

Braving the Waves? Europe's Constitutional Settlement at Twenty*

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Abstract

This article reflects on the diagnosis proposed in 1998 by Moravcsik and Nicolaidis that the EU had reached an incipient constitutional settlement and makes two connected arguments. First, analytically, that contrary to the prevailing view, the EU's constitutional settlement is holding, although it has come under assault from federalists and sovereignists alike. The bicycle theory nevertheless continues to hold sway perhaps because paradigm shifts always exhibit significant lags. Second, normatively, to defend 'the equilibrium' does not amount to a defense of the status quo. On the contrary, and especially in the context of the eurozone crisis, we must reflect on the social foundations of the European project, of which intermittent democratic discontent is only one expression. The argument unfolds through four European cities, each regarding a different moment in the Constitutional saga of the last two decades, to conclude on the relationship between LI and democratic theory, as well as the promise of sustainable integration.

Keywords: European Union; democracy; Liberal Intergovernmentalism; constitution

Introduction

In a 1998 *JCMS* keynote article on the Amsterdam Treaty, Andrew Moravcsik and I argued that contrary to disparaging commentaries at the time about its significance or lack thereof, we believed that this Treaty had been misconstrued (Moravcsik and Nicolaidis, 1998). Cloaked in its modest attire, it was actually the harbinger of things to come. With it, the EU had reached a constitutional settlement of sorts, a mature state whereby the European project would no longer need continually to move forward on a neo-functionalist bicycle in order to stay stable.

Three implications followed from this diagnosis. One, analytically, that the focus of EU actors was changing, from the Maastricht logic of ever deeper integration to maintaining this equilibrium. Two, predictively, that we ought to expect incremental rather than radical change in the foreseeable future, small oscillations that would fine tune the new equilibrium. Europe was yet to expand geographically, reform institutionally and deepen substantively, but all this would take place within the existing constitutional contours. Only an exogenous shock was likely to destabilize it. Three, prescriptively, that this was a good thing, the freeing of the European project from federalist teleology. Thankfully, and in accordance with its nature as a non-statist project, the EU had henceforth started to supplement its 'Ever closer union' mantra with 'United in Diversity.'

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Twenty years later, what should we think of this diagnosis? One could be forgiven for asserting that this question is a no-brainer. The EU has continued to expand its competences, reconfigure its central institutions, and change its external boundaries. *A fortiori*, the eurozone tremors that shook the continent a decade after this prediction, leading *inter alia* to the British decision to withdraw, seem to have made the constitutional settlement argument obsolete.

In this article, I will reflect on lessons learned since the publication of our *JCMS* article and make two connected arguments which admittedly present a genuine tension. In short, as with the famous Rubin vase of a two-faced woman, ours is an ambivalent reality exhibiting both the durability and vulnerability of Europe's constitutional settlement.

First, analytically, the EU's constitutional settlement may have become an increasingly unstable equilibrium over the period, deeply disrupted by the waves of crises, but has remained an equilibrium nevertheless. This is true whether we consider mainstream pronouncements on EU *finalité*, the evolving centralization of competences, or the distribution of powers between institutions at the centre. To be sure, the equilibrium has come under assault from both traditional federalists and sovereignists. But we observe oscillations around the mean, as member states continue to clash over their diverging interests in an increasingly heterogeneous union, demonstrating *inter alia* both Liberal Intergovernmentalism (LI)'s lasting relevance and its incomplete explanatory power (as discussed by Frank Schimmelfennig in this Special Issue).

How do we operationalize such a diagnosis? This is not easy since it is about what has *not* happened along the long road of 'constitutionalization' of EU treaties. A constitutional settlement suggests that member states have reached an imaginary line, which they have been approaching asymptotically, whereby each incremental Treaty change is less significant than the last. Pointing to Maastricht-scale Treaty change in the last decades would falsify this argument. Changes in policies, to which the literature on punctuated equilibria applies, would not.

Second, normatively, to assert the existence of an 'equilibrium' does not amount to a defense of the status quo against federalist ambitions for change. In fact, it is striking that the bicycle paradigm (if the EU stops integrating, it will fall apart) continues to hold sway, presumably because it remains an intuitively appealing metaphor. Yet it is dangerous to accept its unreflexive premise that 'more Europe' is always the answer to the EU's woes. If the EU is to withstand the storm, we do not have the luxury of abstaining from reflecting on its social foundations, of which intermittent democratic discontent is only one expression. While the EU's constitutional plateau entrenched the integration process, it simultaneously exposed its inherent flaws. Only through an uncompromising assessment of these flaws can we imagine rooting its constitutional order in fertile societal soil. The EU will not be stabilized with constitutional magic bullets. Instead, without change in *praxis* and *ethos*, the settlement will increasingly look like an empty constitutional shell. It is this agenda (which calls for ever closer dialogue between political science, political or legal philosophy, history and sociology) complementary to and in tension with LI, that democratic theory seeks to further (Nicolaidis, 2003, 2013).

My argument first unfolds in four parts, each regarding a different moment in the Constitutional saga of the last two decades, each symbolized by a European city:

¹I have left out the refugee crisis for reasons of space not relevance (Viehoff and Nicolaidis, 2017).

Amsterdam, Lisbon, Frankfurt and London.¹ In each part, I present the case for the durability and the vulnerability of the EU constitutional order in turn. In part I, I start by laying out the three main dimensions of Europe's 'constitutional settlement' and then briefly explore some of the difficult questions associated with the argument and its connection with LI. I go on to revisit the original diagnosis in light of subsequent developments, including where the co-authors have agreed or disagreed about its implications in the past. In part II, I revisit the Constitutional treaty debates of 2001–05 and show how the emergence of democratic theory at the time served both to anchor LI normatively and to open a space for critical theory that was missing from its conceptual toolbox. In part III, I argue that the Eurocrisis has been dealt with through policy reform rather than radical Constitutional change, but that this has exposed some of the EU's structural flaws and has come at a high price. In part IV, I tentatively tease out the implications of Brexit. Part V takes stock of these four developments to analyze the ways in which democratic theory relates to and enhances LI thus providing a benchmark for the kind of social anchoring advocated here. I conclude by suggesting that we must now think more holistically about 'sustainable integration' which re-interprets the idea of settlement as a commitment to the long term.

Amsterdam: Constitutional Settlement 1.0.

A technical response to the unfinished business of Maastricht, the Amsterdam Treaty was proclaimed to be at best insignificant, and even disastrous. While there had been some noise beforehand about addressing concerns regarding the EU's so-called democratic deficit in order to 'bring it closer to its citizens', Amsterdam was above all about anticipating the upcoming big-bang enlargement, the geographic 'settlement' of EU borders for the foreseeable future. But in the end, this had engendered a mere tweaking of decision-making procedures. As LI broadly predicted, the second and third pillar remained in the grey zone between pure intergovernmentalism and the community method, and the Treaty neither much expanded the scope of co-operation, nor deepened its reach (Moravcsik and Nicolaidis, 1999; see also Neunreither and Wiener, 2000). This was unsurprising given the lack of an overall reform agenda for a Treaty negotiated around two structuring cleavages, namely big versus small states, and more versus less federalist states.

And yet, beyond this unifying outcome, we suggested that the Treaty was actually the first draft of 'a new constitutionally self-conscious future for Europe'. In this, we stressed a beginning, rather than an end: once the scope of policy-making ceases to increase significantly, the field of co-operation opens up for constitutional debates. Crucially, we did not describe a unitary framework. Instead, we argued, constitutional bargains tend to emerge not from a single (centralizing) principle but from the balance between different underlying principles such as democratization, universality, efficiency, discretion or delegation.

In sum, 'constitutional settlement' as applied to the EU broadly covered three dimensions, against which we can assess change at latter stages:

Finalité – *On the general pace and shape of integration*, a constitutional settlement suggests that a political community has reached a stage when it is best defined by the framework it adopts for its coexistence rather than by its destination of travel. The diagnosis directly counters a teleological understanding of European integration as

moving inexorably towards greater substantive scope, greater uniformity in terms of legal and institutional procedures, and increasingly universal participation in common policies. Instead, we coined the phrase 'evolutionary pragmatism' to convey the idea that Amsterdam represented 'the beginning of a new phase of flexible, pragmatic constitution-building in order to accommodate the diversity of a continent-wide polity' (Moravcsik and Nicolaidis, 1998, p. 36). Such pragmatism, we believed, would increasingly dominate legal purity, leading to a range of procedures occupying the space between no and full communitarization as well as between no and full participation by each individual member state. As a result, the EU would become an assemblage of institutions and approaches appropriate to different issues and circumstances, allowing for a panoply of flexible arrangements among its member states as one of the EU's core *modus operandi*. Differentiation was not new of course, but Amsterdam was its coming 'out'.

Vertical Allocation of Powers – On the allocation and exercise of competences, the diagnosis for settlement stems from the diminishing returns from co-ordinating residual areas of autonomous state policies in culture, education, taxation or social policy. Contrary to the continued need for trade liberalization, it was far less clear 'whether the gains from deeper economic regulation fully offset the sacrifice of control over free movement of peoples, social security, employment, or fiscal policy – or more precisely, governments have far more diverse preferences concerning these forms of cooperation' (Moravcsik and Nicolaidis, 1998, p. 33). Hence the careful attribution of specific issues to either the first or third pillar, depending on how much constraints were accessible, or the delicate compromises on the communitarization of Schengen, as member states sought to ring-fence their residual discretion to pursue their own substantive goals even where competences were already shared. Finally, when formalizing the enhanced co-operation clause, a stable solution required accommodating states' fears of both compulsory inclusion and exclusion.

Horizontal Balance of Power – On the institutionalization of the distribution of power at the centre, a constitutional settlement suggests both a more pragmatic institutionalization of power as well as the continued commitment to mitigating power differentials between member states. The reweighting of national votes in the Council managed to address the 'Lilliput Syndrome' of the big member states without falling into blatant population weighting – simply to make sure that a qualified majority could not be achieved with a minority of the European population (Magnette and Nicolaïdis, 2004). Furthermore, the debates over the number of Commissioners (with actual agreement postponed) made clear that any reduction would hit the hard limit of one Commissioner per country, the core expression of (formal) member state equality. And on the inter-institutional front, with its legal version of the Luxembourg compromise, or the withdrawal of the Commission's ability to compel a unanimous vote on Council changes it opposes, Amsterdam formally entrenched member states' control, while empowering both the Parliament and the Council *vis-à-vis* the Commission.

Importantly, these three dimensions need to be considered as a whole. *Finalité* can be read in the other two dimensions, and the latter are themselves in mutual equilibrium. Joseph Weiler had made this connection most explicit in his 1992 ground-breaking article *Transformation of Europe*, which considered how Europe's constitutional order was anchored in the ECJ jurisprudence as well as the kind of grand political bargains that

preoccupy us here (Weiler, 1991). As the Court locks *vertical allocation* through the closure of selective exit under the logic of integration-through-law, the political masters of the Treaty (re) assert their control in the *horizontal* institutional sphere. The language of constitutional settlement is but one of the ways of asking what has happened to the dynamic but fragile equilibrium between normative centralization and political autonomy at the heart of the European project (Maduro and Wind, 2017).

Aporia of 'Settlement' and the Value of Equilibrium

There is ample room to disagree with our Amsterdam snapshot. But assuming we were generally correct, my concern here is to clarify the implicit assumptions which underpin the diagnosis of 'constitutional settlement' and in doing so, offer openings for its critical assessment 20 years later. There are three assumptions in particular that I believe shape the rest of the debate, regarding the connections between i) explanation and description, ii) description and prescription, and iii) order and contestation.

Explanation-Description

The diagnosis of constitutional settlement invites a shift of agenda from *why* to *what*, from the 'engine' to the 'nature of the beast', in Risse-Kappen's (1996) formulation. The focus on *what* opens up the question as to what category this animal ought to be assessed under, triggering an epistemological competition between comparators, each of which implies a different set of privileged explanatory factors. The *why* that matters depends on whether the EU is now comparable with national political systems in general, federal systems, deep regional integration, past and present empires, or deeply institutionalized forms of international co-operation. In each of these realms the issue of stability and order is discussed in different disciplinary languages. Conversations are opened up and new conceptual trenches dug as 'EU scholars' become more inclined to look around beyond European studies, while interlopers from other disciplines adopt the EU in their comparative designs.

Moravcsik made the connection explicit between LI as an explanatory frame and the diagnosis of constitutional settlement, under the label 'New Synthesis' (Moravcsik, 2008). However, I believed then and now that this connection between explanation and description needed to be problematized. To be sure, our shared diagnosis did rely on LI's basic premises regarding incentives and processes, including that domestic interest groups compete effectively to shape national preference formation. Such premises implied that the settlement would evolve over time, not in response to neo-functional pressures, but by adapting to unavoidable technological, economic and geopolitical developments that are exogenous to European integration. Nevertheless, much of LI's diagnosis rests on the assumption of Pareto optimality that for each grand bargain no country can be made better off without another being made worse off. If we *explain* the bargaining dynamics that way, then it follows that we can *describe* the settlement as stable, short of external shocks. But can we always assume that Pareto-efficiency does in fact buy stability over time? For one, the so-called equilibrium can be overly skewed in favour of some countries or groups and thus be potentially destabilizing. Moreover, the explanation may 'omit' variables that are irrelevant at the time of negotiation (for instance federalist ideology, technocratic capture, and more fundamentally social legitimacy), but which

may become significant *over time*, thus affecting the vulnerability of the outcome. The greatest strength of LI in my view rests with its insistence on explaining variance, which in turn illuminates differentiation on the 'what' side. But if this is true, we need to contemplate the idea that *some* areas of co-operation can be subject to sub-optimal outcomes, which in turn may destabilize the whole edifice, as discussed in the remainder of this article.

Description-Prescription

While the diagnosis of constitutional settlement presents itself as value neutral, our belief at the time was that this equilibrium was also desirable. The connection between what happens and what should happen is obviously a vast question. LI implicitly condones processes it seeks to explain to the extent that it is right for states to continuously bargain over their relative benefits of co-operation and control: substantial sacrifices in sovereignty need to be justified by compelling converging national interests (Nicolaidis, 2017a). In the words of Peter Ludlow, the post-foundational EU would only be successful if it managed 'to show that its modesty was its glory rather than its shame' (Ludlow, 1997, p. 4). The question is not just whether the polity survives, but whether it survives in the form that we value normatively – which will make it truly sustainable.

In the spirit of Weiler's community paradigm, we argued that the Amsterdam Treaty did fine tune a 'precious equilibrium' including by devising proxies for member states' lost vetoes. Should EU scholars not ask themselves explicitly: does my normative belief about what is right for the EU taint my diagnosis with a dose of wishful thinking? On my part, I have come to believe that the actual politics of the EU constitute an overly restricted field from which to 'extract' the desirable. I have searched for more explicit and formal normative benchmarks which can still eschew ideal theory and be immanent in the EU's reality, but which nevertheless abstract from its specific features – or indeed the specific intentions of European actors. My own version of this normative benchmark was first developed by borrowing a federal lens to argue for the recovery of a 'federal vision' that could escape the statist capture of federalism over the last 200 years: a federal union rather than a federal state (Nicolaidis and Howse, 2001). Such a benchmark, later reformulated as democracy (see Part II), may have been approximated by the constitutional settlement, but *only* approximated.

I have suggested the metaphor of the Rubicon separating the dreaded land of anarchy from the promised land of unity (Nicolaidis, 2013). This Rubicon Europeans would not and should not cross, instead braving the waves of densely institutionalized co-operation between deeply entrenched nation-states and resisting the sirens on both side – hence the title of this article, and its question mark.

Order-Contestation

Finally, the diagnosis of constitutional settlement raises the question of the connection between the *ought* of constitutional order and the *praxis* of politics. Constitutional orders, especially but not only when they are translated into formal Constitutions, are ways for the dead to tie the hands of the living – aka Bruce Ackerman. In the EU story, we have mythical 'founding fathers' (never mothers!) in the role of the former, but in their missionary zeal their contemporary interpreters believe it is for them to decide what is best kept out of the vagaries of day-to-day political conflict. Yet, supporting the existence of

a constitutional settlement does not amount to supporting the status quo in terms of policies and politics, nor denying the value of deep political contestation.

In fact, it can be argued that constitutional stability provides a frame for effective contestation, by protecting and even empowering those actors who would not have a voice in a system of pure power-politics. This is all the more true if we believe that the EU's ill-adaptability to shocks is due to bad policies rather than bad constitutional design. This is why those who fear the shift towards 'existential' (or constitutional) euroscepticism should be especially attuned to 'policy euroscepticism' (De Vries, 2018). It could be argued that in today's EU, a constitutional settlement simply coexists with unprecedented political contestation, each on a different plane. But the question remained at the time and remains today: when is contestation so deep that it touches the constitutional order itself? What if it is the order, rather than its policies, that is perceived as the source of social plight? The question would become increasingly acute in the two decades following Amsterdam.

Lisbon: A Constitution in Whose Name?

The 2001 Laeken declaration calling for a Constitutional convention seemed to echo our 1998 prediction that the focus of the coming years would 'be on the construction of a legitimate constitutional order for policy-making responsive to the desires of national governments and their citizens' (Moravcsik and Nicolaidis, 1998, p. 34). In spite of grand constitutional rhetoric and protracted negotiations, and thanks to the intervening French and Dutch 'no', the final constitutional compromise embodied in the Lisbon Treaty six years after Laeken did not radically alter the Amsterdam settlement.

On *finalité*, the Lisbon Treaty abandoned the statist paraphernalia (flag, hymn) as well as terminology that had been introduced in the draft Constitutional treaty which would have constituted a fundamental change. But it retained its frank appeal to the ideal of 'unity in diversity' rather than 'ever closer union' and revised the 'national identity clause' thus empowering national constitutional courts in their assertion that the essential structures of national constitutionalism cannot be overridden by EU law. And while the Maastricht pillars were formally abolished, differentiated decision-making was in fact codified with great care.

On the *vertical allocation of powers*, governments continued carefully to calculate the consequences of further delegation of sovereignty to the Commission and of pooling sovereignty among themselves and reinforced essentially intergovernmental co-operation in a number of areas, including immigration and foreign policy. And the principle of conferral was explicitly codified for the first time according to which competences not conferred on the Union in the Treaties remain with the member states.

On the *horizontal balance of power*, the Lisbon treaty mainly addressed the unfinished business of Amsterdam, by adjusting voting weights and the structure of the Commission. The greatest move away from the prior settlement and its commitment to formal equality between states was the abolishment of the rotating presidency. But even there, rotation was retained for Council formations, thus creating a 'headless presidency'. The codification of the European Council was mainly a formality, and the final Lisbon treaty backtracked on doing away with one commissioner-per-country, due to some degree of re-empowering of small states following the Irish 'no' in 2017.

The new exit clause codified in Article 50 merits a special mention as the ultimate expression of member state control in both the horizontal and vertical dimensions. One could stress continuity in a trivial sense: that withdrawal having always been possible *de facto*, this was a mere formalization. But the relevance of Article 50 to the constitutional settlement is deeper than that. To formally establish that member states still have enough sovereignty autonomously to decide to withdraw truly anchored the post-statist constitutional settlement founded on togetherness by choice (Nicolaidis, 2017a).

How does the vexing question of the 'Constitutional' label affect this conservative account of the Lisbon Treaty? For Moravcsik, constitutional rhetoric constituted statist over-reach, thus disrupting the existing state of affairs, which was of course the main point of the exercise for traditional federalists. But there was no overriding reason, in my view, to equate the idea of a 'Constitution' with statism-writ-large, as demonstrated by the new exit clause. To Moravcsik's 'if it ain't broke, don't fix it' (Moravcsik, 2003), I replied at the time, 'even if it ain't broke, explain it' (Nicolaidis, 2003). A clear and readable text could have contributed to a better political socialization of European citizens, including by simply telling the *hoi polloi* who does what in the Union, offering a creative Preamble followed by the Charter of Fundamental Rights, laying out participatory mechanisms and, crucially setting aside the non-constitutional Treaty provisions.

This line was overly optimistic. European officialdom failed to present the new text as an embellishment on Europe's existing constitutional settlement – as exemplified by the statist paraphernalia – or address fears of 'competence creep' through a competence *passerelle* downwards as some of us advocated. After the French and Dutch 'Nos', we agreed that it would be wrong to try to resurrect the doomed constitutional treaty as such (Moravcsik and Nicolaidis, 2005). Its reincarnation as the Lisbon Treaty may have been necessary, but it is hard to justify the dismissal of 'the people' which ensued. Even if the democratic experiment had proven a failure, the episode had dramatically exhibited the capacity of eurosceptics to mobilize public defiance. Such was the irony of a treaty conjured up to respond to the democratic malaise in the EU yet born from the clutches of defeat in popular votes. Ultimately, Moravcsik was right: there was no need for a formal European Constitution after all. But there was now a serious need for collective soul searching on how to make it up to European publics, what I called at the time our democratic atonement.

The Democratic Critique

Notwithstanding the dubious adoption process of its Lisbon Treaty reincarnation, can we say that the constitutional settlement passed the democratic test? Democracy beyond the state is difficult, within the EU or beyond. While in 2001 Convention scholars disagreed on the state of democratic legitimacy in the EU, few denied that it mattered. However, there was still much plausibility to the claim by Majone and Moravcsik that the European Union did not suffer from a democratic deficit, given the primacy of elected governments in its power structure, the limitation of its competences to efficiency-oriented or non-salient matters, and the prevalence of checks and balance mechanisms, transparency and consultation throughout the system (Majone, 1998; Moravcsik, 2002).

But whether we like it or not, democracy is in the eyes of the beholder, the 'people' who continued to ask: what kind of democracy is it where we cannot throw the rascals

out? It is a very thin democratic theory which ignores the need for contestation of political leadership, as cogently argued at the time by Follesdal and Hix (2006).

Well then, let's not call it democracy but *demoicracy*, was my own response, thus siding with the first camp analytically and the second camp normatively. On the first count, and as a member of the Constitutional Convention I introduced the idea as a descriptive device to better defend the EU-as-is. I worried that citizens could never see the EU as legitimate if they continued to assess it in the same light as a nation-state. It made sense to understand an EU with such a particular constitutional set up as a *demoicracy*, namely a 'Union of peoples who govern together but not as one'. This lens in turn would bring our gaze back to what matters first and foremost: the quality of the democracies that compose it and of their commitment to acting together.

But second, *demoicratic* theory was also meant to provide a normative benchmark against which to highlight the EU's pitfalls, thus bringing to bear the vulnerability of the constitutional settlement. Crucially, the *demoicratic* lens was equally a rejection of both federal mimetism and sovereigntism, in its emphasis of the political not essentialist nature of the *demoi* in question, and thus the normative good stemming not only from their autonomy, but also from their radical openness and mutual horizontal accountability.

Frankfurt: Constitutional Resilience?

While there was little time to 'test' the Lisbon Treaty in steady state before the 2008 eruption of the financial crisis on the EU scene, the saga that followed around EMU governance reform has tested the resilience of Europe's constitutional settlement and its *demoicratic* promise to its limits. Given the externalities of the eurozone on the rest of the EU this is clearly not a test restricted to a single issue-area. Hence, it is not far fetched to argue that the very existence of the EU rests on whether monetary union is soluble in the EU's evolving constitutional settlement.

Consider three categories of reasons for its resilience. First, and *counterfactually*, while some argue that the EU would have been more stable if it had restricted integration to areas where national interests clearly and predictably dovetailed, others have argued that the exogenous financial shock would have been worse without the strictures of EMU and their crisis-led adaptation. The constitutional settlement, in this view, was a stabilizer.

Second, throughout the crisis, member states managed to avoid further Treaty reform and the new hybrid regime was ameliorated *incrementally*, both in terms of competences and in terms of institutions. On the face of it, the crisis simply reinforced existing trends within the post-Maastricht constitutional settlement having to do with the shift of core competences upwards through the Stability and Growth Pact and new intergovernmentalism (Bickerton *et al.*, 2015).

Third, any diagnosis needs to focus on the steady state. After all, it is unsurprising that such an exogenous shock forced member states to operate in 'emergency mode' without much regard for the EU's constitutional set-up, given the sums at stake and the urgent need to placate financial markets (Von Rompuy, 2016). When the existential crisis was considered over in September 2012, EMU governance reform continued to service the need to deal with legacy costs, but the steady-state regime is still evolving. If, at the height of the crisis, shared norms were turned from codes of conduct to enforceable rules, we

remain in a world of 'enforcement light'. In fact, austerity constraints have been loosened over time through the progressive distinction between structural and cyclical deficits, and the Commission has used its margin of appreciation to introduce a growth-oriented approach towards monitoring structural deficits (Schmidt, 2016). Meanwhile, the ECB's exercise of its margin of discretion through quantitative easing in turn created a space where member states could recover their own fiscal breathing space. As a result, the 2010–16 packages of EMU reforms can be considered as part and parcel of the cycles of federalism, rather than ushering in a new EU constitutional bargain.

The Constitutional Settlement at the Mercy of the EU's Structural Flaws

Nevertheless, some of us have argued that by bringing to the surface structural flaws which had been hitherto contained, the Eurocrisis has exposed deep vulnerabilities in the EU's constitutional settlement (Chalmers *et al.*, 2016). These arguments need to be taken seriously:

Finalité

Monetary union was based on a gamble that European economies would converge, and this gamble was lost. As a result, the very existence of the Euro has given ammunition to the bicycle theory of integration – that a single currency cannot work without dramatic increases in integration in fiscal, micro-prudential and macroprudential matters. The travails of Monetary Union have ushered in a string of concurrent unions at different stages of completion, from 'economic', to 'fiscal', 'banking', 'capital', and ultimately 'political' union, each predicated on enforcement mechanisms and institutions. There is much disagreement on the extent to which its dysfunctions actually necessitate the introduction of each and every one of these flanking unions. In any event, a Euro originally set up to increase states' discretion against the constraints of global capitalism has undermined domestic-level social democratic contracts which underpin the European project itself.

Vertical Allocation of Powers and the 'Scaling Up' Bias

Even when transfers of competence were carefully managed in the spirit of the constitutional settlement, it can be argued that the EU has long operated under the assumption that sizing upward offers the best solutions to the need to provide public goods or deal with externalities. As a result, the drawbacks of scaling up have been overlooked, from the pitfalls of administrative centralization, to imperfect knowledge at the centre, to magnifying the effects of poor policies and insensitivity to local concerns. While the scale bias had been contained until then, EMU governance has created an artificial 'continental scale' for the European economy which in turn justifies unprecedented intervention in the affairs of its member states. Any domestic policy that could be said to affect the sustainability of public debt – and which doesn't? – is now game. As a result, the European semester has become the default instrument for all EU desiderata, including the recently introduced social pillar (April 2017). At the extreme end of the spectrum, the MoUs negotiated with programme countries pre-empt a vast array of national choices. In the process, many of the areas that had remain essentially untouched by direct EU policy-making, including taxation, fiscal policy, social welfare, health care, pensions, education, and law and order,

are now under its purview, calling into question the Amsterdam compromise regarding the vertical separation of powers between the member states and the Union.

Horizontal Balance of Power

Arguably, the unbalancing of power during the Euro crisis has been facilitated in part by another prior EU structural flaw, namely government-by-law, whereby policy interventions in each other's affairs are cloaked in over-formalized legal requirements, and deviations are branded as illegal. Thus, if a powerful state in the Union is able to capture the decision-making process, its desiderata become anointed as 'EU law'. The MoUs in particular, enshrined such government-by-law under radical levels of asymmetric bargaining and enforcement power between creditor and debtor countries. At the same time, the management of the crisis has extended the EU's prior propensity to resort to conflict-minimizing decision-making strategies which rely on delegation to technocratic bodies, incomplete contracts, and governance by regulations without the traditional safeguards for small states afforded by the Community method (Chalmers *et al.*, 2016). In short, the entrenchment of creditor-friendly supranational governance through conditionality and even coercion risks derailing the EU from its constitutional settlement in the coming years.

Can such an outcome be avoided? To be sure, more financial integration is desirable in the long term in order to spread risk and resources across Europe, including through more effective banking and capital markets unions. But this does not require radical centralization of EU fiscal, regulatory and supervisory functions. In the end, and from a democratic viewpoint, EU leaders need to ask 'what is the minimum integration necessary' to sustain a common currency among national economies which will remain heterogeneous for the foreseeable future (Begg *et al.*, 2015). EMU must contend with the tension between political ownership and interdependence by prioritizing democratically sustainable reform in separate constituencies who nevertheless must recover the promise of mutual recognition between peoples (Sternberg *et al.*, 2017). The more the EU intrudes on sovereignty-sensitive areas of core powers, the more member states must deepen their national democratic processes and institutions. If they succeed, the constitutional settlement may yet prove more resilient than feared.

London: Choice, Time and the Brexit effect.

In contrast with the protracted slow-motion constitutional challenge induced by the Euro crisis, the latest challenge came with a bang in the form of a popular vote in favour of British withdrawal from the EU on 23 June 2016. It is hard to think of a greater trigger for constitutional reappraisal than the voluntary secession of one part of a political body from the rest. Yet, Moravcsik has argued that Brexit would not be as radical a change as hoped or feared by many. As it will take years for the implications of Brexit to unfold, let me refrain from any predictions and suggest instead the conditions under which Brexit may yet constitute the ultimate demonstration of the EU's resilience, before turning to the deeper cracks in the edifice.

On Finalité

The Brexit negotiations may scare or inspire the 27 EU member states into uniting behind radical reform. Conversely, Brexit may lead to an assault on the constitutional

compromise from sovereigntist parties. But if economic considerations prevail over ideology on both sides, it is possible that negotiators may conjure enough smoke and mirrors for the British government to sell the deal as 'the real thing' while keeping trade arrangements largely unchanged. Britain would move from being in-almost-out to being out-almost-in, consistent with the external dimension of the European constitutional settlement under the innocuous label of 'external governance' which extends differentiation beyond the EU's external borders (Lavenex and Schimmelfennig, 2009). The overriding concern of EU governments will be to ward off popular pressures for exit through strategies involving different degrees of flexibility (Nicolaidis, 2017c). Given the many divides durably criss-crossing the EU, the shared finalité will likely remain wielded to diversity rather than unity teleology.

On Vertical Allocation of Power

Even if the UK's traditionally sovereignty-conscious allies (Netherlands, Denmark, East Europeans) fear the federalizing sirens once British influence is gone, especially with regards to EMU, we know that the UK never stopped EMU reform. If other countries' preferences remain relatively stable and if anti-system parties continue to hold sway across the continent, we should not expect radically greater centralization. Even pressure for 'internal enlargement' (such as Brexit-inspired seceding regions wanting to remain in the EU) can be handled within the current structure of European law. Brexit might also make it harder for the Union to uphold liberal constitutional principles in the member states. But much on this front will depend on how governments individually and collectively deal with their societies rather than on the EU's existing constitutional order.

On Horizontal Balance of Power

The withdrawal of one of the three big powers of the European Union, the traditional balancer of Germany and France, a country with a population equivalent to 20 of the remaining member states, is bound to alter the balance of power between member states in the EU. Nevertheless, while the Franco-German axis will be even more tempted to throw its weight around, and while minor constitutional reforms might be functionally necessary (on decision-making, representation weights etc.) neither is likely to put into question the EU's basic institutional structure.

In sum, beyond the specifics of the negotiations, this constitutional moment is a symbolic struggle over the meaning of the exit clause introduced in Lisbon. Brexit's silver lining is that it makes the settlement clear to all European citizens: this is a Union of choice where conflict about the implications of 'togetherness' can take place not only through deliberation but also through contestation and even ultimately peaceful self-exclusion. If this is the case, Brexit can be seen as part of the European project, not an aberration.

Ontological Insecurity and the Sacrificial Victim

The considerations above may underline the resilience of the EU's constitutional settlement, but they omit an important dimension which speaks to the other meaning of 'settlement', namely settlement as a *place* where people establish a community. To deem a polity 'settled' does not only concern its rules of coexistence within a given territory, but the purposeful and recognizable establishment of a boundary between the domestic

and the foreign, an exercise constitutive of the modern state which has served to address fears of uncertainty and fortify demarcations of belonging and legitimacy, turning the home/abroad binary into a more emotive us versus them.

That this version of settlement as boundary consolidation has eluded the EU may be normatively desirable for some of us, but this constitutes another angle for questioning the EU's stability, and engaging the tenuous link between stability and the politics of contestation discussed in Part I. Brexit is part of a bigger picture where borders are spectacularly reconfigured along three dimensions in Europe, namely border-making, border-crossing and border un-bundling (Bellamy *et al.*, 2017). Each category raises constitutional issues in its own right but it is their joint and concurrent reconfiguration, including through the Brexit effect, which today seems to threaten the ontological security of European citizens in so far as it is affected by their status in the EU and not only as citizens of their own state.

Will the manipulation of ontological insecurity recast Europe's constitutional settlement along more statist lines, bringing back for good the construction of 'fortress Europe'? Will Britain become Europe's sacrificial lamb, allowing the European society of states to regroup within a more state-like entity (Nicolaidis, 2019)?

We should not underestimate the challenge posed by Brexit to the EU's way of dealing with outsiders. The EU will have to invent an unprecedented kind of relationship with a new animal – the 'former member state' – which will raise new constitutional questions. This new relationship will likely clash with 'Great' Britain's unwillingness to agree to the post-colonial pattern of unilateral export of EU standards which it was all too happy to enforce as a member. If member states disagree profoundly on how to accommodate this challenge, EU publics may yet need to be asked how they feel about freedom, and freedom for whom, across their internal and external borders.

From Liberal Intergovernmentalism to Demoicratic Theory: Bringing Normativity Back In.

As the primary object of this Special Issue of *JCMS*, LI offers an explanatory theory for which the diagnosis of constitutional settlement is a descriptive and predictive counterpart. But our journey through four moments in time in the last 20 years strengthens the original intuition that no settlement can remain afloat against the waves without deep societal foundations. Considering those in turn requires an idea of what a resilient ship ought to look like. For a constellation of scholars, this is a demoicratic EU, which can withstand exogenous shocks because the incompleteness of the project does not constitute an endogenous source of crisis (Nicolaidis, 2003; See *inter alia* contributions to Cheneval *et al.*, 2015). Let me at this point make more explicit the conceptual pathways from a liberal intergovernmentalist understanding of European politics to demoicratic theory.

Five Conceptual Pathways

First, the idea of demoicracy shares LI's main premise that the EU is a political system where the member states and therefore their *demoi* take precedence over whatever we each think is their supranational expression. In the LI story, social pressures, transmitted through domestic political institutions, define state preferences – that is, the set of

substantive social purposes that motivate EU policies. In the democratic story, it is this *process* of legitimate aggregation of preferences that defines 'European peoples', or *demos*, rather than any ethnic and reified sense of 'we'. As collectives under a state, the *demos* must remain *pouvoir constituant* whether in their ability to enter, withdraw from or shape the EU's primary law. As citizens, they may or may not also partake in some kind of European sense of belonging, call it a thin European *demos* if you will, but there is no aggregate at the EU level whose members are ready to accept important decisions taken by a simple majority among them. Normatively, these considerations imply that the EU's democratic credentials are to be judged by how it affects the qualities and pathologies of national democracies before asking what happens at the centre, underscoring the relevance of state-society relations for world politics. In a critical vein, a democratic lens asks under what conditions this influence may shift from democracy-enhancing (Keohane *et al.*, 2009) to democracy-preempting. And prescriptively, the EU must thrive to 'do no harm' to its constituent democracies.

Second, however, a democratic frame augments the traditional assumptions of global liberal politics by emphasizing the *normative* weight to be given to the quality of horizontal ties not only between state apparatuses but through transnational networks at all levels (Slaughter, 2017). In other words, the normative bias of democratic scholarship is to shift the spotlight on the imperative of democratic accountability from the vertical focus on internal accountability of liberal theories to a horizontal accountability *among* *demos*, thus bringing transnationalism all the way down. Democratic theory therefore asks how national democratic systems adapt to the imperative of 'other-regardingness' or what I call legal empathy which is at the core of European law (Nicolaidis, 2017b). Europe has reached a stage where what also matters is what we could call *democratic interdependence*, namely the ways in which democratic processes in different countries affect each other. As leaders balance their respective democratic mandates, publics must demand cognitive tools for managing their common democratic citizenship (Sternberg *et al.*, 2017).

Third, when it comes to power, democratic theory asks how the *cratos*, or 'governing together', avoids the pitfalls of domination, either horizontal between states or vertical between EU institutions and the member states. When LI simply notes power asymmetries as reflected in intergovernmental bargains through asymmetric interdependence, democratic theory focuses its normative gaze on the extent to which such asymmetries are mitigated (or magnified) through prevailing institutions.

Fourth, democratic theory recognizes the crucial importance of commitment strategies in allowing a polity of separate but connected popular sovereignties to be sustainable over time (Cheneval and Nicolaidis, 2016). But it is normatively concerned with the foreclosing of options that such commitments create as the product of intergovernmental collusion which may not reflect societal preferences over time and may contribute to the invisibility of power in the EU. Considering the joint decision traps which make it almost impossible to reverse gears in the EU, a democratic lens calls for a much greater resort to sunset clauses as well as to strengthening domestic institutions meant to endogenize commitment to outsiders.

Fifth and finally, a democratic lens takes us beyond interests into ideas by suggesting that the constitutional equilibrium we are concerned with also rests on the kind of social imaginaries that can only follow from democratic praxis within and among societies. An incipient democratic EU must accommodate a diverse range of imaginings among its

citizens of what it is, might be or should be (Lacroix and Nicolaidis, 2010; McNamara, 2015). Allowing for the coexistence of these diverse perspectives – contrary to the repeated and unimaginative calls for a single European story including during the 2001–03 Constitutional Convention – has long represented a kind of narrative ‘constructive ambiguity’ which has helped avoid entrenched teleological struggles among European political actors. If such narrative open-endedness was lost on pro-Brexit voters in the UK, it is also often lost on the Eurosphere in Brussels.

Conclusion: Towards Sustainable Integration?

Many would have us believe that the EU’s multipronged contemporary crisis has rendered the European constitutional settlement of 20 years ago obsolete. Some would argue that the diagnosis was wrong in the first place, that the EU was bound to continue on the path of ‘ever closer and more homogenous union’. Others would say that even if the EU seemed to reach a certain equilibrium at the time, it was an unstable equilibrium and that sooner or later it would have had to cross the Rubicon and acquire the core attributes of statehood.

I have tried to argue dialectically. First, I counter the crude version of these arguments. Neither the constitutional saga of the early 2000s, nor the multifaceted crisis of the early 2010s, nor the shock of Brexit, have managed to destroy Europe’s constitutional settlement which came into focus in the 1990s. The Union’s mantra since Amsterdam remains ‘unity in diversity’ (*finalité*), allowing for highly differentiated integration across issues and states (*vertical allocation of powers*), while the member states continue to be the masters of the Treaties (*horizontal balance of power*).

Second, nevertheless, these developments have, all and in different ways, weakened the EU’s constitutional settlement and exposed the cracks in the edifice. Above all, power is no longer invisible in the workings of the EU. However reluctant it may be, German hegemony has become destabilizing to the extent that it has entrenched a creditor-centric supranational EU governance. Whatever trade-offs governments and bureaucrats have struck over time between co-operation and control, these trade-offs are contested by populations concerned with ‘taking back control’, with Brexit as its most radical expression. And however successful in making the EU ‘boring’ (an attribute praised by Moravcsik), the EU’s conflict-minimizing strategy for building consensus has become counter-productive, seen as it is as an expression of elite conspiracy (Chalmers *et al.*, 2016).

We need to break out of the frame of more versus less Europe and exercise a radical dose of creativity in our commitment to Europe’s constitutional settlement. As stated at the outset and illustrated throughout, I believe that this means above all deepening its social foundations, which calls for a shift from the politics of ‘stability’ to the politics of ‘sustainability’ (Nicolaidis, 2010, 2017c). If in Europe and beyond, we are plagued by the short termism of governments and markets, what better way to justify the project anew than to proclaim the EU’s role as guardian of the long term, engaged in democracy-with-foresight grounded on participatory networks and attuned to the overwhelming desire of the public to preserve our world for our children and grandchildren?

A normative theory of sustainable integration would connect the evolving nature of the constitutional settlement with its social foundations, incorporating some of the original

intuitions of the neo-functionalists on informal integration but freed from their teleological overtone. It requires considering European citizens, be they northerners or southerners, western or eastern, electorates or politicians, consumers or entrepreneurs, nomads or settlers, as co-participants in various contexts in this shared sustainability agenda, rather than only as the atomized components of a permissive or constraining consensus. While the populist character that drives the politicization of European issues pits peoples against peoples in a race to mutual closure, there exist countervailing forms of public mobilization across Europe. That the permissive consensus that was key to EU stability as an incipient democracy is now shattered may yet turn out to be a welcome opening for a more democratic version of Europe's constitutional settlement.

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