

From the Hills of Fiesole: What the European University Institute Did for European Constitutional Law

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From the Hills of Fiesole – What the European University Institute Did for European Constitutional Law

Bruno De Witte

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Abstract:

The title of this article refers to a passage in the book *Brokering Europe* by Antoine Vauchez who wrote that ‘the reinvention [of European law] that we can conveniently place under the banner the “constitutionalization of Europe” flourished most particularly in the hills of Fiesole between Badia Fiesolana and the Villa Schifanoia, the home of the law department of the European University Institute (EUI) since its creation in 1976.’ The task I set myself in this article is to reflect briefly on the contributions made by legal scholars based at the EUI to ‘European Constitutional Imaginaries’, that is, to thinking about European integration as a constitutional project. The article seeks to provide a general view of those contributions during the 30 year-period between 1980 and 2010. Its focus on constitutional law scholarship means that it does not deal with the important work done at the EUI in various fields of substantive European Union (EU) law (including in particular competition law and labour law, areas for which dedicated chairs existed for most of those 30 years) or in the field of EU administrative law, even though much of this work occasionally had constitutional law dimensions or connotations. The general view underlying my article is that there never was a real ‘Florence school’ of European law, but rather a variety of scholars interested in different topics, performing different academic roles and using different research methods. Still, it is possible to identify five topics that were the object of collective endeavours, that is, constitutional law themes or approaches attracting groups of EUI members (both professors and other researchers) for a certain period of time, rather than the one-off contributions by individual scholars. The following pages are a tentative effort at identifying five of those themes, and at describing the main actors and their contributions for each of them. In roughly chronological order, these themes are: the (alleged) contribution of the Integration-through-Law project to the narrative of the constitutionalization of EU law; the law-in-context approach to the study of EU constitutional law; the participation of EUI members to constitutional engineering for the EU; theoretical reflections on the place of the European Union within the world of constitutionalism; and the impact of enlargement on EU constitutionalism.

KEYWORDS: European University Institute, Integration through Law, European constitutional imaginaries

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FROM THE HILLS OF FIESOLE – WHAT THE EUROPEAN UNIVERSITY INSTITUTE DID FOR EUROPEAN CONSTITUTIONAL LAW

Bruno De Witte

1. Introduction

The title of this article refers to a passage in the book *Brokering Europe* by Antoine Vauchez who wrote that ‘the reinvention [of European law] that we can conveniently place under the banner the “constitutionalization of Europe” flourished most particularly in the hills of Fiesole between Badia Fiesolana and the Villa Schifanoia, the home of the law department of the European University Institute (EUI) since its creation in 1976.’¹ The task I set myself in this article is to reflect briefly on the contributions made by legal scholars based at the EUI to ‘European Constitutional Imaginaries’, that is, to thinking about European integration as a constitutional project.² The article seeks to provide a general view of those contributions during the 30 year-period between 1980 and 2010.³ Its focus on constitutional law scholarship means that it does not deal with the important work done at the EUI in various fields of substantive European Union (EU) law (including in particular competition law and labour law, areas for which dedicated chairs existed for most of those 30 years) or in the field of EU administrative law, even though much of this work occasionally had constitutional law dimensions or connotations. The general view underlying my article is that there never was a real ‘Florence school’ of European law, but rather a variety of scholars interested in different topics, performing different academic roles and using different research methods. Still, it is possible to identify five topics that were the object of *collective* endeavours, that is, constitutional law themes or approaches attracting groups of EUI members (both professors and other researchers) for a certain period of time, rather than the one-off contributions by individual scholars. The following pages are a tentative effort at identifying five of those themes, and at describing the main actors and their contributions for each of them. In roughly chronological order, these themes are: the (alleged) contribution of the Integration-through-Law project to the narrative of the

¹ A. Vauchez, *Brokering Europe: Eurolawyers and the Making of a Transnational Polity* (2015), at 202.

² Komárek, ‘European Constitutional Imaginaries: Utopias, Ideologies and the Other’, in J. Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (2022, forthcoming).

³ As one of this paper’s concerns is with the impact of EUI-based work, I have decided to leave aside the work accomplished since 2010, a year that, in several ways, was a turning point in EU constitutional law, with the entry into force of the Lisbon treaty and the onset of the financial and euro crisis. The year 1980 is a convenient starting point, as the EUI’s Law department started operating only in 1976 and its members did not publish much at all about Community law before 1980.

constitutionalization of EU law; the law-in-context approach to the study of EU constitutional law; the participation of EUI members to constitutional engineering for the EU; theoretical reflections on the place of the European Union within the world of constitutionalism; and the impact of enlargement on EU constitutionalism.

2. The ‘Integration Through Law’ Project and the ‘Constitutionalization’ Narrative

The Integration Through Law (ITL) project, led by Mauro Cappelletti who was a professor at the EUI during the first decade of activity of that institution, produced a multivolume and multi-authored comparison of the legal dimensions of European integration and US federalism – in fact, one reviewer wrote, more ‘a series of excellent, single-system studies by individual authors’ than a true comparative study.⁴ In the seven volumes of the ITL project, the notion of constitutionalization appears in the chapter by Cappelletti and Golay on ‘The Judicial Branch’. A short six-page section of that chapter deals with the supremacy doctrine of the European Court of Justice (ECJ) and its acceptance by national courts under the heading ‘The “Constitutionalization” of the Treaties.’⁵ The latter notion, bracketed between inverted commas in the text, is defined as ‘a process implying both the elevation of the Treaties to “higher law” status and their interpretation by techniques more appropriate to constitutions than to multipartite international agreements.’⁶ No further explanation is given, but a footnote refers to another footnote, in an EUI working paper by Joseph Weiler, containing a similar definition of “constitutionalization” (also there the word is put between inverted commas). When a revised version of Weiler’s working paper was later published in the *Yearbook of European Law*, we discover a clue as to where Weiler himself drew the term from, namely from an article by Eric Stein in the *American Journal of International Law*.⁷ In that well-known article, Eric Stein developed the idea that the Court of Justice ‘has construed the European Community Treaties in a constitutional mode rather than employing the traditional international law methodology’.⁸ He had made the same argument already sixteen years before, in a comment on the then recently decided *Costa v ENEL* judgement of the ECJ.⁹

⁴ McWhinney, Book review, 81 *American Journal of International Law* (1987) 806, at 807 – quoted by Alter, ‘On Law and Policy in the European Court of Justice – An American Perspective’, in *Europe The New Realism – Essays in Honour of Hjalte Rasmussen*, 1, at 5.

⁵ Cappelletti and Golay, ‘The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration’, *Integration Through Law*, Vol.1, Book 2 (1986) 261, at 309-315.

⁶ At 309.

⁷ Weiler, ‘The Community System: the Dual Character of Supranationalism’, 1 *Yearbook of European Law* (1981) 267, at 270, note 23.

⁸ Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’, 75 *American Journal of International Law* (1981) 1.

⁹ Stein, ‘Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the *Costa* Case’, 63 *Michigan Law Review* (1965) 491. On the origins of Eric Stein’s conception of the ECJ’s case law, see Boerger and Rasmussen,

Weiler's article in the *Yearbook of European Law*, in which the reference to Stein appeared, developed the distinction and interaction between what he called 'normative and decisional supranationalism' in the development of the EU legal order. The notion of constitutionalization was used by him in passing and nothing hinged on it for the thesis exposed in that article,¹⁰ just as nothing hinged on the use of that notion in Cappelletti and Golay's chapter in the ITL book. As for the general introduction to the ITL project, it does refer to 'judicial constitutionalization, encapsulated in such doctrines as direct effect, supremacy and pre-emption'¹¹ but there is no explanation of why that term is chosen and little or nothing is done with it in the rest of the lengthy introduction, which rather takes 'integration' and 'comparative federalism' as its main organising concepts. As for Weiler's main personal contribution to the ITL project, which was a detailed analysis of the Community's decision-making and compliance mechanisms, it does not even mention the terms 'constitution' or 'constitutionalization'.¹² Also in the five 'substantive' volumes of the ITL project, offering EU - US comparisons in domains such as foreign policy, free movement of persons, free movement of goods, fundamental rights, and environmental and consumer protection, the word constitution only ever appears with reference to the US Constitution. We can then safely say that the ITL project made many interesting contributions to the understanding of Community law (see below, the section on Law-in-Context), but it did *not* articulate or promote a theory about the constitutionalization of the Treaties.

What happened, though, is that the term constitutionalization was picked up by (mostly) non-legal scholars of European integration, especially those based in the US, as a handy shorthand description for the complicated legal doctrines of direct effect, supremacy and pre-emption that Stein (as well as Weiler, Cappelletti and many other jurists) had described in their work. Curiously, the inverted commas kept surrounding the word constitutionalization even in those later receptions of the term.¹³ Therefore, when scholars write of 'Weiler's (and Stein's) constitutional thesis about European

'Transforming European Law: the Establishment of the Constitutional Discourse from 1950 to 1993', 10 *European Constitutional Law Review* (2014) 199, at 216-218.

¹⁰ The notion of 'constitutionalization' played a somewhat more important role in Weiler's 'Transformation of European Law' article, written when he had left the EUI but, by then (in 1991), the use of constitutional discourse had become more common in EU law scholarship generally.

¹¹ Cappelletti, Seccombe and Weiler, 'Integration Through Law: Europe and the American Federal Experience – A General introduction', *Integration Through Law* Vol 1, Book 1 (1986).

¹² Krislov, Ehlermann and Weiler, 'The Political Organs and the Decision-Making Process in the United States and the European Community', *Integration Through Law* Vol 1, Book 2 (1986).

¹³ See Burley and Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', 47 *International Organization* (1993) 41, at 42 (note 2): 'the definitive account of the "constitutionalization" of the treaty is an article by Eric Stein, Lawyers, Judges [...]'.

law’,¹⁴ such a description is not entirely convincing: this is Stein’s thesis, for sure, which Weiler cited in passing, and with approval, but without making it a central part of his main argument about the evolution of EU law and the role of law in the European integration process. So, whereas the idea that law is an engine of European integration did not make a strong impression on EU law scholars (as it may have sounded self-evident to them), it did strike a chord with political scientists and historians, to the point even of being (temporarily) elevated to being a distinct theory of integration. In the volume *European Integration Theory*, which offered a comparative presentation of the various political science theories of integration, a separate chapter was contributed by Ulrich Haltern (a legal scholar) on ‘Integration Through Law’.¹⁵ One might argue that the interdisciplinary character of the ITL project, as well as the appeal of Joseph Weiler’s later work to (especially American) political scientists, convinced the latter of the special role of law in the European integration process and, more generally, helped to establish that any proper political theory of European integration needed to include an account of the important role played by law in that process.¹⁶ Where Rebekka Byberg writes, in introducing her interesting historical account of the ITL project, that ‘these books were the launching pad for the ITL theory arguing that law and the European Court of Justice constituted the key dynamics in the European integration process and that European law had a constitutional nature’,¹⁷ this might be true in terms of the history of ideas but it is true *despite* of what the books actually contained; as I argued in this section, there is no such *theory* in the EUI’s ITL project, but just a few passing nods to other authors who had argued that EU law had been acquiring some kind of constitutional character.

3. EU Constitutional Law-in-Context

The Integration Through Law project was quite interdisciplinary (as was Cappelletti’s previous large scale project at the EUI, dealing with Access to Justice¹⁸). It featured contributions by political scientists (such as Shapiro, Krislov, Elazar, Greilsammer) and economists (Pelkmans). Indeed, as Loic Azoulai noted in a retrospective view of the ITL project, the essential contribution of the project was to situate the role of law in what was a fundamentally political process of European

¹⁴ Boerger and Rasmussen, *supra* note 9, at 222.

¹⁵ Haltern, ‘Integration Through Law’, in A. Wiener and T. Diez (eds), *European Integration Theory* (2004). The chapter was no longer included in the second edition of that book (2009), nor in its third edition (2019).

¹⁶ Even today, political scientists use the concept of ‘integration through law’ to highlight what they recognize as a central and distinctive characteristic of the European integration process (as opposed to other forms of international cooperation); see, for example, Saurugger, ‘Politicisation and Integration through Law: Whither Integration Theory?’, 39 *West European Politics* (2016) 933.

¹⁷ Byberg, ‘The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe’, 18 *German Law Journal* (2017) 1531, at 1532.

¹⁸ M. Cappelletti and B. Garth (eds), *Access to Justice*, 4 volumes, 1978-9.

integration.¹⁹ Similarly, Augenstein and Dawson noted that the ‘mutual conditioning of legal structure and political process was a central insight’ of the ITL project.²⁰ Weiler himself stated, in retrospect, that ‘the implicit statement of Integration through Law was that if the search was for the meaning of law rather than its instrumental legal content, context was indispensable, a *condition sine qua non*, for any meaningful results.’²¹ The linkage between law and politics was present throughout the seven volumes, but perhaps most clearly in the study of the EC’s decision-making process co-authored by Weiler. The focus on law in context was very much present in Weiler’s work from the start, in particular in his piece of 1981 on the dual character of supranationalism (predating the Integration-through-Law volumes).²² There, like ten years later in his ‘Transformation of Europe’,²³ he underlined the close interaction between the legal and political domains of European integration.

In 1995, a new journal was launched, called *European Law Journal: review of European law in context*. Five of its six editors (Bercusson, Joerges, Weiler, Dehousse and editor-in-chief Snyder) were based at the EUI. That intimate connection with the EUI was diluted later on, as the original editors left the EUI, but its later editors-in-chief were alumni of the EUI (Menendez, Mendes and Schepel). The first Editorial defined the new journal’s main purpose as being ‘to express and to develop the study and understanding of European law in its social, cultural, political and economic contexts.’²⁴ The journal sought to bridge the gap between law and other disciplines in two ways: by encouraging interdisciplinary research of legal scholars and by hosting contributions of economists, political scientists and sociologists.²⁵

Law-in-context is not limited to EU *constitutional law* but constitutional law always occupied a prominent place in the work of the EUI’s law-in-context scholars. Indeed, the very first issue of the *European Law Journal* was largely devoted to the study of the European economic constitution. Much of the work of Christian Joerges, in those years, was about re-interpreting internal market law, and proposing a new contextual perspective for the study of the economic constitution of the

¹⁹ Azoulay, ‘Integration through Law and Us’, 14 *International Journal of Constitutional Law* (2016) 449, at 449.

²⁰ Augenstein and Dawson, ‘What Law for What Polity? “Integration through Law” in the European Union Revisited’, in D. Augenstein (ed), *‘Integration Through Law’ Revisited* (2012) 1, at 1.

²¹ Weiler, ‘Epilogue’, in D. Augenstein (ed), *‘Integration Through Law’ Revisited* (2012) 175, at 176.

²² Weiler, ‘The Community System’, *supra* note 7.

²³ Weiler, ‘The Transformation of Europe’, 100 *Yale Law Journal* (1991) 2404.

²⁴ Snyder, ‘Editorial’, 1 *European Law Journal* (1995) 1.

²⁵ As Tony Arnall notes, the launch of the ELJ coincided with the publication of Shaw and More (eds), *New Legal Dynamics of European Union* (1995), which was inspired by the same wish to link EU legal scholarship with the broader processes of European integration and to promote interdisciplinary research (Arnall, ‘The Americanization of EU Law Scholarship’, in A. Arnall, P. Eeckhout and T. Tridimas (eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (2008) 415, at 418.

European Community.²⁶ Francis Snyder, from his side, presented a new way of conceiving of the constitution of the European Union which sought to take account of the social, political, economic and cultural contexts in which EU law was produced and in which it operated.²⁷ EU law-in-context was also advocated and practiced by Renaud Dehousse. He was a professor in the EUI's law department in the 1990s who, during his term, completed his mutation into a political scientist, which he then officially became upon joining Sciences Po in Paris. This made him a true go-between of law and political science. His legal background led him, among other things, to propose a political analysis of the EU's primary legal institution²⁸ and to describe the juridification of the EU's decision-making process.²⁹ After Dehousse and Snyder left the EUI, around the year 2000, the law-in-context tradition was carried forward, in the domain of EU law, by Gráinne de Búrca, particularly through her work on constitutionalism and new governance,³⁰ which was further developed by Mark Dawson in his PhD thesis at the EUI.³¹

4. Constitutional Engineering for the European Union

The Integration through Law project did not have explicit policy making ambitions, even though Weiler, during the final stages of the ITL project, participated as a legal advisor to the adventure of the Draft Treaty on European Union, carried forward by Spinelli in the European Parliament.³² In later years, legal scholars based at the EU have occasionally tried to 'imagine' the future shape of European constitutional law, by conducting research that was explicitly aimed at promoting constitutional change in the EU. Two strands of policy-oriented constitutional law research can be

²⁶ See for example, in his early EUI days, Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', 2 *European Law Journal* (1996) 105; and, in his later EUI days, Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy', 30 *European Law Review* (2005) 461. Major reflections on the European economic constitution were also offered by PhDs defended at the EUI in that period: M. Poiars Maduro, *We the Court – The European Court of Justice and the European Economic Constitution* (1998); J. Baquero Cruz, *Between Competition and Free Movement – The Economic Constitutional Law of the European Community* (2002).

²⁷ Most clearly in a piece published after he had left the EUI: Snyder, 'The Unfinished Constitution of the European Union: Principles, Processes and Culture', in J. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (2003) 55.

²⁸ R. Dehousse, *The European Court of Justice – The Politics of Judicial Integration* (1998).

²⁹ Dehousse, 'Integration Through Law Revisited: Some Thoughts on the Juridification of the European Political Process', in F. Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (2000) 15.

³⁰ G. de Búrca, and J. Scott (eds), *Law and New Governance in the EU and the US* (2006); de Búrca, 'New Modes of Governance and the Protection of Human Rights' in P. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (2005) 31. And see her essay on the relation between law and political science in European studies: de Búrca, 'Rethinking Law in Neofunctionalist Theory', 12 *Journal of European Public Policy* (2005) 310.

³¹ M. Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (2011).

³² On the Draft Treaty, see F. Capotorti et al. (eds.), *The European Union Treaty: Commentary on the Draft Adopted by the European Parliament on 14 February 1984* (1986).

identified: one dealing with the protection of human rights and one dealing with EU institutional reform more broadly.

As regards the first strand, two large-scale policy oriented human rights projects were based at the EUI at almost ten years distance from each other. Both were funded by the European Commission. They were led by, respectively, Antonio Cassese and Philip Alston, both of whom were professors of international human rights law at the EUI, rather than of EU law. Weiler (who had by then left the EUI) was closely associated with both projects. The project led by Cassese led to a multivolume publication in 1991, containing a number of academic studies as well as an ‘agenda for a human rights action plan’ for the EU.³³ That project failed to connect with the then ongoing IGC that led to the Maastricht Treaty, and did not have much of a policy impact. The second project, led by Alston in 1997-1999, had a three-level outcome: (i) a large volume of academic contributions on EU and human rights;³⁴ (ii) a synthetic chapter proposing general avenues and concrete options for policy change, written by Alston and Weiler;³⁵ and (iii), a short legal-political document, authored by a *Comité des Sages* (which included Cassese who had led the previous project) but clearly inspired by Alston and Weiler.³⁶ The latter document contained fourteen concrete initiatives that the EU should take to improve the protection of human rights internally and externally, and that, for the most part, did not require Treaty change. Some of those initiatives were, in fact, implemented in the following years, namely the idea of entrusting one member of the European Commission with a special human rights responsibility, and the creation of what was called in the project a ‘European Human Rights Monitoring Agency’ and was established under the name of Fundamental Rights Agency some years later. One can say that the Alston project contributed to institutionalize the EU’s human rights policy.

As for the second strand of constitutional engineering, namely the policy-oriented work on EU institutional reform, its home, during the 1990s and the early years of the new century, was first the European Policy Unit (created by Weiler) and later its successor the Robert Schuman Centre for

³³ A. Cassese, A. Clapham and J. Weiler, ‘1992 – What are our Rights? Agenda for a Human Rights Action Plan’, in *European Union – The Human Rights Challenge - Vol. II, Human Rights and the European Community: Methods of Protection* (1991) 1.

³⁴ P. Alston (ed), *The EU and Human Rights* (1999). Several EUI members contributed chapters to this volume, including Silvana Sciarra, the EUI’s professor of labour law, who had separately been involved in a project advocating the protection of fundamental social rights by the EU: R. Blanpain, B. Hepple, S. Sciarra and M. Weiss, *Fundamental Social Rights. Proposals for the European Union* (1996).

³⁵ Alston and Weiler, ‘An “Ever Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights’, in P. Alston (ed), *The EU and Human Rights* (1999) 3.

³⁶ ‘Leading by Example: A Human Rights Agenda for the European Union for the Year 2000’, in P. Alston (ed), *The EU and Human Rights* (1999) 921.

Advanced Studies.³⁷ Under the directorship of Yves Mény (who himself had been a professor at the EUI's Law department in the early 1980s before turning to be a political scientist), the Centre generally promoted policy-oriented research on European affairs, and developed a particular strand of constitutional policy advice to the European Parliament and the European Commission. The connection with 'Brussels' was facilitated by the fact that Claus Ehlermann, a former director-general of the Commission's legal service became, upon his retirement from the Commission, a professor of Economic Law at the EUI between 1995 and 2002. Ehlermann conducted, together with Armin von Bogdandy (who was a Jean Monnet Fellow at the EUI in 1995-6, just before he was appointed to his first law chair in Germany) a rather technical project, funded by the European Parliament, on how the 'bits and pieces' resulting from the Maastricht treaty could be put together into 'Just One Treaty'.³⁸ This project was meant to prepare the ground for a merger of the Treaties by the Intergovernmental conference (IGC) leading to the Amsterdam Treaty, but the merger plan did not materialize during that IGC.

A few years later, in May 2000, on a mandate of the European Commission, the Schuman Centre produced a report on the potential for a merger and a 'reorganization' of the Treaties into a basic (or 'constitutional') part and a remaining less-basic part.³⁹ A number of law professors of the EUI had taken part in drafting the report. The Commission and the EP approved its approach, and the idea of a merger and reorganization of the Treaties was adopted by the Convention on the Future of the Union when drafting the Constitutional Treaty.⁴⁰

EUI-based scholars accompanied the process of drafting the Constitutional Treaty⁴¹ and commented on the results achieved by both the Constitutional Treaty and its avatar the Lisbon Treaty, with a particular focus on subjects like external relations, treaty structure, treaty revision and the drafting

³⁷ See A. Vauchez, *Brokering Europe*, *supra* note 1, at 216 and 225.

³⁸ Robert Schuman Centre for Advanced Studies, *A Unified and Simplified Model of the European Communities Treaties and the Treaty on European Union in Just One Treaty*, European Parliament DG for Research, Legal Affairs Series, Working Paper W-9, October 1996. The study was presented by its coordinators in: von Bogdandy and Ehlermann, 'Guest Editorial: Consolidation of the European Treaties: Feasibility, Costs, and Benefits', 33 *Common Market Law Review* (1996) 1107.

³⁹ Robert Schuman Centre for Advanced Studies, *A Basic Treaty for the European Union. A Study of the Reorganization of the Treaties* (coordinated by Y. Mény and C.D. Ehlermann), May 2000. The RSCAS produced a second report, later that same year, on *Reforming the Treaties' Amendment Procedure*, but that report was less influential in the Constitutional Treaty deliberations; in particular, its proposal to mitigate somewhat the unanimity rule for treaty changes was not successful.

⁴⁰ On the reception of the Schuman Centre's study by the EU institutions and later by the Convention, see De Witte, 'Simplification and Reorganization of the European Treaties', 39 *Common Market Law Review* (2002) 1255, at 1270-1274.

⁴¹ B. De Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (2003).

and incorporation of the Charter of Rights.⁴² Jacques Ziller, professor of public law at the EUI, was a particularly prolific author on this subject.⁴³ Another key figure, linking the EUI with the constitution-making arena in Brussels, was Giuliano Amato. He had been a professor of constitutional law in Rome and had served twice as Italian prime minister. Between those two terms, he had been a professor of competition law at the EUI. He served as vice-president of the Convention on the Future of the Union that drafted the Constitutional Treaty. A major commentary on the Constitutional Treaty, co-edited by him, involved a number of EUI scholars and a number of legal experts working for the EU institutions who had been involved in the drafting of the Constitutional Treaty.⁴⁴ He himself was rather disappointed by the outcome.⁴⁵ Weiler, who had been actively involved in the earlier constitutional policy project on human rights, kept aloof from this project and expressed much scepticism about the ‘treaty masquerading as a constitution.’⁴⁶ The significance of the failed attempt at ‘big C’ constitution making was examined, immediately after the events but also in later years, by Neil Walker, who had joined the EUI in 2000.⁴⁷

5. The EU’s Place in the Constitutional Law World

Walker’s commentary on the vicissitudes of the Constitutional Treaty formed part of his broader research agenda which, both during his time at the EUI and afterwards, interrogated ‘the place of European law’,⁴⁸ in particular, how European law fits in contemporary constitutional theory. He explored the ‘possibility’ of European Union constitutional law and the ‘trajectory’ of European constitutionalism:⁴⁹ how to translate the normative concepts of constitutionalism from the state to

⁴² Cremona, ‘The Union’s External Action: Constitutional Perspectives’ in G. Amato, H. Bribosia and B. De Witte (eds), *Genesis and Destiny of the European Constitution: Commentary on the Treaty Establishing a Constitution for Europe in the Light of the travaux préparatoires and Future Prospects* (2007); Cremona, ‘The Two (or Three) Treaty Solution: The New Treaty Structure of the EU’, in A. Biondi, P. Eeckhout and S. Ripley (eds), *EU Law after Lisbon* (2008) 40; De Witte, ‘Treaty Revision Procedures after Lisbon’, in A. Biondi, P. Eeckhout and S. Ripley (eds), *EU Law after Lisbon* (2008) 107; de Búrca and Aschenbrenner, ‘European Constitutionalism and the Charter of Fundamental Rights’, 9 *Columbia Journal of European Law* (2003) 355.

⁴³ J. Ziller, *La nuova costituzione europea* (2004); G. Amato and J. Ziller (eds), *The European Constitution: Cases and Materials in EU and Member States’ Law* (2007); A. Albi and J. Ziller (eds), *The European Constitution and National Constitutions: Ratification and Beyond* (2007); J. Ziller, *Les nouveaux traités européens: Lisbonne et après* (2008); S. Griller and J. Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (2008).

⁴⁴ G. Amato, H. Bribosia and B. De Witte (eds), *Genesis and Destiny*, *supra* note 42.

⁴⁵ See also his recent retrospective view: Amato, ‘From the Years of the Convention to the Years of Brexit. Where Do We Go from Here?’, in N. Barber, M. Cahill and R. Ekins (eds), *The Rise & Fall of the European Constitution* (2019) 11, at 11-15.

⁴⁶ Weiler, ‘A Constitution for Europe? Some Hard Choices’, 40 *Journal of Common Market Studies* (2002) 563; Weiler, ‘On the Power of the Word: Europe’s Constitutional Iconography’, 3 *International Journal of Constitutional Law* (2005) 173.

⁴⁷ Walker, ‘Big “C” or Small “c”?’ 12 *European Law Journal* (2006) 12.

⁴⁸ Walker, ‘The Place of European Law’, in G. de Búrca and J. Weiler (eds), *The Worlds of European Constitutionalism* (2012) 57.

⁴⁹ The expressions between inverted commas are headings in Walker, ‘The European Union’s Unresolved Constitution’, in M. Rosenfeld and A. Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 1185.

the European Union setting,⁵⁰ and how to employ the concepts of constitutionalism to make sense of the EU's evolving political and institutional settlement.⁵¹ Among his more specific themes were those of constitutional pluralism, which spurred a large amount of scholarly writing in the following years,⁵² and the interaction between constitutionalism and new governance, which linked his work with the EUI's law-in-context tradition. He supervised a number of PhD projects on EU constitutional theory whose authors (Avbelj, Cahill, Gibbs, Mac Amhlaigh, Wilkinson and others) continued this line of work after leaving the EUI, including in some joint projects.⁵³

6. Enlargement and the European Constitution

A separate strand of EU constitutional law scholarship, based at the EUI, deserves to be mentioned. Its volume is more limited than the previously mentioned ones, but it is relevant in this context, given the specific interest of Jan Komárek's IMAGINE project for the diffusion of constitutional ideas to Central and Eastern countries as they acceded to the EU. During the first decade of the 21st century, the constitutional context and implications of the major eastward enlargement of the European Union was a continuing field of interest at the EUI. This was due, in no small part, to the appointment of Wojciech Sadurski in 1999. Although he had been appointed a professor of legal philosophy, much of his work at the EUI was about European constitutionalism and in particular the reception of European constitutionalism in central and eastern Europe.⁵⁴ Some PhD students, supervised by Sadurski and others, contributed to that domain of scholarship,⁵⁵ as did some of

⁵⁰ See Walker, 'Postnational Constitutionalism and the Problem of Translation', in J. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (2003) 27; and Walker, 'European Constitutionalism in the State Constitutional Tradition', 29 *Current Legal Problems* (2006) 51.

⁵¹ Walker, 'Europe's Constitutional Momentum and the Search for Polity Legitimacy', 3 *International Journal of Constitutional Law* (2005) 211.

⁵² Walker, 'The Idea of Constitutional Pluralism', 65 *Modern Law Review* (2002) 317. The theme had also been addressed already in the late 1990s by Massimo La Torre, who then held the EUI chair of legal philosophy: La Torre, 'Legal Pluralism as an Evolutionary Achievement of European Community Law', in F. Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (2000) 125. Another contributor to that debate was Miguel Maduro, after he left the EUI as a PhD researcher and before he returned there as a professor: Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed) *Sovereignty in Transition* (2003) 501. The diversity of views on this theme is collected in M. Avbelj and J. Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012).

⁵³ D. Augenstein, *'Integration through Law' Revisited – The Making of the European Polity* (2012), with contributions by Cahill, Gibbs, Avbelj and Mac Amhlaigh.

⁵⁴ Sadurski, 'The Charter and Enlargement', 8 *European Law Journal* (2002) 340; Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe-Democracy-European Union', 14 *European Law Journal* (2008) 1; W. Sadurski, *Constitutionalism and the Enlargement of Europe* (OUP 2012), a volume collecting much of his earlier work, published after he had left the EUI.

⁵⁵ A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (2005); D. Piqani, *Supremacy of EU Law and the Jurisprudence of Constitutional Reservations in Central Eastern Europe and the Western Balkans* (2010).

Sadurski's colleagues in the EUI's Law department,⁵⁶ given that enlargement was rightly perceived then as a 'self-identification exercise of constitutional significance'⁵⁷ for the EU.

7. Two Final Comments

Two final comments are in order to put the above in proper perspective. The first is to note that the influence of EUI-based scholars was facilitated by the network-creating nature of the EUI. The institution could attract numerous PhD students from all corners of Europe every year, and also a sizeable number of postdocs as well as frequent visitors to conferences and workshop. This allowed Florence-shaped ideas about EU constitutional law to circulate more easily than the ideas that originated in less well-connected places in Europe. Also, its professors are appointed for a limited period of time; Francis Snyder notes that as they left the EUI for other universities, 'the work they began, or in which they participated, at the EUI has been transplanted to different academic environments and diverse national legal systems'.⁵⁸ The second comment is a counterpoint to the first one. It is to note that the vast majority of the EUI-based scholarship was written in English. This meant that its influence was much more visible in the English-language world of EU law (which includes the UK, the US, Ireland, but also the Netherlands, Belgium and the Nordic countries) than in the large continental countries France, Germany, Italy and Spain. In the latter, EU law scholarship continued, throughout this whole period and also today, to be produced predominantly in the national language, to pursue country-specific debates, and to mainly cite and discuss national authors, with little islands of influence of English-language authors from the EUI or elsewhere. The impact of EUI-based scholarship dealing with EU constitutional law was, accordingly, more limited in those countries.

⁵⁶ Cremona, 'The Impact of Enlargement: External Policy and External Relations', and De Witte, 'The Impact of Enlargement on the Constitution of the European Union', both in M. Cremona (ed), *The Enlargement of the European Union* (2003); Walker, 'Constitutionalizing Enlargement, Enlarging Constitutionalism', 9 *European Law Journal* (2003) 365.

⁵⁷ Hillion, 'Enlarging the European Union and its Fundamental Rights Protection', in I. Govaere, E. Lannon, P. Van Elsuwege and S. Adam (eds), *The European Union in the World. Essays in Honour of Marc Maresceau* (2014) 557.

⁵⁸ Snyder, 'The EUI Law Department and the Europeanisation of Law: An Introduction', in F. Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (2000) 1, at 2.

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