And Polish lawyers, simplistic positivists all, are themselves bereft of the argumentative equipment to *interpret* law. They simply know how to apply rules, apparently with machine-like repetitiveness and lack of imagination: "they did not presume that a new role in the social discourse was required of them, and especially of judges." This makes them particularly inept receivers of European law, quite unable to deal with "soft law" and more generally the kind of argumentative participation in legal discourse that it demands. Instead of a language, all they have is a book of rules. And another paradox of "integration" is that a form of law that *depends* upon all these discursive and semantic capacities that Poles lack is being introduced in a way that leads

> . . . to the strengthening of the tendency to instrumentalise law. The disintegration of legal order is a result of the narrow understanding of the harmonisation of law as the implementation of new texts. They were introduced to Polish legal order without a reference to the achievements of the European legal discourse. The consequences of this primitive implementation of law have led today to alarming phenomena.

Complementary accounts appear in the articles by Czarnota and Sajó. Czarnota also adds to these "software" considerations, ones of hard and evident realities. The new countries are poor, both in money and in infrastructure, indeed at times worse than poor: what they have is not what anyone would want, products of mis- and not merely under-development. And not all forms of transition from that state are helpful. Sajó notes what he calls some perverse effects of the ways in which accession is being managed, and their interactions with inherent perversities of already-existing "transition." Together, he suggests, these tend to reinforce harmful behavioural and attitudinal legacies of communism. We will return to these suggestions in the final section below.

Now if these pessimistic tones are warranted, they represent a serious source of concern, since no one suggests that Poland and Hungary are the *worst* prepared of the new members of the EU. On the other hand, we should heed Aziz's warning against the common tendency to speak in an undifferentiated way of the "legacies of communism" and "transition" as though all post-communist states share the same legacies and must travel the same path. Instead she insists, the legacies varied, and so too the paths from communism. We have already mentioned Robertson's enthusiasm for post-communist constitutional jurisprudence. And one reason why one occasionally finds more committed democrats in post-communist states than in more established ones, is that not all legacies were necessarily bad, and some aspects of communism that *were* bad spawned good legacies. Thus Daniela Piana suggests that

> since history is constituted by change and tradition, by novelties and memories, it is also reasonable to assume that people have learnt something useful, and helpful in the reconstruction of their political life, even from their experiences

under the communist regimes – in the negative or in the positive sense of the word.

One aspect of this sort of learning from experience is that "people who lived within communism have collective preferences about what they do not want in a new political system. This idea was often stronger than a clear idea about what they want." This accords with the observation that a number of people have made over the years, that people who experience the *absence* of something valuable, more especially its active denial, often show more insight into its worth than people who have never known life without it.[8] But such insights, though precious, are often lopsided, better at telling us what to avoid than what to have and how to get it How enduring even those negative insights are, and how easily sustained in the absence of the conditions that generated them, are among questions to which we might learn answers from the experience of post-communist entrants to the European Union.

3. Process

Not only are the specific challenges faced by this latest and largest EU expansion in many ways unprecedented; so too is the way it was brought about. While our contributors evaluate this process differently, they describe it in pretty comparable terms. First of all, this was manifestly *not* a discussion among equals, but bargaining in a very lopsided sellers' market. No room here for Groucho Marx's disdain for a club which would have him for a member. Here the club had laid down stringent ground rules which had, in its estimation, to be satisfied before it would consider admitting eager applicants. And so the famous 80,000 pages.

Not only was this asymmetry of condition and enthusiasm underlined by the conditionality process itself, with its double standards requiring of new applicants what had not been and still was not required of existing ones. But it was also conceived as a *didactic* process, as a result of which applicants would only be admitted once they had been taught, and persuaded existing members that they had learnt, what insiders purportedly already knew, and had institutionalised what insiders, again purportedly, already had. As Dionysia Tamvaki points out, "[n]ever before has the EU taken such an active stance in teaching proper state conduct to aspiring entrants." The ambition, as she puts it, "assumes the characteristics of a socialisation process, through which Western Europe diffuses its shared beliefs and institutional practices to the 'untrained' East."

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[8] Adam Podgórecki makes a similar point about the insights to be gained from the experience of "crippled rights" in "Human Rights Revolution," in *A Sociological Theory of Law* (Milan: A. Giuffre 1991), pp. 102–103. I have followed him on this point in a number of places, e.g., "Virtuous Circles. Antipodean Reflections on Power, Institutions and Civil Society", *East European Politics and Societies* (11.1) (Winter 1997), p. 80.

This combination of conditionality and pedagogy assumed an asymmetry of attractiveness, competence, and knowledge-worth-having which had its own reflections in the process of implementation. As many of our authors note, it was elite driven, instrumentalist, technocratic, undemocratic, and formalistic. Hardly an exercise in progressive, participatory, dialogical education. This was both because the assumption was strong that the west knew what the east had to learn, and also that in regard to democracy, the rule of law etc., little value was placed on the *process* of achieving the benchmarks set. What mattered were the results. This top–down and instrumental orientation, perhaps inevitably, led to a process with a number of salient characteristics the desirability of which is a matter of argument.

Not only was this a process driven by elites, but it was doubly so. Criteria were devised by Eurocratic elites who "knew" what they should be, and had to be learnt and satisfied by enlargee national elites who needed to show that they too could come to know and apply them. Since the prize was so attractive to the latter, they were reluctant to endanger it by opening it up to the vagaries of domestic politics any more than was unavoidable. That had a certain logic. Fulfilling the criteria was treated primarily as a technocratic, apolitical matter, where expertise rather than values ruled. So Eurocrats met in committees primarily with national bureaucrats and executives more generally. This "comitology" had, in general terms, an anti-political character, and more specifically an anti-democratic one, involving as it did a certain sidelining of parliaments and wider democratic involvement in the accession process within accession states. As Přibáň notes,

> [t]he committee based form of European governance is neither constitutional, nor unconstitutional. It is beyond the reach of the constitutional discourse because it exceeds its concepts of different branches of government, checks and balances, principles of delegation and separation of power etc. The expansion of government by committees contradicts the proclaimed ascendancy of a common European citizenry and its ethos of public control and political accountability. It is much closer to the decisionist concept of law and state elaborated by Carl Schmitt in his critique of the liberal democratic rule of law.

Since bureaucrats had the expertise, even if parliaments had some claim to represent values, the pressures of accession tended to move power from parliamentary to executive elites, and more generally from political to bureaucratic elites, not only in Brussels but in national capitals as well. On the one hand, as Sadurski emphasises, conditionality in any case loads up the position of bureaucrats *vis-à-vis* parliaments. All the more when negotiations were conducted in secret, and more still when "a good deal depended upon informal contacts among negotiators on both sides, not easily subjected to formal control." And when matters got to parliament, there were disincentives to make them subjects of larger domestic public debate. As Přibáň points out:

> the harmonization of the EU law and national legal systems of the accession countries seriously affected the quality of democratic deliberation in those countries because national parliaments favoured a smooth integrative process and mechanically, without an adequate political debate enacted most of the proposals harmonising national laws with the EU legal framework.

And the focus on national elites meant that sub-national elites were also sidelined. As Sasse, Hughes and Gordon show with regard to regionalisation, this has left those sub-national elites ill-informed on matters where ultimately their participation will be crucial, but which hitherto have seemed to them a game played above their heads for stakes that were unlikely to fall into their hands.

According to Tamvaki, Olgiati, and several other observers, and again not surprisingly in such a "benchmarking" venture, "it is mainly the formal adaptation that matters at the elite level", leaving grounds for concern about the extent of penetration of reforms that have satisfied benchmarkers but have yet to play their role in social life. Indeed one might speculate, and Zirk-Sadowski implies, that formal conformity might be bought directly at a price in terms of social embeddedness. Thus he observes of Poland what is unlikely to be too different elsewhere:

> There is the domination of the process of developing legal institutions in the normative dimension over the cultural process of assimilating values and legal principles. The implementation of the Community law was not a process of historical evolution but a purely formal operation of introducing certain legal texts into the system of law. Thus legal institutions have been left suspended in a specific culture vacuum and therefore the actors of the legal institutions assume a purely instrumental attitude towards them; they are not able to fill the legal institutions with rational discourse. This purely external attitude to law, the absence of a social hermeneutics of law, results in the fact that legal institutions do not generate common, socially accepted symbols and meanings. . . . The lack of the rooting of law in culture brings about the attitudes of legal nihilism and legal instrumentalism. No connections are discerned between the normativity of law and moral conventional normativity.

As we have seen, Olgiati views this whole way of doing business as misconceived. Lauso Zagato, too, is sharply critical of the way in which a lot of the implementation was carried out. Thus he claims that "exporting the *acquis* has often consisted in a blind, bureaucratic operation, carried out in some countries without any criterion," and, as the examples he adduces suggest, with little attention to facts on the ground. So much has this elision of "guiding function" and "takeover" tended to ignore local developments, he claims, that

> [p]aradoxically, however, this has ended up weighing especially heavily on the legal systems of the more advanced CEEC, the first States which managed to enact legislation on competition (Poland, the Czech Republic, Hungary). In these countries the provisions were modelled *roughly* on Community law, but had

> their basis in the local system; this is particularly true of the Polish legislation on concentrations. Local experiences of this sort (involving the creation of expertise on the part of administrative and judicial organs, and of the operators themselves) have been wrecked by the activity conducted by the Association Councils of Issuing Implementing Rules (IR). The latter have naturally imposed immediate implementation, pure and simple, of primary and secondary EU law, in the manner of pre-accession strategy.

Sadurski, on the other hand, takes precisely the rigidity and inflexibility of the enlargers to work to the benefit of enlargees. As he writes, provocatively since much that he praises is precisely what many others condemn:

> The combination of the relative inflexibility and rigor of principle of conditionality, on the one hand, with the relative malleability, open-endedness and speed of the political transformations in post-communist states, on the other, contributed to the high degree of effectiveness of the attempt to transplant the rule of the "club" to the "applicants". The EC/EU could dictate the terms because the candidates had more interest in joining than the Union did in enlarging. The democratic forces in the CEE states could bravely design new institutions because the forces of the *ancien regime* were demoralised, traumatised and easily embarrassed.

Christian Boulanger mounts an argument that in part supports Sadurski's. He focuses on the Hungarian constitutional court, and emphasises the extent to which "the prospect of joining Western institutions also has an informal, culturally based impact on constitutional politics." Local elites were speaking to more than local audiences, and they knew it, partly because they could feel the breath of Eurocrats on their necks, but partly too because they *wanted* to be participants in a European discourse. They consequently were concerned to appear proto-Europeans not merely in the local context but at large, partly because they wanted to think of themselves and their country as European already. Now Boulanger emphasises that this cultural identification and aspiration is not uniformly spread around the region. It is important to ask how realistic it is, and to the extent that it is not, how quickly and successfully it might become so? And then it is important to know who, apart from the highest elites, shares it.

4. PROSPECTS

The Copenhagen criterion most relevant to the concerns of this book is the one which requires "the stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities." Taken literally, there are three aspects of the passage worth noting. One is the success language. To qualify for accession, you need to ensure your institutions are *stable*, and they must *guarantee.* It is hard to know how you ensure stability of such things in

a short time (1997–2003), let alone how you can know you have done so. But more striking, a guarantee is an extraordinarily ambitious requirement for things as complex as democracy, the rule of law, human rights and "the respect for and protection of minorities." Particularly since the assumption must be, for otherwise the criterion would be otiose, that they had not been in less than perfect shape hitherto. If candour had been thought appropriate about what institutional design can accomplish, starting in several cases from scratch (or behind scratch), in hard circumstances, in a very brief period, it might have been more honest, if rhetorically somewhat flatter, to require something like

> institutions that appear to have some prospect of lasting, and which there is some hope might, *ceteris paribus*, contribute positively to the achievement of some degree of democracy, the rule of law, [etc.] or in any event not render such degree of achievement impossible.

But that sort of candour is unlikely in an official benchmarking document.

A second notable feature is that it is *institutions* that are to do all this good work. That is not an innocent assumption, though it is a common one. Marc Galanter once observed[9] that, just as health is not found primarily in hospitals so legal institutions are not necessarily the first place you should look to find law. That is a remark with a rather long central and eastern European pedigree, of course, stretching from the Bukovina (Eugen Ehrlich) through Cracow (Bronislaw Malinowski) to St Petersburg and later Warsaw (Leon Petrażycki). Whatever you think about it as applied to *law* writ large,the remark has particular pertinence to the rule of law, human rights, minority protection, and so on. I also think it is true of democracy,[10] though that is more controversial. Whoever wants these things wants a social and political *outcome*, not just laws and legal institutions. They want certain ways of behaving to be established and generalised and above all to become *normative*. They want the norms on which these thing depend to *count*, in people's heads and in their acts, as reliable restraints on, and resources and channels for, the ways in which social and political power are routinely exercised and contested.

What makes such things count in such places and ways is only partly dependent upon the formal institutions one has. Sometimes, if you inherit a strong legal or liberal culture you can have a good deal of legality and liberality even when your institutions are lousy, as happened in the convict origins of my own country. Other times, your institutions might in fact be way better than the legality in the surrounding culture and ways of behaving, but no one much notices. That is one way of interpreting Kathryn Hendley's remarks that post-communist Russia has

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9 "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," *Journal of Legal Pluralism*, 19 (1987), pp. 1–47.

10 See Krygier, "The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law," in András Sajó (ed.), *Out of and Into Authoritarian Law*, (Amsterdam: Kluwer 2002), pp. 221–56 at 231–236.

not such a bad *supply* of appropriate laws and legal institutions in some areas, but often still less than optimal demand.[11] So, if Olgiati is right to allege that "the transition towards a Western-style constitutional democracy and market system of former Socialist countries was considered accomplished with the 'adoption' of a cluster of imposed and heteronomous, formal-official parameters", that conclusion is at the very least premature.

A third point is that what Daniel Smilov shows of judicial independence is true of the key political and legal requirements mentioned in this criterion: their meanings are highly contested and the EU has not rendered perspicuous the specific meanings favoured.[12] So the enlargees were asked to ensure *stable* institutions that *guarantee* something the meaning of which is uncertain, even apparently to those who ask for it. That is a challenge. As Smilov shows, it is already hard enough in the much more specific context of judicial independence, and since no one says that independence is all that you need for democracy, the rule of law, human rights or minority protection, it is exponentially harder in the larger context.

I would not belabour these linguistic quibbles so, if I did not think that they reflected some rather common beliefs. One is that a stable and effective rule of law, not to mention other good things like democracy, is something specifiable, tangible, and constructible, and that the tools for construction are laws and legal institutions. Another is that we know which ones will work (as distinct from which ones have worked, which is not the same thing).

Anti-communist dissidents knew democracy, the rule of law, human rights, were great things (and some thought about minority protection too), since they knew something about life without them. But for all their fineness, wisdom, and at times heroism, they also typically shared (with the rest of us), over-simple ideas of what these good things might require. Thus, it was common in 1989 to insist that what distinguished these revolutions from any of their forebears was that the former intended "no more experiments." Successful models existed in normal countries, and the job was to adopt them, not even to adapt them. Timothy Garton Ash faithfully captures what this was taken, at least by many prominent activists, to mean at the time:

> In politics they are all saying: There is no "socialist democracy", there is only democracy. And by democracy they mean multi-party, parliamentary democracy as practiced in contemporary Western, Northern, and Southern Europe. They are all saying: There is no "socialist legality", there is only legality. And by that they mean the rule of law, guaranteed by the constitutionally anchored independence of the judiciary.[13]

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[11] See Kathryn Hendley, Stephen Holmes, Anders Åslund, András Sajó, "Debate: Demand for Law," 4 *East European Constitutional Review*, 8 (1999), pp. 88–108.

[12] See, for a similar argument re the rule of law, Dale Mineshima, "The Rule of Law and EU expansion", *Liverpool Law Review*, 24 (2002), pp. 73–87.

[13] "Eastern Europe: The Year of Truth", *New York Review of Books*, February 15, 1990, p. 21.

This taste for democracy and legality "without adjectives", as dissidents used to put it, can be readily appreciated. They had more than enough experience of distasteful adjectives being forced upon fine nouns to glorify ghastly parodies. They were rightly allergic to such substance-cancelling qualifiers. But, to the extent that saying "there is only legality" might suggest that there exists one obvious incarnation of legality which merely needs to be copied by eager imitators, then the taste for legality unqualified is misleading. *Mutatis mutandis*, democracy, human rights, minority protection.

For we have no recipes to produce such results, even less single general recipes. We know what democracy and the rule of law are about (more controversially human rights), but we can more easily recognise them where they are well established, than we can specify the particular institutions that will promote them, with any combination of generality, detail and ability to travel. What might go to accomplishing (or thwarting) them will vary with time, place, history and tradition. That makes it a complicated matter to decide what might foster them or even affect them. These complications are evident in the variety and controversy among the authors in this book.

Sadurski focuses on institutions. He is concerned about the bypassing of parliaments, though he thinks it can be exaggerated and that there are counter-trends. He also worries about the increasingly powerful position in which accession will place constitutional courts in the accession states. This novel implant has thrived unexpectedly in its new soil, and Sadurski worries that the issues to be resolved at the intersection of the EU and national constitutional orders in an enlarged Europe will augment the role of these courts as "significant political and legislative players" still further. As a democrat he favours neither over-powerful executives nor over-active courts.

Still, notwithstanding these particular sources of concern, Sadurski is confident that the larger consequences of accession will be positive for the acceding states, and for Europe as a whole. On one hand,

> by providing the democratic forces within the post-communist states with additional support, encouragement and discursive assets against the threats from authoritarian, populist, nationalistic forces, the democratic transition itself has been strengthened. In this sense, the position of democratic elites in new member states will not be all that different from the position of liberal and democratic forces in, say, Italy or Austria, where those with authoritarian tendencies invariably find themselves in the "anti-European" corner, because the institutional and ideological structure of the European Union tends to support liberal and democratic arguments.

And as this last sentence already begins to suggest, Sadurski believes that the positive effects of enlargement will not all travel one way. Indeed, it is the *Europeanisation* of issues to do with democracy, etc., the discovery, or reaffirmation, that so many of the key issues are ones that do not start or stop in particular nations,

that he sees as *the* great significance of enlargement. He believes national identity will become less and less salient, to the extent that

> [t]he understanding of who is part of the *demos* will inevitably be transformed: traditional loyalties and the ethnic and cultural sense of belonging will need to give way to something more akin to "constitutional patriotism", under which the polity is bounded by common civic rights and duties rather than by tradition and ethnic identity.

Pessimists might agree that the need is there, but not on how likely it is to be satisfied.

These are examples of what might be called Sadurski's maximalism. His minimalist position is that "[a]ccession to the EU may not be a panacea for all of the problems of political democracy but it may well be a reasonably good protection against possible future disasters." In this hope and prediction he is strongly supported by Přibáň, who sees "[t]aming ethnos in European nation states . . . [as] the primary purpose of both economic and political integration." Already during the lead-up to accession, the EU has played a crucial role "as a neutralizing force of ethno-national divisions, tensions and conflicts." That central role is not due to diminish. How is this to occur, given that there is no European demos? The answer, it appears, is not to attempt to build such a demos on infertile soil, but rather, not to presume that it is necessary:

> [u]nlike the utopian image of one European people, the European identity is most likely to be constructed as a hybrid mixture of common civil ethos and persisting different national loyalties. It will be the dilemmatic identity which will be impossible to consolidate at the symbolic level. European identity and legitimacy will thus remain an open-ended process of the symbolisation of the common social, cultural and political space. . . . The European constitution-making is therefore accompanied by multi-dimensional identity which is disentangled from the traditional concepts of solidarity, community, and face to face relations. Cultural rigidity is replaced by flexibility of social networks and multiplied personal choices. . . . The European identity can emerge only as a symbolic space of heterogeneity, permanent contestation of existing practices, compromise-oriented negotiations and the conversational model of politics.

Can this possibly work? Yes, says Miriam Aziz, so long as Europe works. That is,

> [w]hether sovereignty resides at the level of the nation state or elsewhere is largely irrelevant. What is important is that sovereignty *exists*. It will, by nature, command affiliation and trust. The level at which sovereignty resides is irrelevant to the affiliation of the trust of the citizen because sovereignty is intrinsic to whether citizens feel confident that states perform certain duties and the citizens feel comfortable with the obligations. Drawing on performance theories, the

> following expectation can be voiced: If the EU performs, it will attract both support and affiliation.

Aziz emphasises that in the new Europe, performance operates in a multiplicity of domains and at a multiplicity of levels. Foci of trust and allegiance will proliferate, and so "[m]atters of trust and loyalty also have to be reconfigured in the face of the plurality of public spheres."

But what does it mean to perform? Sasse *et al.* emphasise that now that accession has been won by the new member states (though not by all who have sought membership), there will necessarily be a shift in focus, from satisfaction of formal criteria to

> the implementation and sustainability of the institutions, rules and norms adopted over the last decade. Thus, the post-enlargement context will add a new impetus to the discussion about the successful transition and consolidation of states, democracy and market economies in CEE.

Formal implementation has been, above all, the concern of national elites, but sustainability will need to delve more deeply, as it spreads more broadly. In their study of regionalisation, Sasse and her colleagues stress the different interests, stakes, and commitment of national and sub-national elites, a difference of increasing significance given that

> [d]espite the weak attitudinal "Europeanization" of sub-national elites, their position and functional importance guarantees their involvement in key policy areas, thereby raising doubts about effective implementation of EU policy, at least in the short-to-medium term.

And, though elites are key, they are not the only people who need to be persuaded to support the European enterprise, and not everyone will find persuasive what persuades elites. Tamvaki points out that while the focus has hitherto been on formal adaptation of institutions, and while the bulk of the scholarly literature focuses on "the international aspect of social learning", formal adaptation matters most at elite level and "the internalisation of EU norms by the public is taken for granted or is even ignored." She does not suggest that is wise. On the contrary, what will be crucial over a longer term, and what we do not know much about, is transformation of what she, following March and Olsen, calls "the logic of consequentiality" to "the logic of appropriateness." The latter involves habituation, and that is crucial, Tamvaki argues, since:

> Habituation as opposed to institutionalization is expected to go beyond individual decision-makers and reach the public. If that is not accomplished then the long-term effectiveness of socialization cannot be guaranteed, because it is not just the State that constitutes the people. The people, in turn, form the State, and their readiness to abide by the new norms determines state actors' future behaviour in the international arena.

Piana, similarly, stresses that

> [f]or the CEECs, the development of a democratic culture depends not only on the presence of democratic institutions and the rise of civil society, but also on the willingness of the citizens to view the emerging democratic framework as historically legitimate.

This, she insists, is not something that can just be imposed from outside, but must mesh with internally generated attitudes, histories, and developments. These, in turn, differ significantly among the new members of the EU and have to be taken into account.

And so, beyond the caution that top–down requirements, however refined, can only be *part* of a successful accomplishment, these arguments serve as a reminder that different recipients will respond differently, and a crucial element in successful transition is the state of the recipients themselves. Our contributors from the region, as we saw in section 2 above, speak with some apprehension of that. Like Zirk-Sadowski, Czarnota does not find much aptitude for the rule of law in Poland or other CEECs, and particularly not aptitude for *European* law. At the level of elites, again, it is the national centre that has controlled. Czarnota believes that most lawyers in the region, and particularly lower court judges, have little understanding of European law and are poorly trained to understand it, let alone interpret and implement it. Like Zirk-Sadowski, he believes that "[y]ears of training in a positivist perception of law and with 'judicial dependence' in thinking has left Central and Eastern European courts ill prepared to become part of the European legal space."

More broadly, there is one thing that post-communists – citizens as well as elites – are well trained in, and that is what the sociologist Adam Podgórecki, called "fellowships of dirty togetherness", or what Czarnota calls "informal operations due to the distrust of authorities." That might, he darkly suggests, be a real source of comity between the accesses "with their own networks and façade type rule of law" and the European network-based "infranationalism" that Joseph Weiler describes as a central feature of the EU. Czarnota concludes, with sardonic gloom, that "[i]n this sense post-communist rule of law will join a post-democratic European Union. But then such a marriage will be at the expense of the average citizen on both sides of the Elbe River."

As we have seen, Sajó, too, is less than enthusiastic about the propensity of his fellow citizens for "democracy, rule of law, human rights and respect for and protection of minorities." Moreover, he suspects that the way accession has been implemented might operate, at least in the short term, to reinforce already-entrenched proclivities inconsistent with these goals. Thus he argues that "the accession process as well as the drafting of the European Constitution has reinforced the irrelevance of constitutional democracy in the eyes of the public who continue to see it as a matter of majoritarianism" and more broadly that