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Article Title: From Myth to Fiction: Why a Legalist-Constructivist Rescue of European Constitutional Ordering Fails

Year of publication: 2009

Link to published article:

<http://dx.doi.org/10.1093/ojls/gqp014>

Publisher statement: This is a pre-copy-editing, author-produced PDF of an article accepted for publication in *Oxford Journal of Legal Studies* following peer review. The definitive publisher-authenticated version

Kuo, M. –S. (2009), *From Myth to Fiction: Why a Legalist-Constructivist Rescue of European Constitutional Ordering Fails*.

*Oxford Journal of Legal Studies*, **29**(3), 579-602 is available online at: <http://dx.doi.org/10.1093/ojls/gqp014>

Draft not for citation.

For the final version, see OXFORD JOURNAL OF LEGAL STUDIES, Vol. 29, No. 3 (2009), pp. 579–602.

**FROM MYTH TO FICTION:  
WHY A LEGALIST-CONSTRUCTIVIST RESCUE OF  
EUROPEAN CONSTITUTIONAL ORDERING FAILS\***

**MING-SUNG KUO<sup>†</sup>**

ABSTRACT

*The defeat of the Constitutional Treaty by French and Dutch voters in 2005 and the following stalemate of the Lisbon Treaty have sparked a soul-searching process for European constitutional scholarship. Among the numerous academic efforts devoted to contemplating the future of European constitution, Michelle Everson and Julia Eisner's *The Making of a European Constitution: Judges and Law Beyond Constitutive Power* deserves a close look. Everson and Eisner argue for a postconstituent view of European constitutionalization, which they call 'Rechtsverfassungsrecht'. Departing from the myth of the constituent power, they interpret the development of a European constitution as a self-creating process by which the ordinary legal system gives itself a set of core values and thereby remakes itself into a constitutional order. Moreover, against the criticisms of juridification, they defend this lawyer-centred process of European constitutionalization as incorporating politics into the daily operation of the legal*

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\* A review of M Everson and J Eisner, *The Making of a European Constitution: Judges and Law Beyond Constitutive Power* (Routledge-Cavendish, Abingdon 2007).

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*system. Engaging with Everson and Eisner’s argumentation, I argue that their account of European constitutional development does not so much put out a realist theory of the EU constitutionalization as sets out a realist academic lawyering for the next round of European constitutional politics, which is shared among European constitutional scholars. Contrasting this community-based legal profession in Europe with the situation of epistemic pluralism in American jurisprudence, in this article I observe that a lawyer-centred European constitutional theory as Everson and Eisner’s book illustrates is premised on an inherited consensus that has held a European legal profession together. However, this lawyer-centred account of European constitutionalization presumes either the projection of a professional community onto a Europe-wide civic culture or the self-appointment of legal professionals as the fiduciary of the citizenry. Each is a fiction, however. This fictional character of the legalist-constructivist strategy to European constitutional politics is the underlying cause of the dilemma facing European constitutional ordering.*

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## 1. INTRODUCTION

Since Eric Stein's groundbreaking work on the legal integration of the European Communities<sup>1</sup> and Joseph Weiler's theorization of how a constitution of Europe has resulted from the jurisprudence of the European Court of Justice (ECJ),<sup>2</sup> a great many publications have been devoted to shedding theoretical light on this constitutional avant-gardism in Europe.<sup>3</sup> The central concern shared among these works is how to lend theoretical support for this European phenomenon: that a constitutional order emerges without the making of a constitution.<sup>4</sup> However, this legalist-constructivist approach to lay theoretical foundations for the development of the European constitutional order has also been criticized as exemplary of the tendency towards 'juridification' of European constitutional politics.<sup>5</sup>

In response to the growing distance between European citizens and European constitutional development as a result of juridification, there arose calls for 'politicizing' the process of European constitutional development, aiming to reconnect the European constitutional order with European citizens by way of politics.<sup>6</sup> Nevertheless, with the rejection of the draft Constitutional Treaty by French and Dutch voters in consecutive

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<sup>1</sup> E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 AJIL 1-27.

<sup>2</sup> J.H.H. Weiler, 'The Transformation of Europe', 100 Yale LJ 2403-83 (1991).

<sup>3</sup> See e.g. A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, Oxford 2005); R Bray (ed), K Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union* (2nd revd edn Sweet & Maxwell, London 2004).

<sup>4</sup> See generally N. Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 OJLS 581-601.

<sup>5</sup> See J. Přibáň, 'The Juridification of Identity, Its Limitations and the Search of EU Democratic Politics', (2009) 16 Constellations 44-58. For an introduction to the constructivist position on the EU legal order, see J. Shaw, 'Postnational Constitutionalism in the European Union' (1999) 6 J Eur Public Policy 579-97, 579-82.

<sup>6</sup> This resulted in the Laeken Declaration in 2001, leading up to the convening of the Convention on the Future of Europe (the Convention) in 2002, and finally to the creation of the Treaty Establishing a Constitution for Europe (the Constitutional Treaty) in 2004. See D Chalmers and A Tomkins, *European Union Public Law* (CUP, Cambridge 2007) 59, 70-73. See also G. de Búrca, 'The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?', (2004) 61 Washington and Lee L

referenda in 2005, this political turn seems to have led to nowhere.<sup>7</sup> Against this backdrop, Michelle Everson and Julia Eisner's *The Making of a European Constitution: Judges and Law Beyond Constitutive Power*,<sup>8</sup> among the numerous scholarly efforts,<sup>9</sup> deserves a close look.

Confronted with the rejection of the Constitutional Treaty by French and Dutch voters when their book was completed,<sup>10</sup> Everson, in collaboration with her co-author and research assistant in empirical studies, Eisner, attempts to provide a systematic theory of European constitutionalism since its origin in the 1960s until the end of the Constitutional Treaty in 2005. Perusing the ECJ jurisprudence, she observes that a nonconstituent, legalistic version of constitutional ordering and constitutionalism (*Rechtsverfassungsrecht*) has evolved from this judicial process.<sup>11</sup> The constitution of Europe driven by the ECJ is based on a self-creating process of constitutionalization, which is detached from traditional constitution making at a constituent moment.<sup>12</sup> She argues that the creation of the Constitutional Treaty reflected the ambition of political elites to rebuild the European constitutional order on the 'myth' of making a constitution through the exercise of the constituent (or constitutive) power (*pouvoir constituant*).<sup>13</sup>

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Rev 555-83.

<sup>7</sup> See Chalmers and Tomkins, (n 6) 73.

<sup>8</sup> M Everson and J Eisner, *The Making of a European Constitution: Judges and Law Beyond Constitutive Power* (Routledge-Cavendish, Abingdon 2007).

<sup>9</sup> See e.g. M O'Neill, *The Struggle for the European Constitution: A Past and Future History* (Routledge, Oxford 2009); S Baroncelli, C Spagnolo and SL Talani (eds), *Back to Maastricht: Obstacles to Constitutional Reform within the EU Treaty (1991-2007)* (Cambridge Scholars Publishing, Newcastle upon Tyne 2008); F Laursen (ed), *The Rise and Fall of the EU's Constitutional Treaty* (Martinus Nijhoff, Dordrecht 2008).

<sup>10</sup> Everson and Eisner, (n 8) 1.

<sup>11</sup> *Ibid*, 22-26, 214-28.

<sup>12</sup> See U.K. Preuss, 'Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution', (1993) 14 *Cardozo L Rev* 639-90. For further reflections on the idea of constituent power, see generally M Loughlin and N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP, Oxford 2007).

<sup>13</sup> (n 8) 1-2, 10-13.

According to Everson, the departure from the pre-Convention path of constitutionalization explains why the Constitutional Treaty failed.<sup>14</sup> However, overshadowed by the uncertain future of the Lisbon Treaty after the Irish referendum in 2008,<sup>15</sup> the ‘return to the pre-Convention’ strategy,<sup>16</sup> which centres on judicial constitutionalization plus technocratic treaty add-ons,<sup>17</sup> seems to face its own challenges too. A critical engagement with Everson’s arguments in this book may shed light on the state of the scholarship on European constitutional law and the future of European constitutionalism.

In this review article, I argue that Everson’s legalistic attempt to ‘constitutionalize’ the European legal order in the place of the citizenry’s constituent political action illustrates the general tendency towards juridification among scholars concerned about the European constitutional project, explaining why current strategies of European constitutional politics have hit the wall. I suggest that the faith in the neutrality and autonomy of the law, which lies at the core of Everson’s argument, rests on a shared epistemic form that holds the European legal professional community together. To project a legalistic constitutional order onto the whole European citizenry, however, would assume the centrality of the legal

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<sup>14</sup> Ibid, 2, 14-19.

<sup>15</sup> The Irish people rejected the Lisbon Treaty and put the reform of the EU institutions in limbo by a margin of 53.4 % to 46.6 %. See S. Lyall and S. Castle, ‘Ireland Derails a Bid to Recast Europe’s Rule’ *New York Times* (New York 14 June 2008) A1. For a critical reflection on the depoliticized reactions from European political leadership to the Irish referendum on the Lisbon Treaty, see G. de Búrca, ‘The Lisbon Treaty No-Vote: An Irish Problem or a European Problem?’ (2009) University College Dublin Law Research Paper No. 03/2009 <<http://ssrn.com/abstract=1359042>> accessed 09 June 2009.

<sup>16</sup> Cf. I. Pernice, ‘Salvaging the Constitution for Europe: A Reform Treaty for the EU’ (2007) WHI Paper-4/07 (Walter-Hallstein Institut für Europäisches Verfassungsrecht, Humboldt University) <<http://www.whi-berlin.de/documents/whi-paper0407.pdf>> accessed 09 June 2009 (noting ‘a more pragmatic approach, a purely technocratic improvement of the primary law of the EU *by simply amending the existing Founding Treaties*’ as ‘the ‘European’ way of salvaging the ‘Constitution for Europe’ after the 2005 defeat of the Constitutional Treaty) (emphasis added). For a critique of the pre-Convention legalistic, technocratic process of constitutionalization of the EU, see M. Shapiro, ‘Comparative Law and Comparative Politics’, (1980) 53 *Southern California L Rev* 537-42.

profession in the political community. I argue that Everson's assumption is fictional and symptomatic of the attempts of academic lawyers to mobilize in order to lend theoretical support to the changing, elusive European constitutional project through innovative theories.<sup>18</sup> To do justice to the constitutionalization of the European legal order, Everson and her colleagues need to tackle squarely the role of constitutional politics in the making of a constitutional order, which traditional constitutional dualists aim but fail to address.<sup>19</sup> On the contrary, as Everson and Eisner's book shows, the legalist-constructivist strategy of European constitutional development fails for its slipping from the dualist myth to the community fiction that they hold dear.

In addition to an Introduction, this article consists of three parts. Part 2 describes the positions that Everson supports and opposes, and argues that her theory suggests a postconstituent view of constitutional ordering. Part 3 constitutes the core of this article. An interlocution with Everson shows that her assumption of legal autonomy belies her methodological claim that she makes the case for a postconstituent European constitutionalism by employing empirical studies and interpreting the ECJ jurisprudence in light of critical legal scholarship. Although I agree with Everson on her diagnosis of the integrity of the legal profession in Europe, I argue that her aspirations for the professional community as the political foundations of the European constitutional order are only feasible in the lawyers' dream world. Projecting the legal professional community as one with which citizens will come to identify is fictional. In Part 4, I conclude that Everson's

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<sup>17</sup> See de Búrca, (n 6) 556, 557-58.

<sup>18</sup> Cf. J.H.H. Weiler, 'Thinking About Rethinking' (2005) 1 Eur Constitutional L Rev 415-16 (expressing a sceptical attitude toward the European Commission's mobilization of legal scholars to extend theoretical support to European constitutional development).

<sup>19</sup> I will discuss the position of constitutional dualists later.

postconstituent view of constitutional ordering gives short shrift to the central question concerning the role of politics in the making of a constitutional order and thus fails to breathe new life into the listless European constitutional ordering.

## **2. DEMYTHIFYING CONSTITUTIONAL SETTLEMENT: TOWARDS A POSTCONSTITUENT CONSTITUTION**

The traditional view of making a constitution through the exercise of the constituent power at an exceptional time lies at the centre of Everson's critique. After introducing this object of criticism, I proceed to discuss her proposal for a lawyer-centred, constructivist view of the making of a constitutional order and explain why her theory points to a postconstituent view of the constitution.<sup>20</sup>

### ***A. Against: Everson's Deconstruction of the Constitutional Myth of a Sovereign Political Community***

The distinction between the constituent power and the constituted power (*pouvoir constitué*) has organized the constitutional tradition established by the American and French Revolutions since the late eighteenth century.<sup>21</sup> According to this dualist view of constitutional democracy, the legal order under a constitutional regime can be divided into two categories: the constitution (including the capital-C constitution and constitutional law comprising judicial interpretations and other constitutional practices)<sup>22</sup> and the

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<sup>20</sup> For another postconstituent view of European constitutionalism, see N. Walker, 'Post-Constituent Constitutionalism? The Case of the European Union' in Loughlin and Walker, (n 12).

<sup>21</sup> See Preuss, (n 12).

<sup>22</sup> See WF Harris II, *The Interpretable Constitution* (Johns Hopkins UP, Baltimore 1993) 1 fn.2, 89-93, 100-13.

nonconstitutional, ordinary body of law.<sup>23</sup> The legitimacy of the constitution rests on popular sovereignty, which embodies and extends its political will in a constitution through the exercise of the constituent power by ‘We the People’.<sup>24</sup> As regards the ordinary body of law and the power to enforce it following the making of a constitution, they are ‘constituted’ in nature, as opposed to the constituent power. The legitimacy of the nonconstitutional legal order is a matter of constitutionality: the exercise of the constituted powers is legitimate inasmuch as it is in consonance with the constitution.<sup>25</sup> Although there are variations on how the distinction is to be made between the constitution and the nonconstitutional laws under a constitutional order, that distinction is embedded in constitutional theories.<sup>26</sup> This dualist structure of the legitimacy of constitutional order is what Everson calls ‘constitutional settlement’.<sup>27</sup>

According to Everson, what is characteristic of this dualist understanding is the assumption of closeness in constitutional settlement.<sup>28</sup> Under the assumption that the legitimacy of the constituted legal system hinges on its constitutionality, the scope and content of the constitution must be identifiable through constitutional interpretation so that the nonconstitutional laws can be evaluated according to the criteria provided for in the constitution. In this way, notes Everson, this dualist constitutional settlement is constructed around the idea of ‘logical perfectionism’.<sup>29</sup>

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<sup>23</sup> See F.I. Michelman, ‘Constitutional Legitimation for Political Acts’ (2003) 66 MLR 1-15, 9.

<sup>24</sup> See Preuss, (n 12). For further discussion on the concept of constitutional legitimacy attached to ‘We the People,’ see M.-S. Kuo, ‘Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman’s Presentist Critique of Constitutional Authorship’ (2009) 7 Int’l J Constitutional L (forthcoming).

<sup>25</sup> See Michelman, (n 23) 8-9.

<sup>26</sup> *Ibid.* See also J.M. Balkin, ‘Respect-Worthy: Frank Michelman and the Legitimate Constitution’, (2004) 39 Tulsa L Rev 485-509, 486-88.

<sup>27</sup> (n 8) 13-19.

<sup>28</sup> Cf. *Ibid* 227.

<sup>29</sup> *Ibid.* 17.

However, Everson makes a twofold critique of this dualist constitutional settlement. First, she questions the fictional character of the ‘logically coherent (and emotionally appealing) institutional edifice’ that has been built around the constitutional settlement.<sup>30</sup> Facing growing social complexity and value pluralism, all attempts to ‘settle’ once and for all the politically contested issues of constitutional rights regarding the relationship between individuals and the government and that among private individuals through ‘the final act of the ‘constituting’ of the polity’ are necessarily ‘reductionist’.<sup>31</sup> To maintain the semblance of the finality of constitutional settlement, constitutional dualists need to assume an inexhaustible source of meaning in the constitutional order to which myriad interpretations of constitutional texts can be attributed. Popular sovereignty, the assumed holder of the constituent power, or in Everson’s words, a ‘national constitutional identity’,<sup>32</sup> not only enables the constitution to function as the constant reference point for the legal system but also provides the required comprehensiveness and closeness to the constitutional order.<sup>33</sup> For this reason, constitutions settled on the constituent power of popular sovereignty are tantamount to ‘totalizing constitutional myths’.<sup>34</sup>

In addition to the flawed presumption of logical perfectionism in the dualist constitutional settlement, Everson pins the second prong of her critique on the dissonance between the structure of constitutional settlement and the evolution of the European constitution. Siding with her numerous colleagues in European law and constitutionalism, Everson holds firm to the proposition that a specific form of constitutionalism for Europe

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<sup>30</sup> Ibid. 16.

<sup>31</sup> Ibid. 214, 16

<sup>32</sup> Ibid. 14.

<sup>33</sup> See also B. Ackerman, ‘2006 Oliver Wendell Holmes Lectures: The Living Constitution’, (2007) 120 Harvard L Rev 1737-,1812 1756.

<sup>34</sup> Everson and Eisner, (n 8) 10.

has materialized in the decades-long process of European integration.<sup>35</sup> On this view, whether the EU has a constitution is a moot issue. Instead, the question is how the dualist theory of constitutional settlement would account for the development of the European constitution. Corresponding to the theories of constitutionalization, which contend that a separate European legal order has not only materialized, overlaying the national legal systems of the EU member states, but has also taken on a constitutional character through the transformative decisions of the ECJ,<sup>36</sup> Everson situates the European constitutional order outside the framework of constitutional settlement.<sup>37</sup>

On the one hand, in contradiction with traditional international law theories, Everson notes that the process of constitutionalization took place beyond the imagination of the ‘masters’ of the European integration when the member-states signed a series of formative treaties of the EU.<sup>38</sup> Thus even if, for the sake of argument, the state masters of the EU legal order are considered the holders of the Europe-wide constituent power, the existing European constitutional order itself cannot be attributed to them.<sup>39</sup> On the other hand, Everson agrees with sceptics of the idea of the European constitution that a European demos is a dream yet to come true.<sup>40</sup> Without a demos, the constituent power to make a constitution does not exist. Taken together, the dualist structure of constitutional settlement, which Everson associates with traditional constitutional theories, fails to account for the development of the existing European constitutional order.

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<sup>35</sup> Ibid. 2.

<sup>36</sup> See Weiler, (n 2). See also M.P. Maduro, ‘The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism’, (2005) 3 Int’l J Constitutional L 332-56.

<sup>37</sup> (n 8) 16-22.

<sup>38</sup> Ibid. 49.

<sup>39</sup> Ibid. 50-51.

<sup>40</sup> Cf. Ibid. 93.

## **B. For: Everson's Legalist-Constructivist Theorization of the European Legal Ordering**

Departing from the dualist structure of constitutional settlement, Everson reinterprets the origin, evolution, and prospect of the European constitutional order in light of the notion of 'Self-constitutionalizing law' (*Rechtsverfassungsrecht*).<sup>41</sup> At the core of this virtually untranslatable concept is the self-creating process by which the ordinary legal system gives itself a set of core values and distinguishes among the values emanating from judicial decisions in a hierarchical order, remaking itself into a constitutional order.<sup>42</sup> This sets Everson's theory of the constitutionalization of the European legal order apart from her academic colleagues.

What is characteristic of Everson's '*Rechtsverfassungsrecht*' is a relationship of immanence between law and society.<sup>43</sup> Against legal classicism,<sup>44</sup> she agrees with the critique made by legal realists that it is a legal fiction that the law as a normative system stands independently of, but governs, social reality. Rather, the law must respond to the 'real-world' needs from society.<sup>45</sup> However, Everson emphasizes the 'autonomy' of the legal system as a normative order.<sup>46</sup> She not only disputes the critical view that equates law with politics but also defends the law against colonization by other disciplines such as

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<sup>41</sup> Everson attributes *Rechtsverfassungsrecht* to German legal scholar Rudolf Wiethölter. Ibid. 22-26. As for the translation of *Rechtsverfassungsrecht*, Everson notes, 'Sadly another phrase that is impossible to render properly in English'. Ibid. 38 n 46. Nevertheless, after regarding it as 'the sobriquet,' she refers to *Rechtsverfassungsrecht* as 'self-constitutionalising [sic]/ socially constitutive law'. Ibid. 25.

<sup>42</sup> Ibid. 25-26.

<sup>43</sup> Ibid. 75, 114. For the relationship of immanence between law and society, see generally G. Pearson and M. Salter, 'Getting Public Law Back into a Critical Condition: The Rule of Law as Source of Immanent Critique' (1999) 8 J Social and Legal Studies 483-508.

<sup>44</sup> See generally T.C. Grey, 'Langdell's Orthodoxy', (1983) 45 University of Pittsburg L Rev 1-53. For a perceptive comparison between American and German legal classicism, see MW Reimann, 'Holmes's Common Law and German Legal Science' in RW Gordon (ed), *The Legacy of Oliver Wendell Holmes, Jr.* (Stanford UP, Stanford 1992).

<sup>45</sup> (n 8) 9-12.

the social sciences.<sup>47</sup> Law is not the mirror of politics or any particular academic disciplines. Law reacts with, but stands above, political actions; legal reasoning concerns more than scientific assessments.

Everson situates the contention between legal classicism and legal realism within the dilemma at the heart of Max Weber's legal sociology: formalism vis-à-vis materialism. As Everson paraphrases, in Weber's view, adherence to formal rationality in the law results in the gap between law and society, undermining the faith in the law, while bringing substantive or material rationality to legal reasoning would impair the neutrality and autonomy of the legal system, placing legal legitimation in jeopardy.<sup>48</sup> Facing this seemingly irreconcilable dilemma, Everson notes, Weber finally chose legal formalism over legal materialism.<sup>49</sup> Nevertheless, Weber's choice did not resolve the fundamental contention. Rather, Weber's formalist view of legal rationality contributed to the disconnection of legal norms from real-world facts, exposing the law to the ceaseless attacks from legal realists and their successors.<sup>50</sup> Bearing Weber's dilemma and his failed solution in mind, Everson emphatically aims to re-establish the legitimacy of the law by bridging the gap between the law and social reality and maintaining the legal autonomy at the same time.

Borrowing sociological theories of law from Eugen Ehrlich, Herman Heller, and Wiethölter among other German-speaking scholars,<sup>51</sup> Everson argues that the norm is immanent in the dynamics of social relations that call for the legal system to adjudicate.<sup>52</sup> The dynamics of social interaction do not suggest a lawless world that waits for legal

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<sup>46</sup> Ibid. 12.

<sup>47</sup> Ibid. 41-44.

<sup>48</sup> Ibid. 23, 61-62.

<sup>49</sup> Ibid. 54, 62.

<sup>50</sup> Ibid. 24-25.

<sup>51</sup> Ibid. 22-26, 62.

intervention. Norms that govern behaviour in social relations can be discovered in the interactions among social actors.<sup>53</sup> From the legal sociological point of view, Weber's dilemma is resolved and the legitimacy of the law is maintained inasmuch as the law responds to real-world needs by grounding its called-for answers in the extralegal norms forming in the dynamics of interactions among social actors.<sup>54</sup>

Seen in this light, the relationship between the legal system and social reality becomes immanent. Moreover, the issue of whether a judicial decision looks formalist or is imbued with substantive rationality is beside the point. What matters is whether the law responds effectively to real-world needs. A legal opinion that is constructed around legal formalism may be applaudable if it results in the effective resolution of the social issue that initially calls for intervention from the legal system.<sup>55</sup> Everson notes that the purpose of the legal system is to provide neutral norms to regulate social reality.<sup>56</sup> How to 'formalize' the normative rules derived from extralegal norms immanent in the dynamics of interactions among social actors through judicial decisions is different from the process of fact finding in laboratorial experiments of natural science or empirical studies of social science. Norm-giving by fact finding is legalistic and characteristic of Everson's treasured reflexive legal reasoning.<sup>57</sup> Alongside formalism and materialism, 'reflexivity' emerges as the third paradigm of the law that sits between facts and norms, shining light on the question that Weber failed to answer.<sup>58</sup>

In addition to her attempt to resolve the formalism vis-à-vis materialism debate,

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<sup>52</sup> Ibid. 75, 114.

<sup>53</sup> Ibid. 219-20.

<sup>54</sup> Ibid. 25-26.

<sup>55</sup> Ibid. 50-55.

<sup>56</sup> Ibid. 55, 60.

<sup>57</sup> Ibid. 43-44.

Everson tries to revolutionize the relationship between revolution and the legal order in order to redefine the democratic foundations of the European constitutional order. Instead of considering legal indeterminacy an exception and a challenge to the legal system, she welcomes it as the source of progress embedded in the law.<sup>59</sup> In contrast to the dualist view that revolution creates and stands apart from the constituted legal order, Everson embeds revolution in the day-to-day business of the legal order. She notes that under the dualist structure, revolution, which takes place at the exceptional constitutional moment outside the constituted order, is liable to degenerate into violence.<sup>60</sup> Considering the threat of violence in the dualist concept of revolution, she takes legal indeterminacy as the locus of legal self-renovation through constructive legal interpretation, thereby internalizing revolution into the daily, routine operation of the legal system.<sup>61</sup> On this view, revolution occurs in the progress that legal profession makes of legal indeterminacy through their innovative interpretations. Progressive legal interpretation takes the place of political revolution as the origin of Everson's '*Rechtsverfassungsrecht*'.<sup>62</sup>

As a result, Everson points out that in the doctrinal toolkit of legal formalism exist concepts that can turn legal indeterminacy to the advantage of progressive legal interpretation, enabling judicial decisions to take the place of the constituent power as the locus of (micro)revolutions.<sup>63</sup> By way of characterizing legal indeterminacy as the locus of internalized revolution, legal concepts such as proportionality, rationality, and subsidiarity are no longer considered challenges to the ECJ in the development of the European legal

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<sup>58</sup> Ibid. 12, 75.

<sup>59</sup> Ibid. 90.

<sup>60</sup> Ibid. 86, 221, 225.

<sup>61</sup> Ibid. 90-93.

<sup>62</sup> Ibid. 23, 90.

<sup>63</sup> Ibid. 86-87, 93.

order. Rather, principles of proportionality, rationality, and subsidiarity are regarded as the transformer for legal indeterminacy to function as the midwife of the ‘*Rechtsverfassungsrecht*’ in the paradigm of reflexive law.<sup>64</sup> Specifically, by way of fleshing out the legal procedural mechanisms inherent in the principles of proportionality, rationality, and subsidiarity with ‘systematic legal consensus’ and ‘deliberative democratic experimentalism,’ Everson suggests that the ECJ has not only constitutionalized but also given democracy to the European legal order.<sup>65</sup> While the constituent power is removed from the evolution of European constitutional ordering, through Everson’s theoretical lens, European constitutionalism is radicalized as the ‘*Rechtsverfassungsrecht*’ in the process of lawyerly daily renovation, dissolving the democracy deficit at the heart of the criticism of the EU.<sup>66</sup>

Taken together, Everson’s ambition is twofold. In contrast to other scholars who base their theorization of the European constitution on the court-centred idea of constitutionalization,<sup>67</sup> Everson’s notion of ‘*Rechtsverfassungsrecht*’ not only provides a theoretical account of the evolution of the European constitutional order beyond the dualist model but also aims to reconstruct the function of law by rebuilding the link between law and society on the concept of reflexivity. On the other hand, she sets herself apart from other legal scholars in the reflexive paradigm by embedding legal reflexivity in the process of constitutionalization in the EU.<sup>68</sup> In her account of European constitutional ordering, legal reflexivity is more than a general proposition of how the law relates to the real world.

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<sup>64</sup> Ibid. 178-80, 220-23.

<sup>65</sup> Ibid. 178-89.

<sup>66</sup> Ibid. 220-24.

<sup>67</sup> See e.g. Stein, (n 1); Weiler, (n 2); Maduro, (n 36).

<sup>68</sup> See e.g. P. Capps and H.P. Olsen, ‘Legal Autonomy and Reflexive Rationality in Complex Societies’ (2002) 11 J Social and Legal Studies 547-67; G. Teubner, ‘Substantive and Reflexive Elements in Modern

To assess whether the ECJ jurisprudence corresponds to the paradigm of legal reflexivity, Everson revisits the ECJ jurisprudence concerning economic market issues and noneconomic, social cases,<sup>69</sup> looking in particular at the principle of institutional balance.<sup>70</sup> Instead of straightforwardly equating social responsiveness with democracy as her fellow legal reflexivists do,<sup>71</sup> she transposes democracy to the legal principles of proportionality, rationality, and subsidiarity, and then construes them in light of the notions that refer to social responsiveness such as democratic experimentalism.<sup>72</sup> By going through the twists and turns in the ECJ jurisprudence in these two areas with her constructivist insight, Everson maps out the legalistic but democratic process of the constitutionalization of the EU legal order under the guidance of legal reflexivity.

### **3. BETWEEN ARGUMENTATION AND FICTION: WELCOME TO THE LAWYERS' DREAM WORLD**

While Everson claims to base her theoretical account of the constitutionalization of the European legal order on the perceptive inputs from critical legal theory,<sup>73</sup> in the last analysis her argumentation turns out to be closer to strategic lawyering than theory building. Moreover, Everson's tendency to turn academic argumentation into part of European lawyerly politics is characteristic of contemporary legal scholarship on European constitutional ordering. In this Part, I first analyze how Everson's argumentation figures in relation to legal realism and its successor critical legal studies (CLS) to show her inclination

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Law', (1983) 17 *Law and Society Rev* 239-85.

<sup>69</sup> (n 8) Ch 2.

<sup>70</sup> *Ibid.* Ch 5.

<sup>71</sup> See Teubner, (n 68).

<sup>72</sup> (n 8) 178-89. See also M.C. Dorf and C.F. Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia L Rev* 267-473.

<sup>73</sup> Cf. (n 8) i, 46-48.

toward strategic lawyering. I then explore whether this legalist-constructivist academic lawyering in relation to European constitutional politics evokes another legal fiction of a harmonious, if not homogeneous, legal community. Resting her theory on a fictional community not only undoes that theory but also reveals the weakest point of the legalist-constructivist strategy regarding the consolidation of European constitutionalism.

### ***A. Interlocuting with Everson: Legal Realism or Realist Lawyering in the Guise of Empirical Studies***

Everson's unique approach to European constitutional ordering is reflected in the organization of her book. First, she lays out her thesis and general theory in Introduction and Chapter 1. Then she meticulously compares two contrasting subject matters in the ECJ jurisprudence: economic market cases and noneconomic, social cases in Chapter 2. In terms of the doctrinal discrepancy in these two fields, Everson argues that it reflects the ECJ's attempts to strike a balance between its multiple tasks.<sup>74</sup> To test this account, in Chapter 3 she explains the ECJ's oscillation as its progressive responses to the real-world needs, while in Chapter 4, she, aided by Eisner, switches the focus to an empirical study of the legal minds involved. Based on their structured interviews and questionnaire surveys, Everson and Eisner manage to establish that legal professionals tend to take refuge in legal formalism in the face of the challenges of legal indeterminacy to the legitimacy of the law.<sup>75</sup>

In the second half of the book, Everson begins by focusing on another subject matter in the ECJ's jurisprudence. In Chapter 5, she examines how, with the EU's institutional

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<sup>74</sup> In economic market cases, Everson argues that facilitating the establishment of a European internal market is the ECJ's central concern. In contrast, in the field of noneconomic, social affairs, the ECJ manages to control the impact of the expansive economic logic on the fabric of social security in the member states. *Ibid.* 63-77.

expansion, the principle of institutional balance comes closer to its domestic sibling, the separation of powers principle, the core of which is to protect individual freedom by limiting government powers.<sup>76</sup> Before concluding in Chapter 7, Everson, again in collaboration with Eisner, undertakes an empirical study in Chapter 6 of how legal professionals position themselves in relation to the principle of institutional balance. They note that lawyers and judges adopt the language of legal formalism to maintain the separation between law and politics.<sup>77</sup> Moreover, Everson and Eisner argue that in the guise of formalistic doctrines such as the principles of proportionality, rationality, and subsidiarity, an innovative reconnection between European law and democracy is to be found.<sup>78</sup> On this view, the ECJ has not only constitutionalized but also laid the democratic foundations for the European legal order.

At first blush, the organization reflects Everson's asserted approach. Putting the law and judicial decisions to the test of empirical study is expected to unveil the truth of the law that has been disguised by legal formalism.<sup>79</sup> In addition to their limited samples,<sup>80</sup> however, a closer look indicates that Everson's approach is not as critical or as realist as she claims. On the contrary, Everson and Eisner replace the veil of legal formalism with their own.

Claiming to substantiate their argument with empirical methodologies such as

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<sup>75</sup> Ibid. 105-17.

<sup>76</sup> Ibid. 125-31.

<sup>77</sup> Ibid. 186-90.

<sup>78</sup> Ibid. 178-79.

<sup>79</sup> Ibid. 97-98.

<sup>80</sup> The first prong of their empirical studies includes only five semi-structured interviews and 44 valid questionnaire samples out of the 166 original surveys they sent out. In addition, all their interviews and questionnaire surveys are targeted at British legal professionals. Ibid. 98. In their second prong of empirical studies, only 17 out of the 200 original questionnaires sent to the members of all the EU institutions and the members of the Convention were filled out and returned. Ibid. 196 n16.

questionnaire surveys and interviews,<sup>81</sup> Everson and Eisner do not seem to do justice to their empirical findings. For example, at one point where a Commission member stated that the principle of institutional balance is political in nature but takes a legal form and ‘the law [is seen] as subservient to politics’,<sup>82</sup> they comment ‘[l]aw is not necessarily ‘subservient’ to politics, or better stated, subservient to any individual political vision’, but without offering any counter empirical evidence.<sup>83</sup> The meanings of interviewees’ replies cannot be revealed without interpretation. Nevertheless, Everson and Eisner do not take these replies as empirical access to the reality of the law but instead treat them as anecdotal evidence to illustrate or contrast with their proposition. They not only selectively place emphasis on particular segments of the replies but even go to extremes to argue with and challenge the interviewees in their interpretations.<sup>84</sup>

What makes their empirical work more awkward is their tendency to conjecture about interviewees’ laughter or intonation and then (re)interpret interviewees’ responses in light of those attributed meanings. Take the above-mentioned interview again. The interview recorded by Everson and Eisner is annotated with an emphasis on the interviewee’s ‘laugh’ following the conclusion of that interview.<sup>85</sup> Proceeding to their interpretation of the previous response that ‘law [is seen] as subservient to politics’, they state: ‘Humour is, as ever, indicative’.<sup>86</sup> Comments of this sort sound more like psychoanalysis than legal argument. To be sure, psychoanalysis of law is no stranger to legal studies.<sup>87</sup> The

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<sup>81</sup> Ibid. 98.

<sup>82</sup> Ibid. 164.

<sup>83</sup> Ibid. 165.

<sup>84</sup> Ibid. 106, 108, 110, 112, 113, 114.

<sup>85</sup> Ibid. 164.

<sup>86</sup> Ibid.

<sup>87</sup> Tools in psychoanalysis have long been adopted by legal scholars to analyze legal issues. Psychoanalysis of law needs to be undertaken in a scientific, systematic way. See S.R. Schmeiser, ‘‘No Truth Machine’’:

problem is that theirs is anecdotal, not systematic.

Thus, the empirical studies conducted by Everson and Eisner are methodologically problematic. However, in terms of the approach of empirical studies to law, the methodological issues are too obvious for Everson and Eisner to overlook. For example, in Chapter 6, they are aware that the poor response rate and the disparity in the responses among the EU institutions constitute ‘distorting factors’ for their findings and inferences.<sup>88</sup> Thus, to make sense of the apparent methodological distortion, it is necessary to look into how they approach their issues.

Everson places ‘critical legal scholarship’ front and centre in her methodology.<sup>89</sup> Corresponding to her claimed inspiration from critical legal scholarship, Everson draws attention to the use of empirical studies.<sup>90</sup> As the development of legal realism in American legal scholarship indicates, the postclassical concept of law may either be reconceived on the basis of social sciences or be understood as part of politics.<sup>91</sup> On the one hand, the law and economics movement takes up the mantle of the strand of social sciences in the postrealist jurisprudence.<sup>92</sup> On the other, CLS politicizes the legal system much further than legal realists originally thought.<sup>93</sup> Seen in this light, if we take her word for it, Everson seems to locate herself in the social-sciences strand of the postrealist counterrevolution after the fall of legal classicism.

However, she expressly distances herself from this camp, defending the law against

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Law, Psychoanalysis, Uncertainty’, (2006) 2 Law, Culture and the Humanities 179-200.

<sup>88</sup> (n 8) 163.

<sup>89</sup> Ibid. i.

<sup>90</sup> Ibid. 98-99.

<sup>91</sup> See also AT Kronman, *The Lost Lawyer: Falling Ideals of the Legal Profession* (Yale UP, New Haven 1993) 166-70. See also G Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century’s End* (New York UP, New York 1995) 28-32 (distinguishing between radical and progressive realists).

<sup>92</sup> See Minda, (n 91) 83-105.

attempted colonization by the social sciences.<sup>94</sup> On the other hand, judging from her most frequently-invoked American sources of authority, Duncan Kennedy and Roberto Unger, when she makes statements about critical legal scholarship,<sup>95</sup> Everson appears closer to the political strand of postrealist jurisprudence. Unlike the ‘crits’, however, she disputes the tendency to politicize the law.<sup>96</sup> Instead, her claim of critical legal scholarship is based mainly on the Continental tradition of legal sociology. While there are variegated strands of thought in the tradition of legal sociology in Europe,<sup>97</sup> Everson turns to the idea of reflexivity, which can be traced to Eugen Ehrlich in the early twentieth century.<sup>98</sup>

Notably, while it is one thing to claim that the law should be embedded in social reality, it is another to establish and articulate how the law and social reality are actually related. What the reflexive law paradigm in the Continental tradition of legal sociology has accomplished is to set out the former position against the backdrop of legal formalism and the free law movement (Freirecht).<sup>99</sup> It is in the latter dimension, however, that Continental legal sociologists fall far short.<sup>100</sup> Lacking empirical evidence to show how the law is actually embedded in the dynamics of the interaction among social actors, legal-sociological theories of reflexivity tend to make general, abstract claims, leaving

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<sup>93</sup> Ibid. 106-27.

<sup>94</sup> Everson and Eisner, (n 8) 41-44, 60-63.

<sup>95</sup> Ibid. 23-24, 46-47.

<sup>96</sup> Ibid. 24, 47.

<sup>97</sup> See also R Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing, Aldershot 2006) 15-28.

<sup>98</sup> (n 8) 62. See also G Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ in G Teubner (ed), *Global Law without a State* (Dartmouth Publishing, Brookfield 1997).

<sup>99</sup> Everson and Eisner, (n 8) 61-63.

<sup>100</sup> For a comparison of the law and society scholarship in the United States and legal sociology in Europe, see A.J. Treviño, ‘The Sociology of Law in Global Perspective’, [Summer 2001] *American Sociologist* 5-9, 5-6, 7-8 n.1. See also L.M. Friedman, ‘The Law and Society Movement’, (1986) 38 *Stanford L Rev* 763-80 (discussing the features of law and society movement in the United States).

reflexive law as much detached from the actual world as legal formalism does.<sup>101</sup>

Rooted in the Continental tradition of legal sociology, which is characteristic of its theory-oriented approach and abstract style, Everson and Eisner do not base their theoretical proposition on empirical evidence.<sup>102</sup> Instead, they first adopt the theoretical model put out by reflexivists and then read the ECJ jurisprudence through the lens of legal reflexivity. All the attempted empirical works are aimed to complement rather than test their theoretical account. Put bluntly, the '*Rechtsverfassungsrecht*' story that Everson narrates in relation to the European constitutional order in the book is already completed without Chapters 4 and 6 where the empirical 'evidence' is presented. Without the support of solid empirical evidence, Everson's claim to unveil the truth of the law with the aid of critical legal scholarship turns out to replace empty legal formalism with obscure legal reflexivity.

She is notably ambitious to present a full, alternative view of how European constitutional ordering can be understood, with or without empirical support. Throughout the book, she makes a strong case as to why the political turn in the development of the EU constitutional order after the Convention is flawed as far as the future of European constitutional politics is concerned. Playing with the popular notions of rationality, proportionality, subsidiarity, and proceduralism, Everson even aims to dissolve the lingering criticism of the democracy deficit concerning the EU.<sup>103</sup> Taken together, at the heart of

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<sup>101</sup> This criticism was first made in E. Blankenburg, 'The Poverty of Evolutionism: A Critique of Teubner's Case for 'Reflexive Law'', (1984) 18 *Law and Society Rev* 273-89. For a summary of the general criticism of the European style of grand theories, as opposed to empirical studies, and its defense, see B. Lange, 'Understanding Regulatory Law: Empirical versus Systems-Theoretical Approaches?', (1998) 18 *OJLS* 449-71.

<sup>102</sup> In contrast, empirical legal studies (ELS) lie at the centre of current law and society studies in American legal scholarship. Cf. T.E. George, 'An Empirical Study of Empirical Legal Scholarship: The Top Law Schools', (2006) 81 *Indiana LJ* 141-61, 145-46 ('[Law and society] includes ELS as well as many other distinctive methods that share only a 'context matters' perspective.').

<sup>103</sup> (n 8) 178-89.

Everson's work is to reestablish the legalistic path on which the constitutionalization of the European legal order used to evolve, resisting the call for a political refounding of the European constitutional order.

This legalistic attitude toward European constitutional development and politics is not particular to Everson. Rather, it is characteristic of a broad trend in legal scholarship on European constitutional law.<sup>104</sup> The constitutionalization of the European legal order is a collaboration of legal professionals.<sup>105</sup> On the one hand, the ECJ judges carved the European legal order out from international law as well as from national legal systems of the member states through its series of landmark decisions.<sup>106</sup> On the other hand, academic lawyers jump to lend theoretical support to their colleagues in the Luxembourg court, laying the grounds of legitimacy for the unique legal order emerging in Europe after the dark days in the wake of WWII.<sup>107</sup>

This tendency towards juridification in the legal scholarship on European law and its constitutional development is strengthened and consolidated by the similar expert-minded

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<sup>104</sup> See Přibáň, (n 5) 46.

<sup>105</sup> For a legal sociological analysis of the role of different types of legal elites in the lead-up of the constitutionalization of the European order, see generally A. Cohen, 'Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s -1960s)', (2007) 32 Law and Social Inquiry 109-36.

<sup>106</sup> Case 26/62 *NV Algemene Transport-en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1 (direct effect); Case 6/64 *Costa v. ENEL* [1964] ECR 585 (supremacy); Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419 (human rights); Case 22/70 *Commission v. Council (AETR)* [1971] ECR 263 (implied powers). For a discussion on the impacts of these four decisions on the European Communities' move toward constitutionalization, see Weiler, (n 2) 2413-19.

<sup>107</sup> See e.g. Weiler, (n 2); A Arnall, *The European Union and Its Court of Justice* (OUP, Oxford 1999); R Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (St. Martin's Press, New York 1998); MP Maduro, *We, the Court: the European Court of Justice and the European Economic Constitution* (Hart Publishing, Oxford 1998); J Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press, Oxford 1993); A.-M. Burley and W. Mattli, 'Europe before the Court: A Political Theory of Legal Integration', (1993) 47 Int'l Organization 41-76; M. Cappelletti, 'Is the European Court of Justice Running Wild?' (1982) 12 EL Rev 3-17. For a perceptive observation of the role of lawyers in European integration, see J. Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic', (1996) 16 OJLS 231-53. I thank Gráinne de Búrca for bringing Jo Shaw's observation to my attention.

Commission, which has distributed significant research funds to legal scholars.<sup>108</sup> The long-term effect of this collaboration between technocracy and academia remains to be further assessed. However, it is evident that with the constantly changing politics of European constitutional development, legal scholars seem to be on call and ready to lend theoretical support to the arcane, chameleon-like European constitutional politics.<sup>109</sup> This explains the changes in the attitude of European legal scholars toward the Constitutional Treaty. Rooted in the pre-Convention legalistic path, they had held a cautious attitude toward the draft Constitutional Treaty before French and Dutch voters went to the voting booths.<sup>110</sup> In contrast, once the negative results were announced in France and the Netherlands, they cast critical eyes on the strategic choice of unifying the sporadic European constitutional laws into a single ‘constitutional’ document.<sup>111</sup>

It is true that theory and practice are related to and nurture each other.<sup>112</sup> It is anachronistic naiveté to maintain the separation between academics and politics.<sup>113</sup> Still, in terms of the intertwinement of legal scholars and constitutional politics in relation to the evolution of European constitutionalism, many theoretical discourses on European

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<sup>108</sup> See Weiler, (n 18). For the expertise-oriented policymaking in the European Commission, see M. Shapiro, “‘Deliberative,’ ‘Independent’ Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?”, (2005) 68 *Law and Contemporary Problems* 341-56, 345-53.

<sup>109</sup> See e.g. S Griller and J Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer, Wien 2008) (a collection of scholarly responses to the Lisbon Treaty); J. Zemanek and others, ‘Rethinking EU Scholarship’ (2005) 1 *Eur. Constitutional L Rev* 412-28 (scholarly contributions to the prospect of EU constitutional development in the wake of the defeat of the Constitutional Treaty).

<sup>110</sup> See e.g. de Búrca, (n 6) 582-83; Deirdre Curtin, Alfred E. Kellermann and Steven Blockmans (eds), *The EU Constitution: The Best Way Forward?* (TMC Asser Press, The Hague 2005). Cf Shaw, (n 107) (likening the mentality of EU legal academics to journalists in time of war or national emergency, which is characterized by self-censorship for fear of impeding the war effort in the case of journalists or the integration project in that of EU legal academics).

<sup>111</sup> See Pernice, (n 16). Cf. G. de Búrca, ‘The European Constitution Project After the Referenda’, (2006) 13 *Constellations* 205-17, 205-06 (noting contrasting indicators of the public attitude toward the Constitutional Treaty before its entering the ratification process).

<sup>112</sup> See J.A. Raelin, ‘Toward an Epistemology of Practice’, (2007) 6 *Academy Management Learning and Education* 495-519.

<sup>113</sup> See RM Unger, *Knowledge and Politics* (Free Press, New York 1975).

constitutional ordering have become indistinguishable from advocates' rhetoric, which is aimed to make their case in the choices regarding European constitutional policies.<sup>114</sup> This is true of Everson's '*Rechtsverfassungsrecht*' story of European constitutional law. In sum, Everson does not so much put out a new theory of the EU constitutionalization on the mould of legal realism and its critical successors as sets out a realist lawyering on the choices ahead of the coming of the next round of European constitutional politics in the guise of empirical studies.

### **B. *Making Sense of Everson's Position: Living in the 'Community'***

In addition to her inclination toward the European tradition of legal sociology, what characterizes Everson's theoretical position is her assumption of the neutrality and autonomy of the legal system.<sup>115</sup> Through her lens of assumed legal neutrality, she naturally gives the benefit of the doubt to the ECJ, which, as a judiciary, is regarded as the embodiment of the neutrality of the legal system, if all legal grammars are followed. Instead of making sense of the ECJ jurisprudence in light of European politics, she interprets the constitutional politics of the EU in accordance with the ECJ's doctrinal oscillation. As a result, the assumption of legal neutrality contributes to Everson's centring on the ECJ in her theory, illustrating a tendency of academics involved in the debates on European constitutional politics.<sup>116</sup> This reveals not only a fundamental difference in legal scholarship and in the legal profession as between Europe and the United States but also the limits of the legalistic approach to European constitutional development.

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<sup>114</sup> Cf. H. Schepel and R. Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe', (2002) 3 Eur LJ 165-88.

<sup>115</sup> (n 8) 214-15.

<sup>116</sup> See e.g. D.M. Curtin, 'European Legal Integration: Paradise Lost?' in DM Curtin and others, *European*

While the free law movement has been regarded as the European counterpart to American legal realism as well as the subsequent CLS movement,<sup>117</sup> it did not shake the centuries-old European legal tradition.<sup>118</sup> This tradition is not only about a mentality towards a definitive, correct answer to the law<sup>119</sup> but also related to the proposition that the tool to find that definitive, correct answer lies in the traditional legal methodology. What characterizes the epistemic foundations of the European legal tradition is the belief that through dogmatic legal pedagogy, the legal texts can be illuminated, leading to the emergence of the correct answer.<sup>120</sup>

This centuries-old tradition has seen challenges but persists.<sup>121</sup> The post-Revolution reaction to issues regarding legal interpretation and judicial discretion in France is a case in point. Judges of the *parlements* were criticized for abusing judicial discretion by inserting their political positions into ambiguous legal texts.<sup>122</sup> In response, on the one hand, laws were made more specific to minimize the chances of judicial discretion. The result was the French Civil Code.<sup>123</sup> With a longstanding belief in the distinction between lawmaking

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*Integration and Law* (Intersentia, Antwerpen 2006).

<sup>117</sup> See D Kennedy, *A Critique of Adjudication: Fin de Siècle* (Harvard UP, Cambridge 1997) 81.

<sup>118</sup> See J E Herget, *Contemporary German Legal Philosophy* (U Pennsylvania Press, Philadelphia 1996) 111. See also J.Q. Whitman, 'No Right Answer?' in John Jackson, Máximo Langer and Peter Tillers (eds), *Crime, Procedure and Evidence in a Comparative International Context: Essays in Honor of Professor Mirjan Damáska* (Hart Publishing, Oxford 2008) 371, 337 (noting that '[t]hose radical views [of free law movement] have had few advocates since 1914 or so').

<sup>119</sup> See Whitman, (n 118) 373-79. See also M. Damáska, 'A Continental Lawyer in an American Law School: Trails and Tribulations of Adjustment', (1968) 116 *University of Pennsylvania L Rev* 1363-78, 1369.

<sup>120</sup> See Damáska, (n 119) 1365-70. For an exemplar of this European legal mentality, see Armin von Bogdandy, 'A Disputed Idea Becomes Law: Remarks on European Democracy as a Legal Principle' in B Kohler-Koch and B Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield, Lanham 2007). But see U. Haltern, 'A Comment on Von Bogdandy' in Kohler-Koch and Rittberger (eds), above (criticizing German legal scholar Armin von Bogdandy's legal doctrinal approach to the debate on the EU democracy).

<sup>121</sup> See Whitman, (n 118) 378.

<sup>122</sup> *Ibid.* 375-76.

<sup>123</sup> *Ibid.* 376.

and lawapplying,<sup>124</sup> for the Continental legal tradition, the threat to the rule of law came from lawapplying, not lawmaking.<sup>125</sup> The politicization of the law by means of discretion could be avoided by improved skills in legislation such as ‘codification’.<sup>126</sup> On the other hand, judges were commanded to follow formal syllogistic legal reasoning in order to guarantee that the law would not be distorted.<sup>127</sup> Given a strong belief in the distinction between lawmaking and lawapplying, the problem of the politicization of law has been confined to lawapplying, while lawmaking has been regarded as the expression of sovereign will, which is legitimately political or rather politicized.<sup>128</sup>

The conceptual framework of the political and epistemic foundations of the European legal tradition as illustrated in the post-Revolution French debate on the role of the judiciary helps to understand how the European legal profession has dissolved the subsequent challenges to the European legal tradition, including the existential challenge to European law during the Nazi era.<sup>129</sup> Although legal formalism has been criticized for paving the

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<sup>124</sup> See M. de S.-O.-L’E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP, Oxford 2004) 34-38. See also Whitman, (n 118) 375-77.

<sup>125</sup> This idea of parliamentary sovereignty has been weakened with the establishment of judicial or constitutional review in Europe in the post-WWII era. See A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, Oxford 2000) 49-60.

<sup>126</sup> See RC van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (CUP, Cambridge 1987) 152-55. In its traditional European sense, codification is more than a written compilation of legal regulations. Rather, it is a systematic and comprehensive organization of legal principles, which puts emphasis on terminological precision, conciseness, and the logical relations among clauses, with an eye to replacing all previous laws, customs and legal authorities. Ibid. 43-45. These features explain the difference in length between American and European statutes. Cf. John Bell, *French Legal Cultures* (Butterworths, London 2001) 56-58 (distinguishing different types of codes and discussing their relationship with codification in France).

<sup>127</sup> See Lasser, (n 124) 34.

<sup>128</sup> See Bell, (n 126) 53-54. In contrast, given the tradition of judge-made law in the common law culture, it is hard to confine the problem of the politicization of the law to lawapplying. If judging as a part of lawmaking is prone to politicization, other participants in lawmaking are likely regarded as politicized players in the legal system as well. See PW Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (U Chicago Press, Chicago 1999) 49.

<sup>129</sup> See M. Stolleis, ‘Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945’ in C Joerges and NS Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Hart Publishing, Oxford 2002). See D

way for the takeover of power by Nazis in Germany,<sup>130</sup> the practice of the purposive interpretation of the law in accordance with the Führer's will by Nazi judges has been diagnosed as the pathology of the European legal tradition.<sup>131</sup> Thus, responses to that darker legacy in Europe have been focused on the return to the centuries-old tradition of the European legal profession.<sup>132</sup> Restoring legal neutrality in lawapplying is the antidote to the Nazi pathology.<sup>133</sup> To European lawyers, the legal tradition is the solution, not the problem.

In contrast, the reaction to legal classicism following the *Lochner* era in the United States was revolutionary.<sup>134</sup> On the one hand, the political foundations of the legal system, the Supreme Court in particular, were called into question. The *Lochner* Court and its legal formalism were criticized for implanting capitalist economic ideology into American constitutional jurisprudence.<sup>135</sup> As a consequence, the Supreme Court barely survived with its (in)famous 'switch in time' under the threat of court packing.<sup>136</sup>

There is no need to repeat this all-too-familiar history. What is noticeable in the reactions to the political judging of the *Lochner* Court is the political understanding of the

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Welch, *The Third Reich: Politics and Propaganda* (2nd edn Routledge, London 2002) 107-16.

<sup>130</sup> See Herget, (n 118) 1-5, 111.

<sup>131</sup> See Stolleis, (n 129).

<sup>132</sup> This is also true of the attitude of the post-Communist Hungarian Constitutional Court toward the Communist past. See P. Paczolay, 'The New Hungarian Constitutional State: Challenges and Perspectives' in AED Howard (ed), *Constitution Making in Eastern Europe* (Woodrow Wilson Center Press, Washington, DC, 1993) 21, 22-24.

<sup>133</sup> Cf. HJ Berman, *Law and Revolution: The Formation of Western Legal Tradition* (Harvard UP, Cambridge 1983) 40-45 (suggesting a return to western legal tradition instead of attacks on legal formalism as a response to Nazi discretionary justice). It should be noted that with the post-WWII adoption of constitutional democracy, constitutions in European countries are not 'neutral' to the degree that values in opposition to liberal democratic institutions among others can be constitutionally banned. Nevertheless, within this constitutional boundary, lawapplying is regarded as a matter of neutrality. See e.g. DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn Duke UP, Durham 1997) 47-48.

<sup>134</sup> See WE Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (OUP, New York 1995) 213-36.

<sup>135</sup> *Lochner v. New York*, 198 US 45, 75 (1905) (Holmes, J., dissenting).

law. As indicated above, unlike its European counterpart, the American legal culture, rooted in the common law tradition, does not maintain a clear distinction between lawmaking and lawapplying.<sup>137</sup> Moreover, Congress in the American constitutional structure does not have the sovereign status enjoyed by its European counterparts in their legal tradition. Sovereignty is embodied in the Constitution, not statutory legislation.<sup>138</sup> Thus, the question of the politicization of the law is not restricted to the judiciary. With the unmasking of the legal neutrality traditionally maintained by formalistic judging, formalistic legal reasoning is regarded as an accomplice to the political hijacking of the law.<sup>139</sup> Both the political and epistemic foundations of legal classicism in American jurisprudence were undermined in the realist reaction to the *Lochner* era and its formalist accomplices.<sup>140</sup>

As noted above, facing the postrealist crisis of American legal scholarship, two reactions arose. One was to play along with the political hijacking of the legal system. On this view, the problem is not the politicization of the law but instead its bad politicization. This resulted in the CLS movement.<sup>141</sup> The other postrealist reaction to the politicization of the law was to confront the problem head-on. The law should not be captured by politics. To save the law from political hijacking is to depoliticize the law. This echoes the post-WWII reaction to the Nazi jurisprudence in Europe.<sup>142</sup> However, what sets the post-WWII development of American jurisprudence apart from its European

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<sup>136</sup> See Leuchtenburg, (n 134).

<sup>137</sup> See Lasser, (n 124) 21.

<sup>138</sup> See PW Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (Yale UP, New Haven 1997) 216-29.

<sup>139</sup> See Kennedy, (n 117) 105-06.

<sup>140</sup> See Minda, (n 91) 26-28 (discussing the epistemological implications from the reaction to the *Lochner* era). For the political changes in the post-*Lochner* era, see Leuchtenburg, (n 134).

<sup>141</sup> See Kennedy, (n 117) 8-12.

<sup>142</sup> See L Kalman, *The Strange Career of Legal Liberalism* (Yale UP, New Haven 1996) 21-22. See also Minda, (n 91) 44-51 (discussing the resurrection of legal positivism following WWII as illustrated by

counterpart was that the traditional epistemic foundations also collapsed in the American realist reaction to legal classicism. While restoring the legal tradition constituted the backbone of Europe's recovery from the Nazi blow to the rule of law, social sciences and other related academic disciplines were called to lay new foundations for the post-WWII jurisprudence in the United States.<sup>143</sup>

Taking into account this divergence in the reactions to the new challenges from social transformation between American jurisprudence and the European legal tradition helps to make sense of the form of Everson's academic lawyering in relation to European constitutional politics. As noted above, despite her criticism of legal formalism, Everson makes a strong assumption about legal neutrality and autonomy in her academic reconstruction of European constitutional law.<sup>144</sup> This belief in legal neutrality maintains continuity with the centuries-old European legal tradition. Moreover, the assumption of legal autonomy evolves into a mentality that rejects the colonization by or pollution from other academic disciplines. Law is not only a neutral normative system but also an independent discipline.<sup>145</sup> For the traditional lawyers, of whom Everson is critical, traditional tools in legal analysis are the epistemic assurance of legal neutrality and autonomy.

However, Everson's epistemic tools for achieving legal neutrality and autonomy may

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Wechslerians).

<sup>143</sup> See Minda, (n 91) 57-61. Economics has stood out among the 'law and...' movement's attempts to reestablish the nonpolitical, scientific foundations of the law. Ibid. 78-79. See also J.R.P. Ogloff, 'Two Steps Forward and One Step Backward: The Law and Psychology Movement(s) in the 20th Century' in JRP Ogloff (ed), *Taking Psychology and Law into the Twenty-First Century* (Kluwer Academic, New York 2002) (discussing the introduction of psychology into legal studies).

<sup>144</sup> (n 8) 214-15.

<sup>145</sup> See e.g. Schepel and Wesseling, (n 114) 166-70.

look trickier. On the one hand, she distances herself from traditional legal formalists.<sup>146</sup> On the other hand, she also keeps social scientists at arm's length, despite her claim to use empirical studies tools.<sup>147</sup> Facing this dilemma, she turns to the idea of legal reflexivity with an eye to maintaining legal neutrality and autonomy by bridging the gap between the law and real-world issues.<sup>148</sup> Yet, once the label of legal reflexivity is replaced with legal formalism, the argumentative styles are hardly distinguishable. Without actually demonstrating how the law relates reflexively to the real world with empirical evidence, legal reflexivity simply glosses over the black hole that critics of traditional legal thinking have identified with the gap between the major premise and the minor premise in traditional syllogistic legal reasoning.<sup>149</sup>

Thus, underneath the difference between Everson and her traditional European colleagues is a shared epistemic form, which underpins their common belief in legal neutrality and autonomy. In contrast, what is characteristic of contemporary American legal scholarship and profession is the lack of that form of consensus. In the famous Fish v. Fiss debate on whether the law as a separate and independent discipline died following the *Lochner* era in the United States, Owen Fiss and Stanley Fish centre their arguments on the integrity of an interpretive community. While Fiss contends that law's independence will survive with the consensus that holds the professional community of law together,<sup>150</sup> Fish makes a contrary diagnosis, announcing the death of law simply because of too many

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<sup>146</sup> (n 8) 22-24.

<sup>147</sup> Ibid. 60-63, 212.

<sup>148</sup> Ibid. 212-20.

<sup>149</sup> See N. MacCormick, 'Notes on Narrativity and the Normative Syllogism' (1991) 4 Int'l J Semiotics and Law 163-74, 174.

<sup>150</sup> See O.M. Fiss, 'Objectivity and Interpretation', (1982) 34 Stanford L Rev 739-63, 742.

communities in the law.<sup>151</sup>

Leaving aside the CLS movement that hails the politicization of the law, while there have been continued attempts to re-establish legal knowledge outside the traditional legal methodology in the postrealist refounding of legal discipline, the social sciences strand that attempts to restore the independence of law from politics does not speak with one voice. It turns out that lawyers, academics as well as practitioners, are faced with competing claims to truth.<sup>152</sup> ‘Law and...movements’ speak to the epistemic pluralism in American law.<sup>153</sup>

Taken as whole, in a legal culture such as the United States in which the consensus that holds a legal epistemic community together has disintegrated, it is hard to identify a clear, agreed-upon way to legal knowledge. On the contrary, in Europe, as Everson and Eisner’s book shows, even in different garbs, European legal professionals remain united on a form of consensus rooted in the culture of a professional community.<sup>154</sup> In sum, Everson’s legalist-constructivist theory of European constitutional development not only suggests that her theory remains rooted in the path of constitutionalization set out in the Community era of European integration but also characterizes the professional community of law, which she exemplifies well.

What is more, the fact that Everson’s theory, in conceiving the constitutional order in Europe, is premised on the professional community also reveals the limits of this legalistic approach to European constitutionalism. Whether attempts to repoliticize European constitutional development can deliver on the promise that legal elites fail to fulfil with their

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<sup>151</sup> See S. Fish, ‘Fish v. Fiss’, (1984) 36 Stanford L Rev 1325-47.

<sup>152</sup> See BA Ackerman, ‘My Debt to Mirjan Damaška’, (2009) 118 Yale LJ Pocket Part 171 <<http://thepocketpart.org/2009/03/23/ackerman.html>> accessed 29 May 2009 (noting the *Methodenstreit* in American contemporary legal scholarship). See also Minda, (n 91) 75-80.

<sup>153</sup> See Minda, (n 91) 78-80.

<sup>154</sup> See Schepel and Wesseling, (n 114) 166-71.

theories and academic lawyering remains to be seen.<sup>155</sup> Nevertheless, it is not difficult to figure out how wide the gap between the professional community and the European citizenry is. As Everson emphasizes, the negation of the Constitutional Treaty in French and Dutch referenda was a popular no-confidence vote on European political elites.<sup>156</sup> However, the failure of the Constitutional Treaty cannot be considered a reaction only to political elites. Rather, the creation of the Constitutional Treaty itself was a response to the detachment of European citizens from the entire pre-Convention constitutional order.<sup>157</sup> The defeat of the Constitutional Treaty reflects the failure of the responsive strategy as a whole.

Thus, the rejection of the Constitutional Treaty is anything but an affirmation of the pre-Convention constitutional order. Rather, it reveals the naiveté of the constitutional symbolism that the Convention adopted in response to a deep challenge to the European constitutional order.<sup>158</sup> The inadequacy of Everson's partial diagnosis of the fate of the Constitutional Treaty is betrayed in the current stalemate of the Lisbon Treaty, which is a return to the pre-Convention strategy.<sup>159</sup> If the indifference and alienation of the European citizenry in relation to the status quo of the European constitutional order is the main issue facing European constitutionalism, it also reveals the gap between legal elites and citizens in

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<sup>155</sup> See U. Haltern, 'On Finality' in A von Bogdandy and J Bast (eds), (n 3).

<sup>156</sup> (n 8) 1-2.

<sup>157</sup> See de Búrca, (n 6) 561-63, 571-73 (discussing the gap between the motives and the reality of the creation of the Constitutional Treaty as a response to the legitimacy deficit of the EU). See also de Búrca, (n 111) at 205-06.

<sup>158</sup> See Haltern, (n 155). But see J Přibáň, *Legal Symbolism: On Law, Time and European Identity* (Ashgate Publishing, Aldershot 2007) (discussing and defending legal symbolism especially in the domain of constitutional law).

<sup>159</sup> See Pernice, (n 16). Cf de Búrca, (n 15) (noting the Irish rejection of the Lisbon Treaty as 'the latest manifestation of an ongoing and profoundly challenging popular legitimacy crisis experienced by the EU since the time of the Maastricht Treaty').

Europe.<sup>160</sup>

As Everson and Eisner's book illustrates, the legalistic view of European constitutional development is premised on a professional community. To generalize this legalistic view of constitutionalism as a popularly held constitutional order suggests either the projection of a professional community onto a Europe-wide civic culture or the self-appointment of legal professionals as the fiduciary of the citizenry.<sup>161</sup> Each is a fiction, however. This fictional character of the legalist-constructivist strategy to European constitutional politics is the underlying cause of the dilemma facing European constitutional ordering.

#### 4. CONCLUSION

The relationship between law and politics is the Gordian knot of legal theory and constitutional scholarship. Constitutional dualism takes its place among other numerous attempts to put law and politics in their places.<sup>162</sup> As Everson and Eisner's book meticulously shows, constitutional dualism is flawed by locating politics outside the boundary of law.<sup>163</sup> However, they do not ultimately do a better job than their dualist opponents. They give short shrift to the role of politics in the process of constitutional ordering, which constitutional dualists aim but fail to address.

Critically engaging with constitutional dualism that maintains a distinction between the constituent and the constituted powers, Everson argues that the history of the constitutionalization of the European legal order suggests an alternative, postconstituent

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<sup>160</sup> Cf. de Búrca, (n 6) 557 (noting that through the decades of constitutionalization, 'the idea of a European Constitution was not a politically viable subject' 'apart from within the specialized world of lawyers').

<sup>161</sup> See P.L. Lindseth, 'Weak' Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union' (2001) 21 OJLS 145-63. See also Shapiro, (n 108).

<sup>162</sup> See M. Loughlin and N. Walker, 'Introduction' in Loughlin and Walker (eds), (n 12) 1.

<sup>163</sup> (n 8) 33.

view of constitutional ordering. She maintains that as the EU model exemplifies, the process of constitutionalization takes place in the daily, routine operation of the legal system, blurring the distinction between the constituent and the constituted. Noticeably, the legal profession occupies centre stage in this postconstituent view of European constitutional ordering. Moreover, as I have argued, Everson's theory is built on a longstanding European legal tradition, at the core of which lies the belief in legal autonomy and the instrumental role that traditional legal methodology plays in achieving that goal. This requires a form of consensus, which not only sustains a professional community of European jurists but also lays the common epistemic grounds for the belief in legal autonomy. 'Community' is the cornerstone of Everson's theoretical cathedral.

Everson is right to point out that unlike constitutional dualism, politics is constantly involved in the process of constitutional (re)ordering. However, in establishing her legalist-constructivist notion of '*Rechtsverfassungsrecht*', Everson does not tell her citizen readers how politics, which involves not only politicians, professional groups, but also the citizens at large, has actually played out in the process of European constitutionalization. Instead, as I have noted, she fixes her eyes on the legal minds without much of the empirical support that she promises. At best, she points out that legal indeterminacy provides an interface between law and politics and portrays the role of academic lawyering in the making of a European constitutional order. Still, she does not provide a full account of constitutional politics in a postconstituent light, leaving the dynamics of politics unaddressed. To present a postconstituent concept of constitutional ordering as a convincing alternative to traditional theories regarding the relationship between law and politics, Everson needs to tackle squarely the dynamics of politics in shaping legal interpretations and in filling the holes inherent in legal indeterminacy.

Moreover, as recent constitutional scholarship has suggested, bringing politics back in dissolves the dualist myth that sustains the strict separation of the constituent power from the constituted order.<sup>164</sup> Nevertheless, this does not mean that the entirety of everyday activities play out equally in the making of constitutional ordering, although no activity in our everyday life can escape the influence of politics.<sup>165</sup> Without dealing with this more subtle distinction than the traditional dualist model indicates, Everson jumps from a theorization of academic lawyering in relation to European law to an assertion of European constitutional politics, picturing a self-governing citizenry in the image of a professional community.

In sum, a postconstituent view of constitutional ordering requires a corresponding concept of politics that would provide a framework of reference within which the role of politics in constitutional ordering can be distinctively assessed. Unfortunately, this is where Everson and Eisner's book falls far short. Rather, Everson's legalistic theory of European constitutionalism is premised on the professional community in which she is deeply embedded. Without confronting the widening gap between the legalistic process of the constitutionalization of the European legal order and the European citizenry head-on, this community-based approach to European constitutionalism is fictional, leaving the root cause of the failure of the Constitutional Treaty unaddressed.

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<sup>164</sup> See e.g. Harris, (n 22) 2-16, 46-163, 201-04. See also A Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (CUP, Cambridge 2008); B Ackerman, *We the People: Foundations, volume 1* (Belknap Press, Cambridge 1990).

<sup>165</sup> Even if Bruce Ackerman acknowledges the role of politics in everyday legal operation, he maintains the distinction between constitutional and normal politics. The former is only at play in the time of higher lawmaking, i.e., constitutional moments, leading to constitutional changes. See Ackerman, (n 164). See also Walker, (n 20) 266.