy, *Modern Law Review* 65 (2002), 204.

[6] See e.g. A. Giddens, *The Constitution of Society*, 1984.

III. A NEW BRIEF FOR EUROPEAN CONSTITUTIONAL LAWYERS?

What can European constitutional lawyers learn from this analysis? In essence, Wiener throws out both a methodological and a substantive challenge to lawyers. Let us examine both – the first briefly and the second in a little more depth.

1. Methodological Self-Examination

First, the methodological challenge. Wiener does not make the mistake of assuming that all lawyers implicitly or explicitly subscribe to just one of the theories of institutional behaviour she sets out. Rather, she suggests that the methodological diversity, the contestation over the best approach, and the different research designs and questions which flow from this contested background "might come as a surprise to lawyers, especially those who are used to applying a dogmatic approach" (p.7). We may sum up the import of this observation as suggesting that whatever assumptions lawyers might make about the appropriate relationship between institutions and behaviour, they do not tend to suffer from *methodological doubt* in the same way as do IR specialists and other political scientists and sociologists who cannot escape the ongoing disputation at the heart of all social science disciplines as to the underlying roots of social organisation and dynamics of social action.

Why is this so and what are its implications? First of all, to the extent that it is true – and, as Wiener would concede, it is only true, or, at least, is most emphatically true of lawyers whose work concentrates on the exposition and analysis of particular areas of legal doctrine and not of sociology of law, law-and-economics, normative legal theory and all the other reflective sub-disciplines which grow up around the doctrinal study of law – it is true first and foremost because lawyer are in Lane and Ersonn's terms "intrinsic institutionalists."[7] That is to say, they are scholars who study "institutions for their own sake [as] interesting objects of analysis by merely being such institutions or having been so for many decades or even centuries". In other

[7] J. E. Lane and S. Ersson, *The New Institutional politics: Performance and Outcomes*, 2000, 10.

words, lawyers always assume that the law matters, but this is already to make some kind of tentative judgement about the 'extrinsic' significance of law, that it is not a 'mock institution' but an institution which has *some* kind and degree of effect on social outcomes Beyond that, it is difficult to generalize about just what implicit or explicit methodological assumptions lawyers do in fact make. In many cases, let us be honest, it is not clear if *any* particular methodological assumptions are made, even implicitly, beyond the minimal faith that law somehow matters in social and political life. This is a question of priorities – the hard work lies in describing and finessing the structure rather than gazing at its foundations. For others, a kind of naïve structuralism might be at work, an assumption that law does strongly guide behaviour, without much consideration of why it should have this massive normative power. For others still though, and probably just as numerous, even if they do not explicitly subscribe to a law-and-economics approach, they assume a kind of methodological individualism where actors' interests are formed prior to institutional design and institutional action, and where legal institutions exist to serve particular interests and to be applied and interpreted in favour of these interests. In other words, there are many lawyers who would implicitly take the same approach as rational choice institutionalists. Nor should we be surprised at this. Constant exposure to the law is a likely to lead to a fundamental rule scepticism, to a sense that the living law is what largely self-interested actors want to make of it and that its open texture of interpretation and application is an entirely unsurprising social fact and consequence, (just think, for instance, of the history of American legal realism, and how wholeheartedly it was endorsed even within the highest echelons of the American judiciary) as it is to lead to a kind of respectful formalism, in which the inert paper normativity of the law is treated as a precious and unquestioned datum.

Be this as it may, the value of Wiener's approach is to point our the limitations and possible dangers of the absence of methodological doubt, and also, whether or not we subscribe to every fine detail of her own methodological approach, to indicate the persuasiveness of an approach which is neither dogmatically structuralist nor dogmatically voluntarist and individualist.. Of course, we can all agree that law remains an institutions of intrinsic importance, and that whatever the latest state of play in the methodological Holy Wars of the social sciences, law's banner will still stand as of some importance, continuing to justify the expositional and analytical

work of constitutional lawyers very bit as much as it does that of lawyers working in any other area of legal doctrine. Yet this does leave hard questions unanswered, and insofar as particular legal designs embed particular notions of the efficacy or otherwise of law, methodological assumptions do have real effects, which may be perverse effects if the methodological assumptions turn out to be wrong. And in particular, when we reach a historical moment where law, which has always been an essential tool of social engineering in the European project (as, most emphatically, in the early 'integration though law' movement) becomes, for the reasons Wiener sets out, a focal point in the phase of polity building, then the rightness or wrongness of the methodological assumptions about the relationship between legal institutions and political behaviour becomes critical.

As I have already pointed out, in the new 'constitutional phase' of the European project, the question of the appropriate constitutional approach is actually a number of deeply complex and interconnected questions. Not just, how to design institutions to legitimate and co-ordinate a self-standing (and no longer state-parasitic) regime, but also; how, if at all, to give effect to fundamental polity-defining values through law; how, if at all, to discover and embed a stably consensual set of 'higher law' norms with the authority and gravitas to supply a semi-permanent frame for political action; how, if at all, to design a constitutional process which mobilizes European public opinion around the idea of a new and legitimate non-state demos with the levels of mutual engagement, understanding trust and solidarity that implies; how, if at all, to make constitutional law an accessible and legible frame, one whose content is known to and provides meaningful information to the citizen in deciding his or her life-plans and in thinking about the nature and implications of his or her political identity in a world of multiple claims to political loyalty and multiple requirements of effective political citizenship and active political literacy. We should not, of course, expect European constitutional lawyers to have all the answers to these complex constructivist puzzles, but they should at least be aware that, whatever their particular contribution, they are involved in an enterprise which is ultimately doomed to incoherence unless some serious engagement with these questions is going on and unless all constituencies – themselves included - actively involved in the polity-making process are open to the problems raised within and insights emerging from that engagement.

2. Re-examining European Constitutionalism

This brings us, finally, to Wiener's other challenge - the substantive challenge of the 'Capital–C **C**onstitutional sceptic'. Wiener, while supportive of a broad constitutional register of debate as necessary and adequate to the polity-building phase, is clearly at least agnostic and probably highly "doubtful" (p.33) about the value of a written constitutional document.[8] In a passage where her debts to discursive democrats such as Habermas and Tully are most apparent, she writes with reference to the poverty of contexts (both in view of Enlargement and more generally) in which there are effective opportunities for European citizens to engage in political activity in a manner which allows them sufficient input in norm creation and which would invest dominant institutional norms with the degree of social enbeddedness necessary to their widespread legitimacy, that "the main issue appears to be less one of agreeing on a new constitutional model than establishing transnational fora for deliberation in selected policy areas in which elected representatives from political levels of governance and public associations participate in equal and ongoing debates as European citizens." (pp.34-35).This opens up a huge debate – one which exercises many in the present volume and well beyond. A number of points may be made by way of conclusion, and by way of introduction to this wider debate.

To begin with, and I am sure that Antje Wiener would agree with me on this point, her capital –C **C**onstitutional scepticism – if that is what it is – does not follow necessarily and inexorably from her methodological premises. Certainly, there may be a *tendential* relationship between the two. Her advocacy of the dual quality of norms[9] as both socially produced and socially productive and her stress on the importance of the wider socio-cultural embeddedness of norms undoubtedly invites a degree of caution in the face of documentary Constitutionalism, particularly in the early phase of polity formation. In her approach she wants to stress the 'thin' quality of the institutional 'hardware' of legal and constitutional norms in the absence of a supportive socio-cultural environment. The 'factity' and legitimacy of any norms

[8] See also, A. Wiener, Editorial: Evolving Norms of Constitutionalism, *ELJ* 9 (2003), 1.
[9] See A. Wiener, The Dual Quality of Norms: Stability and Flexibility (manuscript on file with

cannot be taken for granted in the absence of a historical context in which the emergence of norms is sensitive to and expressive of deeper and highly diverse cultural patterns nor, it follows, in the absence of a decision-making environment in which the development and application of the norms thus emerged is in accordance with practices of participation and representation which are broadly inclusive of these diverse sensibilities and world-views.

From this perspective, a documentary Constitution may promise both too much and too little. It may promise too much in the sense that the institutional rupture and normative discontinuity attendant upon the 'big-bang' constitutional moment, particularly in a still emergent political community with no previous record of documentary constitutionalism, suggests that the new norms that the documentary constitution promulgates will lack the social embeddedness necessary to their legitimacy.[10] It may promise too little in the sense that, conceived of as an event rather than a process, the constitutional moment can offer no guarantees that the post-adoption phase will involve the requisite level of social involvement in giving the constitution the appropriate breadth and depth of contextual meaning. Rather, the danger is that the community of constitutional interpretation will be unacceptably narrow and exclusive, particularly given the general tendency of constitutional settlements – especially in federal or quasi-federal structures – to make judges rather than politicians or other voices guardians of the text, and particularly also given the specific tendency within the EU for even those who are best-placed to serve as these other privileged voices of constitutionally authorised influence – Commission, Council and Parliament – themselves to possess only modest if indeed any democratic legitimacy. In a sense, both of these objections might be summed up by saying that the written Constitution has an incorrigibly 'top-down' quality both in its emergence and in its application, whereas a properly nuanced theory of the adequate relationship between institutions and actions stresses the importance of a 'bottom up' approach, the ever precarious legitimacy of norms depending upon the prior existence and subsequent sustenance of inclusive processes for the generation of shared meanings.

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author), 2002.

[10] See J.H.H. Weiler, A Constitution for Europe? Some Hard Choices, *Journal of Common Market Studies* 40 (2002), 563 (578).

Yet, while we may concede that there is a paradoxical boot-strapping quality in the attempt to generate a 'bottom-up' sense of political community through a 'top-down' process, the historical popularity of written Constitutions in the process of polity formation should give us pause for thought before we dismiss such a key form of political and social engineering as necessarily doomed to failure or consigned to the margins of pertinent institutional design. For surely the broader message of the more sociologically sensitive approach to the way in which constitutionalism mediates the relationship between norms and actions that Wiener advocates is the strictly empirical motto that *it all depends*.

If we return to our assessment of the wider objectives that are served by a constitutional project, then we can pose a number of pertinent questions, none of which has compelling *a priori* answers. Wiener concedes that the present constitutional debate, given its ambitious scope of inquiry and self-arrogating presumption of authority, has at least the potential to bring the deep-rooted conflicts which attend the present phase of polity development to the fore, in particular providing a critical counterpoint to the closed-down, technocratic quality of an Enlargement debate which has proceeded on the assumption of one-way compliance rather than two-way deliberation. In this mode, she speculates that the Convention "offers the opportunity to establish institutions that warrant flexible adaptation to diversity based on the *principle of contestedness*".(p.5)[11] The difficulty, therefore, even for a position as robustly sceptical as Wiener's, is – to put it simply – not whether the process of documentary constitutionalism has *in principle* the potential to help deliver a more inclusive and responsive political community, but whether, in the given circumstances, it has much *likelihood* of doing so. Can the process of mobilization of community initiated in the post-Laeken process draw in, whether directly or indirectly, a range of interests and aspirations, both in relation to the equalization of influence between old and new members in the context of Enlargement and more generally, sufficient to stimulate and accelerate the process of inclusive political community–formation? Can the 'higher law' values which are articulated in the final settlement resonate in such a manner with the histories of

[11] Here, she is again drawing closely on Tully's agonistic approach; see note 5.

different European communities to provide from the raw material of *parallel* and overlapping experiences and aspiration the possibility of the development of *shared* meanings? Can the institutional regime put in place by the constitutional settlement appeal sufficiently widely to conceptions of the appropriate balance between core universal values – democracy, political freedom and administrative efficiency, to allow a least a high degree of abstract support for its terms in advance of their concrete application? And, perhaps most crucially of all, can the ongoing institutional and procedural context of the concrete application of the basic settlement over values guarantee sufficient opportunities for the expression and reconciliation of different voices for that abstract support to be vindicated in practice?

It seems to me that there are no easy answers to these complex questions, which of course also complexly related *inter se*. One response is that the very project of documentary constitutionalism cannot escape the legacy of its statist origins, and so has an in-built structural predisposition towards consecrating an image of community that, based on a notion of unitary authority, is incapable of giving effect to the ethic of "toleration"[12] of diversity which lies at the heart of an acceptable European political community. Or, even if documentary constitutionalism is not repugnant in this strong sense to inclusive political community formation, it might be vulnerable to the more pragmatic objection that now is just too soon for such an a experiment, or that such an experiment constitutes a wasteful diversion of resources and interest away from other more viable forms of legitimate political organisation in the European domain. Again, more positively, the response might be that a Constitutional settlement could be an important symbolic and instrumental container for *developing* a sense of legitimate political community, even though it can only ever be one modest element within such an ongoing project.

However difficult the answers, two more general and cumulative points may give us further pause for thought before we dismiss the more positive prognosis for the project of documentary Constitutionalism – and with these I finish. First, as constitutionalism is first and foremost linked to the practical reasoning and *praxis* of a political community, there is an internal relationship between diagnosis and action.

[12] Weiler, see note 10, 565-569.

The questions we pose are not simply questions posed of inert matter. Rather, the attitude we take to the possibilities of constitutionalism in the making of political community themselves make a difference. Habermas may be overstating things when he says that the documentary constitutional process can be a "self-fulfilling prophecy"[13] of community building, but it is certainly true that nothing guarantees failure more than the expectation of failure. Moreover, if the temptation is to dismiss this sentiment merely as an attempt to make a virtue out of wishful thinking, perhaps a more nuanced understanding of 'success' and 'failure' can still that temptation. For despite the best efforts of Giscard D'Estaing as President of the current Convention to present it as a once-or-never, all-or-nothing "European Philadelphia,"[14] it is simply not a plausible reading of the Convention that it offers a uniquely propitious 'constitutional moment.' It is easy to understand why Giscard and others advance such a prejudice – project such a fantasy of finality[15] - as a way of seizing the initiative and marginalizing more cautious, sceptical or cynical voices, yet this should not blind us to a more nuanced reality. Precisely because, as Wiener says, the evolution of political community must be seen as a process rather than as a staccato series of events, the 'true meaning' of the present Convention will be contested in ways which necessarily problematize its achievement and create spaces for new initiatives. The IGC of 2004 will certainly have its say, and there is no guarantee that it will endorse either the Constitutional 'form' or the constitutional 'substance' preferred by the current Convention. We will probably be left instead with a hybrid, neither a "Constitution' nor a 'Treaty' but a 'Constitutional Treaty' and a new set of open-ended political impulses, themselves stimulated by the Convention experiment, together with a new set of open-ended regulatory processes (perhaps Constitutional amendment, perhaps Treaty amendment, perhaps new – or reconvened – Convention?) to channel these impulses. In other words, the Convention may well prove to be a false start, and certainly in terms of the orthodox science of constitution-making will be a more modest achievement than its more uncompromising supporters have predicted, but if it manages to provide a new and enhanced baseline from which later attempts at reflexive and inclusive self-mobilization of the European political

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[13] See e.g. Why Europe Needs a Constitution?, *New Left Review*, November 2001.
[14] Weiler, see note 10, 563.
[15] See e.g. N. Walker, The Idea of a European Constitution and the *Finalite* of Integration, in: B. de Witte (ed.), *The Emergence of a European Constitution* (forthcoming).

community are possible, then from a process-based as opposed to an event-based view of political community formation we should not count that as 'failure.'

In the second place, if, according to the old saw, it is still too early to tell whether the French Revolution of 1789 has been a success, a similar point may be made of the European Constitution, however abbreviated or extended its formative phase turns out to be. There is more than a hint of historicism in many affirmatory narratives of the role of old state constitutions in polity formation. Inevitably, it is only with the benefit of long hindsight that we can say that a constitutional moment contributed positively to polity formation, yet often in so doing there is a tendency to project the lessons of hindsight onto the meaning of the past. Constitutions in retrospect deemed successful tend also in retrospect to become pre-destined to success, even when it perhaps did not look like that to many people at the time. Of course, this kind of historicism is complicated by and contributed to by the tendency of the constitutional ideologies prevalent within the society itself – rather than just that society's bad historians - to embrace the myth of constitutional predestination. So, for example, part of the success, such as it is, of the American constitutional project lies precisely in the making and sustaining of a myth through later generations of judges, politicians and other significant figures that there was something special in terms of the conjuncture of political events, the horizons of the political conversation, the quality of the participants and the wisdom of their output which attended the Philadelphia Convention of 1787-9.

What lessons does this hold for Europe's constitutional process? To begin with, when constitutional history is *actually* being made rather than written or mythologized, it is bound to seem much more contingent, much more fickle, much more mundane, much less noble, much less pregnant with future meaning - at least to those not intimately involved in its making.[16] Perhaps, then, the current European constitutional moment is less different to some of its more celebrated national predecessors than we sometimes imagine. Yet this conclusion would give us little comfort if it simply meant that we were bound to dismiss all affirmative narratives of constitutional history as so much

[16] For a recent reminder from the United States context of the strong interest of the founders themselves in posterity – both textual and personal, see J.J. Ellis, *Founding Brothers: The Revolutionary Generation*, 2001.

cynical impression management, or as so such much willful self-delusion. For, if that were the case, then any retrospective affirmation of Europe's constitutional moment would just be the latest in a long line of deliberately mystifying misreadings of history – no worse than its national predecessors but not necessarily any better.

But the relationship between significant historical events in the formation of political community and their subsequent characterization is more complex than this, and perhaps permits a more optimistic conclusion. If the current constitutional process were to become the focus of some kind of retrospective affirmation, then that would necessarily imply a long-term political culture had in fact developed that took Europe seriously as a political community. In turn, the very existence of a future collective subject which took the historical Constitutional object seriously would offer some kind of vindication of the Constitutional object itself, since it is precisely with the construction of such a viable collective subject that the sponsors of that object are concerned. Of course, a sustained political community is not necessarily a legitimate political community, and here we should heed Habermas's stipulation that in order for constitutional patriotism to play a positive role in the formation and sustenance of a legitimate political community it must adopt "a scrutinizing attitude towards [its] own identity-forming traditions." [17] So no future representation of Europe's constitutional tradition should be one of uncritical pride, but this does not rule out that tradition being a celebrated as a matter of some collective pride, with hindsight allowing additional perspective upon and a measure of vindication of the processes followed and the choices taken within the founding constitutional context.

For those of us living through such an important stage in Europe's constitutional formation, it may indeed be very difficult to see the forest for the trees – to discern the prospect of a legitimate long-term vision amidst all the petty, quotidian politics. But we should recognize that these difficulties are inevitable, are indeed staples of constitution-making through the ages. And history tells us that if we nonetheless do not surrender to fatalism about our prospects of gradually reconfiguring the

[17] J. Habermas, *The New Conservatism: Cultural Criticism and the Historian's Debate*, 1989, 261; see also C. Laborde, From Constitutional to Civic Patriotism, *British Journal of Political Science* 32 (2002), 591.

institutional "whole"[18] rather than simply squabbling over the parts, then we need not discount the possibility of the current constitutional process making a modest but significantly affirmative contribution to the future of the European polity – even if history will be unable to endorse that particular conclusion for quite some time.

[18] N. Onuf, Institutions, Intentions and International Relations, *Review of International Studies* 28 (2002), 218; Wiener draws on this suggestive article in the opening sections of her contribution.