
Introduction

1.1 European Constitutionalization Questioned

1.1.1 *Crisis and Constitutional Order in Europe*

In both the court of public opinion and modern legal scholarship, our Europe of today appears to lurch from crisis to crisis.¹ These crises are political, cultural, social, environmental and now also economic. A severe financial crash has sent shockwaves around the continent, exposing the fault lines in Europe's institutions and constitution.² After the near-collapse of Greece's national economy, the EU focused heavily on inventing new mechanisms to provide economic stability for the euro-currency countries. However, deeper issues with the broader European project, which had festered in the dark for years, were revealed and thrown into stark relief

¹ M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *Modern Law Review* 817–44; J.-C. Piris, *The Future of Europe: Towards a Two-Speed EU?* (New York 2012); F. Laursen (ed.), *The EU and the Eurozone Crisis: Policy Challenges and Strategic Choices* (Farnham 2013); M. Beblavý, D. Cobham and L. u. Ódor, *The Euro Area and the Financial Crisis* (Cambridge 2011); P. Arestis and M. Sawyer, *The Euro Crisis* (Basingstoke 2012); P. R. Lane, 'The European Sovereign Debt Crisis' (2012) 26 *The Journal of Economic Perspectives* 49–67; A. Georgosouli, 'The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation' (2012) 10(4) *International Journal of Constitutional Law* 1174–7; P. F. Kjaer, G. Teubner and A. Febraro, *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford 2011); S. Deakin, 'Social Policy, Economic Governance and EMU: Alternatives to Austerity', Cambridge Working Papers (Cambridge 2013); A. Blundell-Wignall, 'Solving the Financial and Sovereign Debt Crisis in Europe' (2012) 2011(2) *OECD Journal: Financial Market Trends* 201; H. Hofmeister, 'To Bail Out or Not to Bail Out? Legal Aspects of the Greek Crisis' (2011) 13 *Cambridge Yearbook of European Legal Studies* 113.

² F. Chaltiel, 'Les crises de l'Europe' (September 2011) No. 551 *Revue de l'Union européenne* 485.

by the financial floodlights. Most recently the COVID-19 global health crisis also challenged the EU with Member States initially reacting unilaterally but realising that by collaborating the crisis could be more effectively addressed. The 'quick fixes' sought by European decision-makers addressed only their perception of victimization in the hands of global financial markets and neglected to establish a longer-term solution for troublesome questions of governance. While the European public was informed about the near-disintegration of their economic and social system,³ these events unfolded almost without their support or even their engagement. Bruce Ackerman rightly argues that the EU's crisis is constitutional in nature. He argues that there are three different paths of constitutional contestation and fundamental law-making: the French tradition by which revolutionaries enshrine in the constitution the values that inspired their struggle, the UK tradition of elite reform preventing revolutionary movements before they happen and the German tradition of constitutionalization inspired by outsiders or foreign influences. He thus calls the EU's constitutional crisis cultural and perhaps Brexit is one expression of the level of utter dissonance between these different constitutional pathways inside the EU.⁴ This work tries to follow his call and 'provoke Europeans to think more deeply about the distinctive mix of constitutional cultures currently prevailing on the continent'.⁵

The crises are also constitutional in nature because of the response to answer them each chosen by the institutions. This allows us to refer back to David Dyzenhaus, who aptly argued that the Constitution of Law, especially in times of crisis, has to rely on the courts more than the other branches of government. He explained:

I will respond to that challenge in arguing that judges have a constitutional duty to uphold the rule of law even, perhaps especially, in the face of indications from the legislature or the executive that they are trying to withdraw from the rule-of-law project. Indeed, the legislature and the executive have that same duty to uphold the rule of law in emergency times no less than in ordinary times, which is why judges are entitled to assert the rule of law in the face of what seem to be legislative or executive indications to the contrary.⁶

³ T. Risse, *European Public Spheres* (Cambridge 2014).

⁴ B. A. Ackerman, 'Three Paths to Constitutionalism – and the Crisis of the European Union' (2015) 45 *British Journal of Political Science* 705.

⁵ *Ibid.* 716.

⁶ D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge 2006) 4.

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In other words, the reaction by the courts to overcome crisis is increasingly important.

A new dimension of crisis was added in 2016 when the British Prime Minister first attempted to re-negotiate some of the fundamentals of the European economic integration project and then lost a referendum vote in which the Leave campaign blamed virtually all economic ills of the UK on the European Union. This new constitutional crisis could perhaps trigger a renewed reflection in the EU and it is thus timely to discuss European constitutionalization.

One answer, pushed in particular by Germany, was provided through a new wave of constitutionally balanced budget provisions. In a December 2011 Intergovernmental Conference (IGC) in Brussels, the European Council, comprising the Heads of State and Governments of the EU's then twenty-seven Member States, agreed to adopt yet another reform treaty, enshrining the balanced budget ideology and imposing very tight controls on national budgets. During a further January 2012 EU Summit in Brussels, a Stability and Growth Pact was adopted by twenty-five EU Member States. The Pact added yet another chapter to the step-by-step incremental governance building book, which is being written by and for the EU over the last sixty years. At the same time, it re-observed, and perhaps even evaded, concerted efforts to understand the more fundamental problems in the EU's constitutionalization process.

How should the European Union overcome these crises? Which opportunities should be explored? Which obstacles should become Europe's central concerns? To date, the political discussions have focused upon the next feeble steps to be taken in Europe's policy of incrementalism,⁷ characterized by formal intergovernmental amendment of the Constitutional Treaties.⁸ Yet to overcome the succession of financial, institutional and constitutional crises shaking the EU, a more considered approach to further constitutionalization is required. The debate is deliberately shifted towards a previously under-researched dimension of EU constitutionalization,

⁷ On this 'step-by-step process of constitution-making' seen with the Amsterdam Treaty, Wiener and Neunreither wrote that '[t]he 1996–7 IGC demonstrated that the heads of the EU member states and governments were in no mood for radical changes, neither "forward" towards a state-like European centre of decision-making, nor indeed in any other distinguishable direction. On the contrary, the overall approach was rather incremental; it resembled a repair shop more than a design centre': A. Wiener and K. Neunreither, 'Introduction: Amsterdam and Beyond' in K. Neunreither and A. Wiener (eds.), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford 2000) 10.

⁸ See D. Cameron, 'EU Speech at Bloomberg' [on the future of the EU and the UK's relationship with it] (23 January 2013), www.number10.gov.uk/news/eu-speech-at-bloomberg/.

which not only provides opportunities to help overcome the current series of crises but also presents a new approach to integration that takes seriously the perceptions and understandings of European jurisprudence with regard to federalism and the EU public sphere.⁹

The process of European constitutionalization is met with extensive scepticism, both in current national legal and political spheres and in broader circles of public opinion across Europe. By shedding light on these concerns, this book reveals a widespread misunderstanding of constitutional federalism, which permeates the Member State courts, popular media and many academic communities. A failure to address confusion over this fundamental concept is leading us towards an impoverished development of the EU's 'Second Constitution' and even ensuring that the role of both domestic and international European courts in enriching the constitutionalization process is overlooked and undervalued. In a bid to avoid such consequences, this book explores how federalism and further constitutionalization – rightly understood in a dialogue of the European courts – may actually change this process and allow a clearer advance to Europe's Second Constitution for, but also with, the people of Europe.

While the primary method is based on juridical analysis of over 240 court decisions between the centre European Courts and the periphery Member State courts over the past three decades, discussions are illustrated with examples from a number of other jurisdictions, to flesh out the concepts that are currently so misconceived in Europe.

Certainly, there is nothing very straightforward about the EU integration project and it does present some particular issues. Indeed, this book was originally inspired by the EU Constitutional Treaty process, which arguably did more harm to further constitutional development than it contributed to our advance.¹⁰ EU constitutionalization is clearly no simple replica of US constitutionalization, transposed to a different continent 200 years later. Further, while the study of EU constitutional law

⁹ On existing integration theories, see the various contributions in A. Wiener, T. A. Börzel and T. Risse, *European Integration Theory*, 3rd ed. (Oxford 2018).

¹⁰ On the Constitutional Convention, see P. Craig, 'Constitutional Process and Reform in the EU: Nice, Laeken, The Convention and the IGC' (2004) 10 *European Public Law* 635; P. Norman, *The Accidental Constitution: The Making of Europe's Constitutional Treaty* (Brussels 2005); M. Rosenfeld, 'The European Convention and Constitution Making in Philadelphia' (2003) 1 *International Journal of Constitutional Law* 373–8; F. Galinas and L. Sirota, 'Constitutional Conventions and Senate Reform' (2013) 5 *Revue québécoise de droit constitutionnel* 107.

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has become more common over time in continental Europe,¹¹ the use of comparative federalism tools continues to risk inaccurate or superficial analogies.¹² These errors are even more serious when they enter and influence what currently passes for European public policy discourse across key Member States and their allies. For instance, it caught both European and American headlines when Valéry Giscard d'Estaing, President of the Constitutional Convention, reviewed a biography of John Adams to prepare for his Convention tasks.¹³ However, every standard text on EU law now contains a chapter on the constitutional

- ¹¹ W. Halstein, H. H. Götz and K.-H. Narjes, *Der unvollendete Bundesstaat – Europäische Erfahrungen und Erkenntnisse* (Dusseldorf 1969); R. Bieber, 'Verfassungsentwicklung und Verfassungsgebung in der Europäischen Gemeinschaft' in R. Wildenmann (ed.), *Staatswerdung Europas? Optionen für eine Europäische Union* (Baden-Baden 1991) 393; M.-T. Bitsch, *Histoire de la construction européenne de 1945 à nos jours* (Brussels 1999); A. Augustin, *Das Volk der Europäischen Union. Zu Inhalt und Kritik eines normativen Begriffs* (Berlin 2000); H.-J. Blanke, 'Der Unionsvertrag von Maastricht – Ein Schrittauf dem Weg zu einem europäischen Bundesstaat' (1993) *Die Öffentliche Verwaltung* 412; P. Häberle, *Europäische Rechtskultur* (Baden-Baden 1994) 33. On European Constitutional law, see K. Bahlmann, 'Europäische Grundrechtsperspektiven' in B. Börner and K. Carstens (eds.), *Einigkeit und Recht und Freiheit – Festschrift für Karl Carstens zum 70* (Cologne 1984) 17; K. von Beyme, 'Fischers Griffnacheiner EuropäischenVerfassung' in C. Joerges, Y. Mény and J. H. H. Weiler (eds.), *What Kind of Constitution for What Kind of Policy? Responses to Joschka Fischer* (Cambridge, MA 2000) 61; P. Häberle, 'Gemeineuropäisches Verfassungsrecht' (1991) *Europäische Grundrechte Zeitschrift* 261; I. Pernice, 'Europäisches und nationales Verfassungsrecht' (2001) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 60, 148; I. Pernice, 'The European Constitution' (May 2001), paper presented at the 16th Sinclair House Talks in Bad-Homburg; H. Quandt Stiftung, *Europe's Constitution: A Framework for the Future of the Union* (Bad Homburg 2001) 18; I. Pernice, 'Multilevel Constitutionalism in the European Union' (2002) 27 *European Law Review* 511; A. Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin 2001); A. Peters, 'Global Constitutionalism Revisited' (2005) 11 *International Legal Theory* 39; J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403; J. H. H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision' (1995) 1 *European Law Journal* 219; J. H. H. Weiler, 'European Neo-constitutionalism: In Search of Foundations for the European Constitutional Order' (1996) 44 *Political Studies* 517; J. H. H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge 1999); J. H. H. Weiler and M. Winds, *European Constitutionalism beyond the State* (Cambridge 2003); P. Costanzo, L. Mezzetti and A. Ruggeri, *Lineamenti di Diritto costituzionale dell'Unione Europea: Quarta edizione* (Torino 2014); A. Rosas and L. Armati, *EU Constitutional Law: An Introduction* (London 2018); S. Kadelbach (ed.), *Verfassungskrisen in der Europäischen Union* (Baden-Baden 2018).
- ¹² See for example a lecture given at Humboldt University, Berlin, 6 June 2002 by G. Burghardt, 'Die Europäische Verfassungsentwicklung aus dem Blickwinkel der USA' in A. Golze and E. Lenski (eds.), *Die europäische Verfassung im globalen Kontext* (Baden-Baden 2004) 41.
- ¹³ L. Dembart, 'Giscard's Summer Reading: Federalism in the U.S.: The Future Europe Takes Form' (3 September 2002), *New York Times*.

dimension of integration.¹⁴ And the Union's highest court, the Court of Justice (ECJ), decided in *Les Verts* that the founding treaties of the European Union can be described as '*la charte constitutionnelle de base*'.¹⁵ Further, in the Advocate General Opinion in *Government of the French Community and Walloon Government v. Flemish Government* case,¹⁶ AG Leo Sharpston not only described a Member State Constitution as a devolutionary cousin but also framed the Constitution in question as the result of a series of incremental adaptive changes similar to the EU itself.¹⁷

Of course, the European project remains far from being completely unique and immune to any comparison. The history of federal thought is rich, and thus far most works still focus on factual similarities without highlighting the history of ideas behind the polity. The

¹⁴ See C. Barnard and S. Peers, *European Union Law* (Oxford 2014); or see P. Craig and G. de Burca, *EU Law: Text, Cases, and Materials*, 5th ed. (Oxford 2011), whose discussion of constitutional pluralism at 297 is worth reviewing in detail.

¹⁵ Case C-294/83, *Parti écologiste 'Les Verts' v. European Parliament* [1986] ECR 01339, at para. 23. Reflecting on the impact of the case decades later, see: K. Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law' in M. P. Maduro and L. Azoulay (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford 2010) 295; A. Boerger and B. Davies, 'Imagining the Course of European Law?' in F. Nicola and B. Davies (eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge 2017) 83–102.

¹⁶ Case C-212/06, *Government of the French Community and Walloon Government v. Flemish Government*, Judgment of the Court (Grand Chamber) of 1 April 2008 [2008] ECR I-01683.

¹⁷ Opinion of Advocate General Sharpston delivered on 28 June 2007, *Government of the French Community and Walloon Government v. Flemish Government*, C-212/06: The Belgian federal system, rather like a devolutionary cousin of the Community [K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38(2) *American Journal of Comparative Law* 205], did not come about as a result of a single plan. [See the well-known excerpt from the Schuman Declaration of 9 May 1950: 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.' Press Conference, Robert Schuman, French Foreign Minister (May 9, 1950) (transcript available at www.robert-schuman.eu/declaration_9_mai.php).] It is the result of incremental changes, originally driven by the Flemish desire to gain cultural autonomy, which took form in the Communities, and the Walloon desire for economic autonomy, which was achieved through the Regions. For further enlightenment in English on the rather labyrinthine Belgian federal structure, see P. Peeters, 'The Federal Structure: Kingdom, Regions and Communities' in G. Craenen (ed.), *The Institutions of Federal Belgium: An Introduction to Belgian Public Law* (Leuven 1996) 55. For an in-depth analysis of the Belgian federal structure, see: A. Alen and K. Muylle, *Compendium van het Belgisch staatsrecht, Diegem* (The Hague 2004), 239–499 and M. Uyttendaele, *Précis de droit constitutionnel belge. Regards sur un système institutionnel paradoxal*, 3rd ed. (Brussels 2005) 815–1071.

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primary contribution of this book, however, is its focus upon judicial decisions and what they can reveal to us. Somewhat akin to a common law approach to constitutional thought, this examination proves that, while in several key dimensions the critics of constitutionalization are wrong, a crucial obstacle remains to be overcome.

This chapter, by way of introduction, explains the central argument, rationale, assumptions and context of this work, outlines the methodology and data set studied, and provides a brief road map. Specifically, it begins by stating and explaining the central idea and its rationale. Second, it introduces current constitutional debates in the European Union, identifying current obstacles to three key dimensions of further constitutionalization. Third, it explains the legal research methodology, combining a 'common law' analysis of European jurisprudence with evocations of illustrative examples from other early federal projects. Fourth, it also outlines the structure and remaining progression of the volume.

1.1.2 *Central Idea*

Through a detailed analysis of Member State court jurisprudence and associated literature, I have evaluated the most important *demos*, *civitas* and *ius* dimensions of the European Constitutional project.

The term '*demos*' was coined to describe the political identity of the common people of an ancient Greek state. Today, the concept of *demos* is equally relevant, referring as it does to the populace of a democracy as a self-perceived, aware and organized political unit.¹⁸ At its core, the term highlights that 'any type of majoritarian-based government would need a *demos* for such a system to be democratically legitimate. Thus, although a *demos* is a prerequisite for a democracy, the extent to which a *demos* is a prerequisite for democratic decision-making will depend on how it is intended that the making of certain decisions is going to be legitimized.'¹⁹ The European *demos* dimension of European constitutionalization concerns the political cohesion of the people of the Union, the potential for Europe to develop a common European citizenship, values or attitude towards religion. *Demos* can also encompass a common European public space for deliberation and

¹⁸ A. Stevenson (ed.), *Oxford Dictionary of English*, 3rd ed. (Oxford 2010).

¹⁹ M. Jolly, *The European Union and the People* (New York 2007) 71.

effective communications through discussions in intelligible working languages.²⁰

The term ‘*civitas*’, also originally Latin, stands for the collection of rights attributed to a citizen or community, and in later years more broadly to a state.²¹ Samuel von Pufendorf, often credited as the founder of modern constitutional law scholarship,²² highlighted the importance of this dimension of constitutionalization as early as 1668, reflecting on *civitas composita* or the composite commonwealth of the Holy Roman Empire.²³ The *civitas* dimension of European constitutional development invokes the potential for a functioning EU institutional law, as highlighted by several courts and academics.²⁴ Important elements of *civitas*, for Europe, include EU democratic elections, European political parties, the role of the president in the EU, the function of the Council and the European Parliament, and the role of a foundational document.

Finally, the term ‘*ius*’, in Latin, refers to the rule of law and respect for rights, which also includes more broadly the mandates of legal authorities and the functioning of effective courts of justice.²⁵ The term *ius* describes this dimension of constitutionalization, inspired by discussions in Europe of common structures in the law based on EU law and, in particular, general principles said to form a new kind of *Ius Commune*

²⁰ See Jolly, ch. 3; A. Moravcsik, ‘In Defense of the “Democratic Deficit”: Reassessing Legitimacy in the European Union’ (2002) 40(4) *Journal of Common Market Studies* 603; D. M. Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy* (London 1997); A. Sbragia, ‘Post-National Democracy as Post-National Democratization’ in S. Fabbrini (ed.), *Democracy and Federalism in the European Union and the United States: Exploring Post-National Governance* (Abingdon/New York 2005) 167; A. D. Smith, ‘National Identity and the Idea of European Unity’ (1992) 68(1) *International Affairs* 55; German Federal Constitutional Court [‘GFCC’], *Maastricht Treaty*, BVerfGE 89, 155 of 12 October 1993 [‘Maastricht Decision’].

²¹ J. Morwood (ed.), *Oxford Latin Dictionary: Latin–English*, 3rd ed. (Oxford 2012).

²² R. M. Hatton, R. Oresko, G. C. Gibbs and H. M. Scott, *Royal and Republican Sovereignty in Early Modern Europe: Essays in Memory of Ragnhild Hatton* (Cambridge 1997) 456.

²³ S. Pufendorf, *Dissertatio de Republica irregulari* (Heidelberg 1668) ch. IV para. 9.

²⁴ See T. Kostakopoulou, ‘Democracy-Talk in the European Union: The Need for a Reflexive Approach’ (2003) 9 *Columbia Journal of European Law* 411; Y. Devuyt, ‘The European Union’s Constitutional Order? Between Community Method and Ad Hoc Compromise’ (2000) 18 *Berkeley Journal of International Law* 1; M. Nettesheim, ‘A Tribute to Professor Richard M. Buxbaum: Developing a Theory of Democracy for the European Union’ (2005) 23 *Berkeley Journal of International Law* 358; M. Zuleeg, ‘What Holds a Nation Together? Cohesion and Democracy in the United States of America and in the European Union’ (1997) 45 *American Journal of Comparative Law* 505; GFCC, *Lisbon Treaty*, BVerfG, 2 BvE 2/08 of 30 June 2009 [‘Lisbon Decision’], www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

²⁵ Morwood.

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Europaemum, a common law uniting Europe,²⁶ as outlined in one of the most influential EU law book collections.²⁷ The term highlights the distinction between common law and civil law, but refers to the entire collection of rules and rule-making in Europe. In this sense, the *ius* dimension of European constitutionalization discusses the potential for a single rule of law in Europe, the structure of the EU Court System, the criminal law and police force, the system of human rights protection, as well as external relations law in the EU.²⁸

I argue that it is in these three dimensions that EU constitutionalization has been judged by many periphery Courts to be either non-existent or deficient. At the root of these opinions is an impoverished understanding of federalism and its potential role in further European constitutionalization. This work demonstrates that the litany of obstacles commonly raised by Member State courts and academics have nearly all been overcome or were never challenges in the first place. Through case law analysis, it is also revealed that many Member State courts on the periphery do not fully appreciate either the constitutional nature of federations or the lived experiences of federalism in other jurisdictions.²⁹ The term 'obstacle' was chosen because the nature of the criticisms of European constitutionalization is manifold. Some include denial of the legal or doctrinal prerequisites of a federal structure' other reasons include empirical or socio-legal arguments. Some might term what this work calls 'obstacle' just a source of scepticism towards further integration, but, arguably, most constitutionalists go further and outright deny that constitutionalization can take place at the EU level. The term 'obstacle' captures this more fundamental scepticism. It is less a critique and more an outright denial that a supranational structure could be anything other than a (perhaps constitutional) order of sovereign states.³⁰

Once many concerns have largely been dismissed, the most significant and potentially fatal remaining obstacle to EU constitutionalization can be

²⁶ X. Groussot, *Creation, Development and Impact of the General Principles of Community Law: Towards a Ius Commune Europaemum?* (Lund 2005).

²⁷ *Ius Commune Europaemum* book series Intersentia, <https://intersentia.com/en/product/series/show/id/9164/>.

²⁸ See the GFCC repeatedly in *Solange I*, BVerf 37 of 29 May 1974, *Solange II*, BVerfGE 73 of 22 October 1986, *Maastricht Decision* and *Lisbon Decision*. With an emphasis on fundamental rights (similar to *Solange I*), see D. Grimm, *Braucht Europa eine Verfassung?*, vol. 60 Siemens Stiftung (Munich 1995).

²⁹ See M. Burgess, *Comparative Federalism: Theory and Practice* (New York 2006).

³⁰ See A. Arnall, C. Barnard, M. Dougan and E. Spaventa (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford/Portland, OR 2011).

identified: the absence of a strong and vibrant trans-European public sphere in which transparent, legitimate policy debates can occur. Corollary challenges such as lack of a pragmatic number of working languages, lack of unitary elections and important gaps in the central court's *Kompetenz-Kompetenz* also remain to be addressed. Overcoming this obstacle and its related challenges would do much to address the constitutional crisis and set Europe on a healthier path towards further constitutionalization.

My research further leads me to conclude that while a European constitutional moment might be the most straightforward step forward, it is currently not really on the political horizon. Other constitutional adaptive mechanisms offer further options. While incremental formal treaty amendments and fundamentally changed constitutional practices have helped to address certain other obstacles, given embedded Member State privileges, they are unlikely alone to be effective in addressing this remaining hurdle. Rather, I argue that there is a crucially decisive challenge to be taken up in the jurisprudence itself. Further constitutionalization can, in essence, be prepared by the concerted efforts of more courageous centre and periphery courts, through engaged and legitimate dialogues between the Courts of Europe themselves. Only by enabling and strengthening a vibrant pan-European public policy debate can Europe's Second Constitution one day become a reality.

1.1.3 *Rationale and Scope of the Volume*

By combining a 'common law constitutional approach' – the analysis of recent constitutional debates in Europe through the lens of the last three decades of jurisprudence from the European Courts in dialogue with national courts – with a comparison of several federal jurisdictions during the early stages of their federal development, this book provides a novel approach to the constitutionalization process in Europe. After analysing over 60 national court decisions and 180 decisions of the European Courts between 1952 and 2014, drawing examples from the comparative constitutional development of Germany, the United States, Canada, Argentina and Switzerland during their federal formative periods, I am convinced that many of the usual obstacles named for further EU constitutional development either have been overcome through radically different constitutional praxis (such as the '*Spitzenkandidaten*') or were founded on misconceptions. Through this research and analysis, I hope to show that certain obstacles to the *demos* dimension of European constitutionalization, such as the lack of certain forms of homogeneity as demanded by certain courts, are not actually needed