Chapter II
The EU Constitution Viewed in the Light of
Fundamental Constitutional Theories

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Introduction

This paper is concerned with some fundamental constitutional theories applied to the constitutional law of the European Union. The theories will be viewed from the perspective of political philosophy and it will be a citizen’s perspective of these issues, rather than a public international law or an internal community law perspective that will be taken. In particular the paper will look closer at two important theories that, so I will claim, can be identified in the constitution of the European Union. They are the theories of popular sovereignty and constitutionalism respectively. These theories have been chosen for two reasons: Firstly they make up the core elements of what we might call the Western theory of political society in general. Secondly they reveal rather interesting differences when we apply them to the European Union. The paper

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will set out with a brief introduction of the problem. After that, the two theories will be looked at more in detail and I will finish by trying to apply them or make sense of them in the context of the European Union.

1. The Debate on the Constitutional Treaty and the Relation with Fundamental Constitutional Theories

Currently the issue of the European Constitution is both widely, and wildly, debated as a result of the European Convention presenting its Draft Treaty establishing the constitution for Europe (the Constitutional Treaty) which was in turn agreed upon at the meeting of the European Council on 17–18 June 2004 and finally adopted at the meeting of the European Council on 29 October 2004. The Constitutional Treaty has begun its process of ratification in the 25 Member States in accordance with article 48 of the TEU in 2005, but as we know this process is now at a halt.

At this moment the future of the Constitutional Treaty is quite uncertain. The Constitutional Treaty was rejected in referendums in both France and the Netherlands (on 29 May and 1 June 2005 respectively) and several Member States are, in the light of these results, pondering whether to proceed with the ratification or not (some 13 Member States have already ratified the Constitutional Treaty). Nevertheless, the Constitutional Treaty is the final product of an extraordinary process of negotiations and deliberation on constitutional issues of the European Union, first in the context of the European Convention (established after the meeting of the European Council at Laeken in December 2001) and subsequently between the Member States within the European Council. It is the most comprehensive attempt yet at simplifying the present Treaty structure and addressing the constitutional features of the European Union. Consequently, there are still good reasons for taking a closer look at the content and implications of the Constitutional Treaty even if it is not, in the end, adopted in its present form.

In spite of the sometimes heated debate over the Constitutional Treaty it remains a curious fact, that it has been seen as anything from the emerging European super-state, the Leviathan reborn at the European level, to something of a weakening blow to the European Union project of today, something that will actually limit its powers. The debate has most likely been stirred by the use, for the first time, in an official context of the “C-word” – the Constitution. The European Union will now have a constitution just like a state has a constitution, and so, the argument goes, that would be something competing with the traditional constitutions of the Member States. Should the European Union be furnished with a Constitution in the same manner as a State that will lead us straight to the core question that haunts practically every discussion of the constitutional law of the European Union: that of the so-called