

The Constitutional Significance of the Charter of Fundamental Rights*

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Suggested Citation: Antje Wiener, PhD, *The Constitutional Significance of the Charter of Fundamental Rights**, 2 German Law Journal (2001), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=113> "(C)onstitutionalism is, (...) but a prism through which one can observe a landscape in a certain way, an academic artifact with which one can organize the milestones and landmarks within the landscape [...], an intellectual construct by which one can assign meaning to, or even constitute, that which is observed." (1)

I. Introduction

[1] While constitutionalism appears to be a new buzzword in political, public and analytical Eurospeak, it is never quite clear whether there are any shared terms of reference in this debate in "Europe," let alone on a worldwide scale. To sort out the different approaches and their analytical strengths and weaknesses, this article offers an overview of analytical choices that are likely to determine the type and outcome of discussions about the constitutional significance of the European Union's Charter of Fundamental Rights (hereafter: the Charter). (2) It juxtaposes the seemingly paradoxical parallel development of a widespread use of "constitutionalism," and increasingly "constitutionalization," on the one hand, and the theoretical and political divergence in its application, on the other.

[2] The article begins with the core observation that even exclusive understandings about the role and meaning of a constitution exist in the multi-constitutional context that is the wider Europe. In other words, a significant divergence about constitutional issues can be observed. This divergence stands in odd contrast with the current upsurge in constitutional discourse pushed by strategic efforts of European institutions in Brussels as well as, if to a lesser and more contested extent, in the Member States. Indeed, in terms of purely discursive frequency, a convergence in reference to all things constitutional can be seen. The seemingly paradoxical development of divergent understandings, though converging on the term as such in its daily usage, cautions against fast, let alone, forced constitutionalization akin to previous nation-state experiences. (3)

[3] If understandings about the meaning of constitutional issues including role and function, type and structure, let alone, principles and norms of constitutions in nation-states polities differ considerably, what does this imply for the success of constitutional politics beyond the nation-state, *i.e.* with reference to European constitution-making? This article suggests that the choice of analytical approaches comes down to applying two mutually exclusive approaches, dubbed as the *pathos vs. process* models of constitution-making. The success of each model depends on the choice of analytical framework that situates the model within contexts of "efficient" or "inefficient" history. (4) It is argued that mapping approaches to constitutionalism in this way, not only allows for an allocation of policy choices, given that policy substance and agenda-setting are in general informed and influenced by precisely these analytical choices of academic policy advisers, but .

[4] This article is organized in four sections. The *first section* discusses the analytical steps towards mapping an analytical framework of constitutionalism. The *second section* develops a chart of distinctive approaches to constitution-making based on *pathos* or *process* models that are identified as two significantly divergent perceptions of constitution-making, as well as on the choice between "efficient" and "inefficient" perceptions of history. (5) The *third section* applies this model to the approaches to constitutional policy taken by two of the European Union's political organs (the European Council and the European Commission). Turning to constitutional policy in 'Brussels,' the *fourth section* suggests that the Charter's significance for European constitution-making depends on its promoters' success in offering and conducting an inclusive public debate over its substance. While this may appear to be a commonplace truism (indeed, much of the recent constitutional discourse across Europe would suggest that such a conclusion is an obvious and relatively straight forward recipe for success, justifying the reliance upon the convention model, public hearings, and the mobilisation towards a referendum on a 'European' constitution) the devil, as they say, lies in the details. This article intends to elaborate on those details.

II. What and Where: Constitutional Significance in Context

[5] In order to assess the constitutional significance of the Charter, it is first necessary to identify a political frame of reference. In other words, what is the focus of analysis: "beast" or "cage" or something else? For example, the European Union has long been addressed by applying the metaphor of a "beast," (6) suggesting that the EU is one actor. This terminology is misleading in so far as the reference point of most analyses is that of a political container, more precisely described by using the metaphor of a "cage." (7) With a few notable exceptions, the EU's behavior is usually discussed in relation to the concept of a polity that bears, in one way or another, a resemblance to modern nation-states. Political scientists' and German lawyers' perspectives on the EU have been particularly "caged-in," so

to speak, despite remarkable efforts to bring in interdisciplinary wisdom from sociology, international and European law, or, indeed the theory of international relations.

[6] This article also seeks to incorporate some of these approaches, in particular: (a) studies that address processes of constitutionalization in world politics; and (b) analyses of the political culture of constitutionalism in a comparative perspective. With reference to the zoological metaphors, it is argued that, the "post-Nice" debate about European constitutionalism suggests indeed, that the animal's behavior might be a key in exploring the constitutional significance of the Charter in two ways. The first important aspect of this shift involves the move from a statist frame-of-reference towards a mode-of-interaction as a theoretical window of opportunity to avoid statism. The second important aspect lies in the empirical focus on interaction which offers an access point for answering the question whether or not a "cage" is desired at all, and if so, which model. These considerations are not to be underestimated as the Europlity's character as simultaneously "anti-state" and "near-state" has proven difficult to address with traditional concepts, tools, and assumptions. Thus, while most would agree that the EU is neither a state nor is it likely to become one at any point in the future, few have managed to avoid the traps of "methodological nationalism." (8)

[7] According to a rough distinction among three different views on politics and policy making that is of constitutional relevance for the EU, three different contexts are of potential importance for an assessment of the Charter's constitutional significance.

[8] *Integration* Constitutional significance may be analyzed as part of the integration process that seeks to explain institution building on the supra-national level. This approach would follow early theoretical debates over how to best explain some level of integration based on institutional arrangements established outside the state (the neo-functionalism vs. inter-governmentalism debate in the 1960s and 1970s). The significance of the Charter would therefore be measured in terms of its contribution to some level of integration on the supra-state level.

[9] *Institutional Adaptation* Secondly, it may be understood as institutional adaptation in the EU member states and candidate states. Depending on institutional compatibility or incompatibility with supra-national conditions, national institutions are seen to adapt towards better fit. According to the institutional adaptation approach then, the Charter's significance would be measured in terms of whether or not the Charter would put states under pressure to adapt their respective constitutional settings accordingly. (Since, as it stands, the Charter is explicitly deemed a non-reference point for the ECJ, it is unlikely to play a key role in processes of institutional adaptation within member states in the near future.)

[10] *Constitutionalization* Finally, discussions of the constitutional relevance of the Charter may be assessed within a larger context of assessing the role of social context and legal rules and procedures with respect to constitutionalization. Here, comparative approaches of transnational interaction within a narrower European as well as within a larger, global political frame-of-reference are possible. Studies would compare the Charter's emergence from and impact on processes of constitutionalization with a view to the "civilization" of world politics. (9) As such, this process is not unique to the EU context. Indeed, public mobilization, for example, on issues of constitutionalization within the framework of the World Trade Organization, have stirred much more public interest, than the EU's half-articulated process of constitutionalization. (10)

[11] As the Max Planck Institute for Comparative and International Law observes:

[A]t the international and regional level, the states have increasingly moved beyond mere cooperation in matters of security, human rights protection, trade and the environment and established multilateral mechanisms which in their normative dimensions as well as their institutional ramifications present certain constitutional characteristics. This process of constitutionalization has been particularly strong in the European context with the foundation and the dynamic institutional development of the European Communities as well as with the establishment of a highly effective system for human rights protection under the auspices of the European Council which now covers the whole of Europe. (11)

As this assessment rightly stresses, European and world political processes are inexorably linked. Indeed, the Charter brings together a conglomerate of rights which have been derived from different institutional contexts in world politics. If both processes bear an imprint on the substance of the Charter, the reverse can be expected as well, that is, the Charter or discussions about the Charter are likely to produce changes of constitutionalization in both the European and world political arenas.

III. Constitutional Moment or Process?

[12] This section turns to defining the role and meaning of constitution-making based on the analytical conception of a constitutional moment, a constitutional process, or a process of constitutionalization. It discusses the implications of conceptual choices taking a constitutionalist approach in the sense suggested by Joseph Weiler. (12) That is, constitutionalism is applied as a theoretical tool which allows us to focus on constitutional issues from an academic perspective. Thus it is possible to distinguish among different perceptions of constitution-making. For example, if constitutions are viewed as a "deliberate act of political foundation which not only aims at the creation of a legal order but which is itself already a legal act—the exercise of the constituent power," (13) then the significance of the Charter will be assessed as part of such a constitutional moment and its future implications, using the experience of national states as a comparative point-of-reference. In turn, if a constitution is defined as "not static and bound to the state, but dynamic [...] as a process of step-by-step constitution of legitimate [...] sovereign power," (14) then the Charter's impact would be evaluated according to its part in the process of constitution-making.

[13] Alternatively, and different from the first two approaches (both of which define the constitution at a point in time which either precedes or follows a constitutional moment in order to define the limits of sovereign power and enables just rule within a particular context), a third view of the constitution as a process itself, is more open ended. Thus, the definition of the Canadian constitution as "a 'living instrument of government,' always wider in scope than the terms of the British North America Act, 1867, and not restricted to the intentions of the Fathers of the Canadian Confederation. [...] the settlement of 1867 was only the beginning, and has been under constant transformation since that time," (15) does not perceive the constitution as a single fixed-point. Instead, it remains a process of continuous-becoming. It can thus be viewed as an evolving constitution. (16)

[14] What does such a perception of constitution-making imply? Would it be an option for Europe and if so, what would be the constitutional significance of the Charter of Fundamental Rights? The following elaborates on these questions based on analytical choices and the subsequent elaboration of available types of action which are related to each. It is argued that analytical scrutiny along the *pathos* and *process* model respectively demonstrates that, what is often presented as a process approach, turns out to be working with the underlying reference to a constitution as fixed-point. To address the issue of constitutional significance of the Charter, it is important to make explicit the perception of the constitution in context, *i.e.* to state whether the constitution is seen as a process in itself, or, alternatively, as a point in time which either precedes or follows process.

1. Constitutions as Fixed-points

[15] Two *pathos* models can be distinguished according to their respective grounding in the assumption of history as being efficient or inefficient. This helpful distinction about the belief in historical efficiency has been put forward by March and Olson's study on political orders as sets of institutional arrangements. According to this approach to the belief in efficient or inefficient history, the positions are distinguished as follows: "On the one side are those who see history as following a course that leads inexorably and relatively quickly to a unique equilibrium dictated by exogenous determined interests and resources. On the other side are those who see history as inefficient, as following a meandering path affected by multiple equilibria and endogenous transformations of interests and resources." (17)

[16] A constitution's role according to the belief in efficient history would be assessed according to its place within a context of a path-dependent constitutional trajectory, including specific types of policy and institutional arrangements. The significance of the Charter would thus be gleaned from historical experience and assumed to be structured by the institutional and cultural context. The approach that deems history as inefficient and hence subject to being shaped by strategic policy or political intervention, would stress the symbolic power of constitutions, either in principle, or speaking from historical experience. Different from the first *pathos* model, it assumes that history can and should be formed by actors. In other words, strategic intervention with a particular goal is possible. According to this model, a constitution may either generate debate or a deliberative process, which precedes the solemn passing of a constitution. Both views entail a, if only implicitly stated, key role for a constitutional moment. The Charter's significance would hence be seen primarily as stimulating public debate. Its role can be summarized as follows: "Notwithstanding that [the Charter] is for now passed as a programmatic declaration only, it will adopt a leading and orientating function with an impact that reaches far beyond previously passed declarations by the European institutions, to be sure." (18)

2. Process: Constitutionalization

[17] Public discourse communicated through the media and political debates, entails few explicit references to a European constitution. However, constitutionalization understood as the process which contributes to converting institutions such as beliefs, ideas and procedures into a system of legally entrenched and hence enforceable rules and norms has nonetheless proceeded steadily. All of the following have played a substantial part in the evolving norms and practices of European constitutionalism: (a) integration through law including the firm establishment of

primary and secondary law in the European Community (EC) and now EU member states, (b) integration through policy implementing and regulating EC law, and (c) integration through politics, debating and establishing new principles and new political substance to the *acquis communautaire*, e.g. subsidiarity, flexibility, citizenship, the communitarization of Schengen. Since the 'relaunch' of European integration with the Single European Act in 1987, students of European integration have preferred to address the processes of institution building or adaptation within the *sui generis* model of the European polity, or, if rejecting that approach for analytical reasons, resorted to comparative politics or comparative policy studies. Lawyers, and more recently comparativists, who have carefully monitored the hidden process of integration through law have found that "constitutionalization" (19) was well under way for some time in the EU, defining it as "[T]he process by which the EC treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere of application of EC law." (20)

[18] Elsewhere, lawyers and scholars in the field of international relations have often, on the same time-axis, begun to collaborate in studying the impact of international institutions, often with a focus on trade and rights, in particular, human rights. Such studies pursued questions of compliance with rules that were established within the anarchic context of the world system of states, loosely connected by sets of institutions which often emerged first in specific issue-areas. Compliance was found to be pushed by power, interest, shaming or commitment. (21) Different types of actions that lead to compliance have been discussed, including the neo-realist stress on cooperation and the liberal focus on the key role of bargaining fathomed by cooperation and collaboration approaches. Constructivists have pointed out that interactive processes such as communication, learning and arguing play a key role towards explaining compliance, thus stressing international interaction among states and, increasingly, transnational interaction among non-state actors. (22) As a result, processes of legalization and legal bureaucratization in world politics have been brought to the fore. (23) More recently, transnational interaction has contributed to an emerging, if still not sufficiently specified, academic focus on processes of "constitutionalization" beyond the state. (24)

[19] At this stage it is possible to summarize that, as a process, constitutionalization involves turning institutions such as beliefs, ideas and procedures into a system of legally entrenched and hence enforceable rules and norms. From an academic perspective, it allows a focus on evolving constitutional norms including their social context of emergence, their legal value, and their political power. According to the *pathos vs. process* approach, the Charter's significance is potentially twofold within the context of European integration (more or less Europe). **Figure 1** maps the possible analytical choices towards finding an answer to the article's leading question of what is the constitutional significance of the Charter?

Figure 1: Ontological Standpoints and Significance of Charter

Conception of Constitution

		symbol	substance
<i>Conceptions of History</i>	efficient history	(II) history-dependent	(III) strategic institutionalism (<i>top-down</i>)
	inefficient history	(I) strategic intervention (<i>top-down</i>)	(IV) strategic interaction (<i>mutually constitutive</i>)

I. Lower left quadrant: First, it may be understood as a symbolic act which, by causing reaction and mobilization, contributes to the promotion of European integration. Secondly, it may lead to the establishment of a constitution which, by way of having been exposed to the scrutiny of public debate, has achieved legitimacy ("more integration").

II. Upper left quadrant: Secondly, the Charter may be viewed as the process which establishes the conditions for a more efficient struggle over resources to improve individual interests, *i.e.* setting up the Convention model offers a window of opportunity for some groups to state their claims.

III. Upper right quadrant: Alternatively, the Charter's impact may be assessed according to the respective process models as offering a normatively better, or more efficient practice for the future process of constitution-making in the EU, *i.e.* adding the convention model as a more popular and democratic pendant to the IGC procedure.

IV. Lower right quadrant: Or, as the interactive process model suggests, the constitution is seen as a process itself, history is open. Conditions for change can be created by mutually constitutive discursive interaction.

[20] In addition to offering a tool for mapping theoretical approaches, the horizontal distinction between *pathos* and *process* models of constitutions allows for a rough distinction among constitutional traditions of the involved states. For example, the constitutional tradition of Germany and France are allocated on the left (*pathos*) group, while the United Kingdom's tradition would fall onto the right hand side of the table (*process*). Whether or not, the respective country's trajectory can be influenced by constitutional policy-making and, if so, how, depends then, on two factors. The outcome of constitutional policy depends, first, on the respective advisors' belief in efficient or inefficient history. Second, and arguably of greater importance, it depends on the type of action chosen, *i.e.* strategic intervention (*top-down*) or discursive intervention (*mutually constitutive*).

IV. Constitution-Making in the EU: Pathos or Process?

[21] To raise the question with reference to a recent example: The European Commission conducted a survey on European attitudes in the Irish Republic, noting that a "marked lack of enthusiasm among the public in European issues" is predominant. "Just one in 10 are keenly interested, 54 per cent said they would be "indifferent," or without an opinion, if the EU was scrapped. More than half of those who voted "Yes" for the Amsterdam Treaty in 1998, abstained in June, including farmers and women; only 36 per cent of Amsterdam "No" voters stayed at home. It

illustrates the dramatic rise in the number of those confused, or with no opinion since voters first debated whether Ireland should join the European Economic Community. Then, just 30 per cent of people abstained. In June, that figure had jumped to 66 per cent. Just 18 per cent of people actually voted "No," while 16 per cent cast their voters in favour." (25)

-- *Pathos* models would either expect to turn such lack of enthusiasm for Europe around through the power of symbolism (I), or, by creating more incentives for participation such as by the convention model (I).

-- *Process* models would either change the contents of the debate by strategic discursive intervention, e.g. stressing the social rights in the Charter or other normative incentives (III), or, they would seek to establish acceptable conditions for participation through discursive interaction (IV).

[22] From the analytical steps in the previous sections, it is now possible to turn to an, if at this stage still cursory, analysis of the European Union's strategy of constitutional policy in order to establish the Charter's constitutional significance. Several policy documents in the run-up to solemnly passing the Charter of Fundamental Rights in Nice 2000, offer an insight into the intentions behind constitutional policy making by 'Brussels' institutions.

[23] For example, the European Council stated that with regard to the EU Charter of Fundamental Rights, "[T]he European Council takes the view that, at the present stage of development of the European Union, the fundamental rights applicable at the Union level should be consolidated in a Charter and *thereby made more evident*." (26) Towards that end the European Council, at its meeting in Cologne, agreed to pursue the drafting of a Charter of Fundamental Rights with the understanding that "[P]rotection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. *There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens.*" (27) According to this Council mandate, the Charter is expected to fulfill a particular function in the process of European integration. This function lies in bringing particular aspects of existing rules and regulations to the fore, making them more "visible" to the citizens.

[24] The models of constitution-making discussed above suggest that this emphasis on rights policy can be allocated to both the *pathos* and the *process* model. The distinction and variation in impact of both models does not become discernible until the way rights are dealt with is identified. Crucially, according to **Figure 1**, we need to ask whether intervention or interaction sets the pattern of behavior in following up the Council Decision. Intervention would imply inserting the Charter into the European political discourse and promoting public debates with a view to one particular goal: the making of a European constitution, working towards a constitutional moment, or working towards the change of normative substance. In turn, while proceeding in a quite similar way, the interaction model would not aspire to create a constitution as the finality of choice. Instead, it would leave the outcome open, pending significant changes in the interactive process.

[25] The Commission pursued a similar approach, albeit in an even more blunt fashion, stating that "the Union cannot be based exclusively on purely economic considerations. On the contrary, it must henceforth seek its roots in the fundamental human values common to all European countries. This is a necessary precondition if the people of Europe are to place their trust in the continuing task of European integration. *We must prove to them that the Union provides a framework with which they can identify.*" (28) Similar to the European Council, the Commission also sees the need to bring already existing elements to the fore, in an effort to convince the citizens (who, it would have to be assumed, appeared unconvinced up to that point) of their shared values. This approach of strategic intervention with the goal of strengthening, or, for that matter, creating a European identity is further substantiated by a second Communication of the Commission, dated 11 October 2000. (29) According to its own website, the "Commission adopted a pragmatic approach: the Charter will have an impact whatever its status. The institutions that will have proclaimed the Charter will have committed themselves to respecting it and the Court of Justice of the European Communities will refer to it in its case law. Considering the added value of the Charter, one can safely reckon that, sooner or later, the Charter will be integrated into the treaties. The Nice summit will decide how this may come about." (30) According to this second Commission Communication, the potential added value of the Charter therefore lies in its ability to enshrine "the very essence of the European *acquis* on fundamental rights." (31)

[26] Elaborating the meaning of this discourse according to the *pathos-or-process* question, requires a deeper investigation into how the *acquis* is defined. How did it come about, and what type of action is supposed to lead towards enshrining its essence in a Charter? Note that the document refers to a 'European *acquis*,' not to the *acquis communautaire* (is the wider Europe addressed?). The reference suggests that shared values within a wider European context can be evoked. Which values? How did they come about? How do we know whether they are shared? Can this be documented?

[27] Even cursory reviews of rights policy in the wider Europe, including citizenship rights, human rights, gender rights and minority rights suggest otherwise. Indeed, recent studies on rights policy in the wider Europe have demonstrated that, far from a European convergence in the area of rights policy, divergence is predominant. That is, the understanding of rights, *i.e.* constitutional norms expression of various types of rights, is not shared but in conflict. It has, for example, been demonstrated that *citizenship policy* has produced unintended consequences, *minority rights policy*, specifically as applied in the current eastern enlargement process, is likely to produce clashes of norms based on diverging rather than converging understandings of European rights norms. (32) Why, then, bring in more rights and expect them to bring forth a monumental change in the European public's perception of Europe? (33) After all, as it stands, the Charter is to be placed in line with previous symbolic policy-making towards the creation of European identity that began with the drafting of the European identity document in 1973.

[28] The Charter is but the latest in a series of strategies which aim to increase public awareness, and somehow automatically, with it, legitimacy, democracy and accountability, in the European polity. It tops a number of previous efforts to boost a shared European identity by symbolic policies. These included most prominently the burgundy colored European passport, Union citizenship, a European anthem, a European flag, all taken straight from the textbook of nation-building not from comparison with international organizations. Statistical and academic review reveals, however, that in the past such symbolism has done little to establish a favorable public perception of the EU as a just and legitimate system of governance. In the face of this history, the Charter's celebration as a new focus in the long and tiresome project of creating legitimate governance in the EU comes as a surprise. Why should symbolism be likely to work now if it had not worked before? Are there reasons to believe that this launch has the power to bring "the Union closer to the citizen," instead of lingering on a principle that, when not simply ignored, manages to stir fear and irritation among some (beware of more European integration!) and head-scratching among others (what else can be done to sell the European project?). If symbolism has done so little to 'sell' the product, so far, why introduce yet another symbolic act? Are there potential other meanings of the Charter? Is there an alternative to the European institutions' *pathos* approach to constitution building? Can the Charter of Fundamental Rights play a role nonetheless?

[29] Launched as the result of a meshed set of political strategies designed by various actors within the European polity, many promoters of the Charter see it as, indeed, having the potential to break with the phenomenon of unarticulated constitutionalization in the Europoly. As many policy-makers and academic observers maintain, the Charter holds integrative force akin to the core constitutional documents of modern times. In other words, "[T]he Charter of Human Rights proclaimed at the Nice conference may be seen as a vehicle for constitution making." (34) Such hopeful observations are rooted in the firm belief in a, however defined, formative impact for the Charter. Assuming that it might acquire a role in shaping, in particular, the citizens' view of the European political order. This article has offered a more skeptical reading of the success associated with the current thrust of constitutional policy that is promoted in Brussels and elsewhere. This does not, however, indicate that the Charter's role must be altogether counter-productive. To the contrary, its impact on constitutionalization potentially lies in the discussion of the rights it claims to protect. Such a discussion would mean raising questions about substance and, hence, be diametrically opposed to the Commission's pragmatic push for more EU awareness based on the symbolic value added "whether legal or not." (35)

V. Conclusion

[30] The conglomerate of constitutional traditions in the member states with their respective and differing windows of opportunity for constitutional change and policy influence form all but one dimension in the process of constitutionalization in Europe. The European political institutions' progress and function determine the other dimension. (36) Different from familiar and readily comparable cases in the history of constitutionalism, the EU's non-state and multi-constitutional polity is in principle a conflicting framework for constitutional debates. The constitutional significance of the Charter therefore depends on first, the varying constitutional traditions in the current and potential EU member states (*pathos or process*), second, the belief of historical efficiency (yes or no), and third, the type of action applied (intervention or interaction).

[31] In an effort to offer an informed response to the question of what the constitutional significance of the Charter of Fundamental Rights might be, this article has argued, that such an assessment depends on certain framework conditions of analysis. Accordingly, it has been argued that in order to raise informed predictions, two steps are necessary to identify the framework conditions in analytical terms. These steps include first the choice of constitutional models (*pathos or process?*), and secondly, the contextual framework in which the significance of the Charter would be measured. The article first defined the European polity according to institutional approaches to types of political order in world politics. On the basis of a constitutionalist approach, it then proceeded to map out four different approaches to constitution-making.

[32] The systematic approach developed in this article suggests, somewhat surprisingly perhaps, that while *pathos* models are open to process, their focus on a constitution as a fixed-point either at the end or at the beginning of the process is in keeping with the statist experience of constitution-making, nonetheless. It does not allow for an open-ended discussion in which the type of polity, the type of actors, and the type of constitutional agreement is conceptualized as an outcome of an interactive debate. Instead, it seeks to guide the debate based on strategic intervention in the policy process. In turn, *process* models gleaned from different constitutional experiences as the Canadian, the 'European' as well as world political experience of constitutionalization as an ongoing process, will stress either normative intervention that seeks to intervene with the constitution-making process according to pre-conceptualized values and norms, or to create a context in which interaction with a view to establish shared norms is possible. The latter, in particular, offers a possible frame of reference with the potential for facing the analytical challenge of avoiding statist approaches in a non-state setting (*i.e.* methodological nationalism).

[33] This article cautions against the assumption that any policy pursued in the spirit of seeking to bring "Europe closer to the citizen" will produce the desired result. The possible pitfalls of taking Charter debates lightly were assessed with reference to two tracks. The first was the choice of analytical approach, the second the reference to previous experiences by enlisting symbols into the cause of developing "good governance" (37) in the EU. The article thus raises doubts about often overly enthusiastic assumptions of the Charter's potential role as a public relations tool, that is, as a document with the power to shape the debate and with the potential to raise public awareness in order to establish a more favorable perception of 'Brussels.' As it stands, the Charter is part of a symbolic policy that works according to the logic of strategic intervention, *i.e.* top-down action that seeks to convince the 'other' (the citizen) of a given goal. If this strategic intervention is not turned around to a more open-ended approach of discursive interaction which does not only aspire to broaden input but which is also prepared to listen and perhaps adapt previous policy positions accordingly, the constitutional significance of the Charter is likely to produce unintended consequences such as "fuelling anti-EU feelings" similar to previous cases of symbolic policymaking in the EU. (38) The difference in both approaches lies in the former's interest in the goal (*i.e.* the constitution) and the latter's interest in the process (*i.e.* participation).

* Revised version of a paper presented at the Conference on "The EU Charter for Fundamental Rights," Irish Centre for European Law, 9 November 2001, Belfast. The organizer of the Conference, Cathryn Costello, posed the question that has become this article's title. For a more detailed and theoretically elaborate version of this paper, see, Antje Wiener, *Pathos vs. Process* (2001) (unpublished manuscript on file with the author).

(1) Weiler, J. H.H. *The Constitutional of Europe*, Cambridge: CUP, 1999, 223.

(2) Proclaimed during the IGC in Nice on December 7, 2000, Official Journal of the EC, Dec 18, 2000, C 364701, http://europa.eu.int/comm/justice_home/unit/charte/pdf/texte_en.pdf.

(3) Schmitter, Philippe, *An Excursus on Constitutionalization*, *Constitutionalism*, Webpaper, ConWEB 3/2000, 2 ff, <http://www.qub.ac.uk/ies/onlinepapers/const.html>.

(4) See, March, James G. and Olson, Johan P., *The Institutional Dynamics of International Political Orders*, 52 INTERNATIONAL ORGANIZATION 943, 954 ff. (1998).

(5) *Id.*, at 957.

(6) Risse-Kappen, Thomas, *Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union*, 34 JOURNAL OF COMMON MARKET STUDIES 53 (1996) (And the plentiful citations that followed).

(7) Böös, Mathias and Wiener, Antje, *Borders of Global Politics: The Perspective of Citizenship*, 14 (1997)

(Unpublished manuscript prepared for presentation at the International Studies Association convention, 19-22 March 1997, Toronto, Canada – on file with the authors Heidelberg/Sussex/Hanover).

(8) See, Shaw, Jo and Wiener, Antje, *The Paradox of the 'European' Polity* 10/99 Harvard Jean Monnet Working Papers (1999) at <http://www.jeanmonnetprogram.org/papers/99/991001.html>; Zürn, Michael, *Democratic Governance Beyond the Nation-State: The EU and Other International Institutions* 6 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 183-221 (2000).

(9) See, e.g., Albert, Mathias, Brock, Lothar and Wolf, Klaus Dieter eds., *CIVILIZING WORLD SOCIETY*. (2000); Joerges, Christian and Sand, Inger-Johanne, *CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE* (2001), <http://www.iue.it/LAW/joerges/transnationalism/project.htm>.

(10) See, e.g., Scott, Joanne, *On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO*, <http://www.jeanmonnetprogram.org/papers/99/990301.html>.

(11) Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht Heidelberg Tätigkeitsbericht für das Jahr 2000 http://www.virtual-institute.de/en/Taet2000/etat00_78.cfm.

(12) Weiler, *supra* note 1.

(13) See (14) Pernice, Ingolf, *Die Notwendigkeit institutioneller Reformen. Aussichten für die Regierungskonferenz* 55

INTERNATIONALE POLITIK 11, 15 (2000).

(15) See, McKenna 1995, p. xv.

(16) For a process-oriented approach to EU constitutionalization, see, Walker, Neil, *The White Paper in Constitutional Context*, Symposium on the Commission's White Paper (Joerges, Ch., Y. Meny and J.H.H. Weiler eds., 2001) <http://www.jeanmonnetprogram.org/papers/01/011001.html>.

(17) March and Olson, at 954.

(18) Weber, Albrecht, *Grundrechte in den EU-Mitgliedstaaten im Vergleich*, in CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION 13 (Bremische Bürgerschaft ed. 2000) (This and all following translations from German original texts by the author).

(19) Weiler, at 221.

(20) Stone 1995, 1, RSC Working Paper, c.f. Weiler 1999, 221.

(21) See, for example, Risse, Thomas, Stephen C. Ropp, and Kathryn Sikkink, eds. 1999. *The Power of Human Rights. International Norms and Domestic Change*. Cambridge: Cambridge UP. Chayes, Abram and Antonia Handler Chayes. 1995. *The New Sovereignty. Compliance with International Regulatory Regimes*. Cambridge and London: Harvard University Press. Koh, Harold Hongju. 1997. *Why do Nations Obey International Law?* Review Essay. *The Yale Law Journals* 106: 2599-2659. Zürn, M. and D. Wolf. 1999. *European law and international regimes: the features of law beyond the nation state*. *European Law Journal* 5, no. 3: 272-292.

(22) Finnemore, Martha. 2000. *Are Legal Norms Distinctive?* *Journal of International Law & Politics* 32: 699-705.

Checkel, Jeffrey T. 2001. *Why Comply? Social Norms Learning and European Identity Change*. *International Organization* 55, no. 3: 553-588. Risse, Thomas. 2000. *Let's Argue! Communicative Action in World Politics*. *International Organization* 54, no. 1: 1-39.

(23) See Goldstein, Kahler, Keohane and Slaughter, Eds. *Legalization in World Politics*, *International Organization* 54, 3 (Special Issue) 2000, for a critical evaluation see Finnemore, Martha and Stephen J. Toope. 2001. *Alternatives to Legalization: Richer Views of Law and Politics*. *International Organization* 55, no. 3: 743-758.

(24) Defining the concept of constitutionalization is subject to different views among scholars. As Deborah Cass writes with a view to its application in world trade disputes *"(W)hat is immediately striking ... is the ambiguity of the term. Some scholars use it to mean the establishment of a set of institutions, rules and practices to administer, implement and operate the multilateral trading system. Others include within the term not only institutions, rules and practices, but also, importantly, rights, including a right to trade, which ultimately could be relied upon by individuals within states. Still others read constitutionalization (in other supranational trading contexts) to include a kind of 'spirit' without which there can be no durable social contract within the emergent constitutional community."* See: Cass 2001 op. cit. at page: <http://www.ejil.org/journal/Vol12/No1/art1-01.html#TopOfPage>

(25) *The Irish Times*, Thursday 1 November 2001, *"Survey finds Irish 'more confused' about EU"*, Mark Hennessy, <http://www.ireland.com/newspaper/ireland/2001/1101/hom19.htm>

(26) *Presidency Conclusions*, Cologne European Council 3-4 June 1999, http://europa.eu.int/comm/justice_home/unit/charte/en/mandates.html (emphasis added).

(27) *European Council Decision on drawing up of a Charter of Fundamental Rights of the European Union* (emphasis added, AW)

(28) *Commission Communication on the Charter of Fundamental Rights of the European Union*, COM(2000) 559 final, Brussels 13 September 2000, http://europa.eu.int/comm/justice_home/unit/charte/pdf/com2000-559_en.pdf.

(29) *Commission Communication on the Legal Nature of the Charter of Fundamental Rights of the European Union*, COM(2000) 644 final, Brussels 11 October 2000, http://europa.eu.int/comm/justice_home/unit/charte/pdf/com2000-644_en.pdf.

(30) http://europa.eu.int/comm/justice_home/unit/charte/en/communications.html.

(31) COM(2000) 644 final, Brussels 11 October 2000, p. 2.

(32) See: Wiener, Antje. 2001. *Zur Verfassungspolitik jenseits des Staates: Die Vermittlung von Bedeutung am Beispiel der Unionsbürgerschaft*. *Zeitschrift für Internationale Beziehungen* 8, no. 1: 73-104. Williamson, Andrew. 2000. *Enlargement of the Union and human rights conditionality: a policy of distinction?* *European Law Review* 25: 601-617. Witte, Bruno de. 1998. *Ethnic Minorities, the European Union and its Enlargement*. In *Reflection Group on Long-Term Implications of EU Enlargement: The Nature of the New Border*. European University Institute, Florence. Wiener, Antje and Theresa Wobbe, 2001, *Norm Resonance in the Process of Eastern Enlargement*, unpubl. Ms Belfast/Erfurt. Schweltnus, Guido. 2001. *Much ado about nothing? Minority Protection and the EU Charter of Fundamental Rights*, ECPR Meetings, 6-10 September 2001, Kent, Canterbury.

(33) For a brilliant elaboration of a sceptical position about such symbolic rights policy see Haltern, Ulrich, 2001, *Europe Goes Camper, Constitutionalism Webpapers ConWEB No. 3/2001*, <http://www.qub.ac.uk/ies/onlinepapers/const.html>.

(34) Eriksson, 2001, <http://www.jeanmonnetprogram.org/papers/01/011201-10.html#TopOfPage>, see also: Pernice, Ingolf. 1999. *Vertragsrevision oder Europäische Verfassungsgebung?* *Frankfurter Allgemeine Zeitung*, Rubrik *"Die Gegenwart"*, 7. Juli 1999, S. 7. Also, verbal intervention at the workshop on European Governance, Heinrich Böll Foundation, Berlin 14 October 2001.

(35) *The Charter has no legal standing, and most of the included rights have long been integrated in the various European polities. The rights proclaimed in the Charter are legally protected by national constitutions of each member*

state, by the European Convention of Human Rights, by the UN Declaration of Human Rights, and, indeed, by the Treaty of European Union (TEU).

(36) See various suggestions for conceptual distinctions of this model as "multi-level constitutionalism" Pernice, Ingolf. 1999. *Vertragsrevision oder Europäische Verfassungsgebung?* *Frankfurter Allgemeine Zeitung*, Rubrik 'Die Gegenwart', 7. Juli 1999, S. 7. Bogdandy, Armin von. 1999. *The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System.* *Common Market Law Review* 36, no. 5: 887-910.

(37) For a discussion of 'good' governance, see in particular Kohler-Koch, Beate. 1998. *Regieren in entgrenzten Räumen.* *Politische Vierteljahresschrift* 29, no. special issue. Jachtenfuchs, Markus. 1997. *Democracy and Governance in the European Union.* *European Integration online Papers (EIoP)*, <http://eiop.or.at/eiop/texte/1997-002a.htm> 1, no. 002. Kohler-Koch, Beate. 1999. *Europe in Search of Legitimate Governance.* *ARENA Working Papers* WP 99/27. Zürn, Michael. 2000. *Democratic Governance Beyond the Nation-State: The EU and Other International Institutions.* *European Journal of International Relations* 6, no. 2: 183-221.

(38) Wiener 2001, *op. cit.* p. 74.