Introduction

The aim of this book is twofold. First, it attempts to explain the European Union (EU) as it currently exists, how the Union will be if the Treaty establishing a Constitution for Europe (now submitted for the ratification procedure) is adopted by the twenty-five Member States, and how it may evolve thereafter. Second, it aims to show how the distinctive features of a democratic polity that characterize the Member States can be gradually transplanted to the European Union. The book is written from a legal perspective, though I will make many references to political science and recent history. It attempts to explain to a general audience how the Union's complex structure operates. To make the book useful to a more specialized subset of the public as well, it contains a large number of notes with detailed information that point to additional reading on a variety of topics. Because I wrote the book with a diverse readership from both sides of the Atlantic in mind, and as it was actually written at both Stanford and Leuven, the book regularly compares the European and the American political scenes and draws on sources from both sides of the ocean.

The book is not about the EU's obvious successes: its establishment of a common internal or single market with economic freedoms, its external trade and competition policies, and its monetary union. In addition, the book will no more than occasionally deal with the Union's growth from the six original Member States to its most recent enlargement to twenty-five Member States, which took effect on May 1, 2004. It focuses instead on lesser-known aspects of the Union, including how "Europe" was gradually transformed from a technocratic organization into an ever-closer union of states and peoples with a growing democratic legitimacy. This process of democratic growth has been underway for more than half a century, from the European Community's modest beginnings in 1952 as the European Coal and Steel Community to the creation in 1992 of the European Union, which now encompasses all economic

and many non-economic sectors and is steadily developing into a democratic political entity.

The proposition underlying the book is that the most appropriate way to turn the Union into a full-fledged "body politic"—a polity of states and peoples[1]—is to replicate, at Union level, the parliamentary form of government, which is familiar to all of the Member States in one way or another, rather than to invent a new doctrine of democratic legitimacy. That does *not* imply, however, that the Union should become a large nation-state. Even if the European peoples and governments did wish to go in that direction, which I doubt, the Union would be better off evolving into a "citizen-state" rather than a "nation-state," that is, into a political entity in which nationalistic feelings are left behind. These feelings, and the concept of the nation-state, have been associated with one of Europe's darkest eras. Consequently, calling the Union a citizen state (or, rather, a polity of states *and* citizens) reflects the Union's desire to adhere to a new political arrangement: a supranational community increasingly characterized by "a sense of common belonging among those who share civic institutions, with no exclusiveness towards any person or group willing to participate in them."[2]

The book is divided into seven chapters. The first is an introductory chapter in which I describe the EU's institutions and explore the Union's identity and values. In the second and the third chapters, two distinctive features of democratic government are examined: accountability of government and adherence to the rule of law. In chapter 4, I deal with the concept of good governance, which is the exercise of public power to pursue citizens' goals in accordance with proper procedures and with equal concern for citizens and residents. In chapter 5, I discuss civic responsibility, open government, and citizen

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[1] The title of the book, *The European Union: A Polity of States and Peoples*, refers to the special character of the Union, which, from the outset, has been built on a succession of treaties concluded by the Member States and with the assent of the peoples of Europe—not only as a result of the ratification of these treaties in accordance with each Member State's constitutional requirements but also, increasingly, with the peoples' involvement in the Union's legislative process through their directly elected European representatives. See further chapter 1. For a discussion of this development within the context of the draft Treaty establishing a Constitution for Europe (dealt with in chapter 6), see Koen Lenaerts and Damien Gerard, "The Structure of the Union According to the Constitution for Europe: The Emperor Is Getting Dressed," 29 *ELRev.*, 2004, 289–322.

[2] See Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 170. See also J. H. H. Weiler, "Europe: The Case Against the Case for Statehood," 4 *ELJ*, 1998, 43–62, at 62. See further chapter 1, pp. 40–41.

participation. In chapter 6 the proposed Constitution for Europe is described and analyzed, and in chapter 7 the form of government Europe may wish to take in the future is examined. I conclude the book with a short epilogue indicating the most recent constitutional developments, that is, those that have occurred since the completion of this manuscript, and briefly describing the Union's relationship with its neighbors—a subject that I intended to discuss in an additional chapter 8, if space had permitted me to do so.

As mentioned, the proposition underlying this book is that it is advisable for the Union to become a full-fledged democratic political entity by the replication of the Member States' political systems at the EU level. Though this may seem a bold proposition, it is not really a controversial one. Indeed, it can hardly be disputed that a government that is accountable, open, and in compliance with the rule of law, as the Member States' democracies are (themes that will be discussed in chapters 2, 3, and 5), is the sort of government that would enhance the Union's democratic legitimacy. The same holds true for good governance and the goals that it implies: a commitment to ethics and the pursuit of efficiency, equal treatment, and affirmative action to reduce disparities, themes that will be examined in chapter 4. Obviously, the content of each of these instruments is uncertain, and I will attempt to define their content within the European Union. The most controversial point in that regard is whether, and to what extent, social policy is part of good governance. The point is not disputed among the EU Member States, all of which accept that a comprehensive social security system is closely associated with the concept of *Rechtsstaat,* or rule of law. It is, however, a controversial point in comparing the EU to the United States, where the pursuit of social welfare is not generally considered to be part of good governance.

The themes discussed in chapters 6 and 7, constitution making and form of government, relate, respectively, to the question of whether the legislative and institutional revisions embodied in the draft Constitution for Europe turn the Union into a more integrated and a more democratic political entity (chapter 6), and to the question—which was not discussed in the Convention preparing the draft—of which form of government the Union should take in the future (chapter 7). In both these respects, the underlying proposition is, again, that democratic legitimacy in the Union should be achieved in accordance with a system of checks and balances comparable to (albeit more complicated than) the one existing in the Member States, and that preference should be given to a parliamentary form of government (rather than a presidential one), which is the one adopted by most of the twenty-five Member States.

The book originated as a series of public lectures given at the Stanford Institute for International Studies in March and April of 2003 and at the Centre

of European Law at King's College, London, in December 2003. Both series of lectures gave me the opportunity to better understand the implications of the Union's democratic legitimacy. However, the redrafting of the text of these lectures for publication expanded my subject matter. Whereas the focus was first on executive accountability, it gradually shifted toward democratic legitimacy as a whole. The drafting has not been an easy process, not the least because writing a book in a language other than the author's mother tongue remains a delicate undertaking, and it confronts the author with the reality that form and substance are very much related. Moreover, the subject of the book is not one I was familiar with when I started to prepare the lectures. Writing the book has therefore been as much a learning process for me as it might be for the readers.

One last point concerning terminology: As chapter 1 will discuss, the European Union (EU) currently consists of three pillars, the first of which encompasses primarily the European Community (EC). Hereinafter I will use the term European Community (EC) when I am referring specifically to matters regulated under the provisions of the EC Treaty, that is, the first pillar of the European Union, and I will use the term European Union (EU) when I refer to provisions in the EU Treaty regulating the Union as a whole (that is, the three pillars taken together) or regulating specific matters falling under the second or third pillars. The situation is even more confusing than it appears because some EU institutions, such as the EU Commission and the EU Council of Ministers, refer to themselves as EU institutions, while the two EU courts, the European Court of Justice and the Court of First Instance, still refer to themselves as EC or Community courts (as I will mostly do hereinafter).[5] Moreover, it is necessary to distinguish the two Community courts, which are located in Luxembourg, from the European Court of Human Rights (ECtHR), which is located in Strasbourg. The ECtHR belongs to a different European organization, called the Council of Europe, and is founded on the European Convention on Human Rights (ECHR). The ECtHR is responsible for most of the human rights case law discussed in the following chapters.

The book is up to date as of April 15, 2004. However, in the epilogue (and occasionally in the text, or in the footnotes) I refer to events that have taken place after that date. Moreover, the draft Constitution for Europe (described in chapter 6 and mentioned in other chapters as well) was amended by the June 18, 2004 IGC meeting in Brussels and, before being solemnly signed at

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[5] The reason for this is that the Community courts have no, or only limited, jurisdiction in matters falling under the second and third pillars: see chapter 1, pp. 118–21.

the October 29, 2004 IGC meeting in Rome, was revised by linguists and law-
yers. Part of the revision process was the renumbering of the articles, which
was carried out as follows: the articles in the four parts of the final constitu-
tional text, as signed in Rome and submitted for ratification to the Member
States, are now numbered continuously and not, as in the initial version,
starting from 1 again for each of the four parts.[4] However, the division into
four parts is still reflected in the numbering by the use of roman numerals (I,
II, III, and IV) alongside the arabic article numbers. To make it easy for the
reader to find the renumbered (and sometimes reworded) articles in the final
text, I give the new numbers in square brackets each time an article of the ini-
tial version is mentioned in the text or the footnotes.

When the book is published, in early 2005, the draft Constitutional treaty
will not yet have entered into force. Indeed, in the most optimistic scenario
that will not happen before 2007, that is, provided that all twenty-five Member
States have ratified the text in accordance with their constitutional require-
ments, as foreseen in Article IV-8 of the initial version [now Article IV-447] of
the draft.[5] Even after the draft Constitution does enter into effect (if ever), this
book will remain of interest to those who wish to know how the European in-
stitutional system has evolved over the last fifty years, and the directions it
may take in the future, with or without constitutional text, in order to become
a more perfect union in terms of democratic legitimacy.

[4] The final text of the proposed Treaty establishing a Constitution for Europe, as
signed by the heads of state or government in their meeting at Rome on October 29,
2004, is contained in document CIG 87/1/04, REV 1, of October 13, 2004. The thirty-six
protocols and annexes I and II annexed to the Treaty are contained in Addendum I, of
the same date, to CIG 87/1/04, REV 1, and the forty-eight declarations annexed to the
Treaty are contained in Addendum II, dated October 25, 2004, to CIG 87/1/04 REV 2.
They can all be found at http://www.europa.eu.int/constitution/constitution_en.htm.
[5] On what might happen to the draft Constitution if it were not ratified by all
Member States, and therefore would not enter into effect, see Bruno de Witte, "The
Process of Ratification and the Crisis Options: A Legal Perspective," forthcoming (lec-
ture held in The Hague at the Asser Colloquium on 13–16 October 2004).