The EU Constitution, War and Treaty Interpretation

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Federico Fabbrini, *The EU Constitution in Time of War: Legal Responses to Russia's Aggression against Ukraine* (Oxford University Press 2025)

Federico Fabbrini's book, *The EU Constitution in Time of War, Legal Responses to Russia's Aggression against Ukraine*, is a scholarly and timely work, which also raises issues concerning the nature of EU law that are contestable and require further analysis. The catalyst is, as indicated by the title, Russian aggression against Ukraine. The work has indeed become more timely since its publication, given the changes in the world order during the first year of President Trump's second term of office, including in this respect the dangers posed to the continued existence of NATO, and the implications of this for the role of the EU during times of war. We shall return to these issues in due course.

The book sheds valuable light on the legal dimensions that arise from the Russian war of aggression against Ukraine. It is well-researched, with a rich blend of analytical textual analysis, combined with due attention given to the broader political and geopolitical environment that prevails in this area.

This review begins by addressing the structure of the book and the focus of the individual chapters. This is followed by consideration of four issues of more general relevance for EU legal studies. They are: the comparative constitutional focal point with the US that informs the overall architecture of the book; the meaning to be accorded to the European constitution; the idea of the EU as embodying a living constitution; and the implications and desirability of Treaty amendments suggested by the author.

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The argument: an overview

The book has seven chapters, consisting of an Introduction, five substantive chapters, and a Conclusion. The Introduction provides the reader with the book's rationale and analytical frame. In terms of rationale, Fabbrini duly notes that Russia's aggression against Ukraine has meant that the EU has faced, practically for the first time in its existence, the question of war. The consequence is that it is 'urgent to reflect from an EU law perspective how the EU's constitution has operated under the circumstances, analysing *de lege lata* the EU's responses to the war in Ukraine, and its shortcomings, and considering *de lege ferenda* how to fix them'.[1] In terms of analytical frame, Fabbrini draws on the preamble to the US Constitution, which then informs the analytical architecture of the subsequent chapters. He argues that we should consider the extent to which the EU constitution is capable of securing five issues addressed in the preamble to the US Constitution: provision for common defence; promotion of the general welfare; justice; domestic tranquillity; and liberty. These concepts then provide the titles for the subsequent chapters. Thus the title of Chapter 2 is 'To "provide for the common defense": Developments in foreign affairs and defence'; Chapter 3, 'To "promote the general welfare": Developments in fiscal and economic policy'; Chapter 4, 'To "establish justice": Developments in justice and home affairs'; Chapter 5, 'To "ensure domestic tranquillity": Developments in energy and industrial policy'; and Chapter 6, 'To "secure the blessings of liberty": Developments in enlargement and reform'. There is a Conclusion in Chapter 7.

The individual chapters are shaped by the same architectural frame, which facilitates comparison across and between the different topics covered in the book. Thus, each chapter begins with consideration of the core strategic measures adopted in the relevant area, concerning defence, economic policy and the like; this is followed by analysis of the consequences of adoption of the relevant measures; thought is then given to the challenges revealed by the legal measures adopted in each area studied and the constraints imposed by the existing text of the Treaties. Fabbrini's suggestions for reforms will be considered in due course later in this review. Space precludes detailed examination of the many complex measures adopted by the EU during the course of this war, which are elaborated by the author in this study. Suffice it to say the following by way of brief elaboration of the arguments in the chapters.

Chapter 2 on defence charts the diplomatic, military, and defence production measures taken by the EU in response to the war in Ukraine. These include, *inter alia*, adoption of the Strategic Compass; delivery of weapons to the Ukrainian

[1]F. Fabbrini, *The EU Constitution in Time of War, Legal Responses to Russia's Aggression against Ukraine* (Oxford University Press 2025) p. 5.

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army; security guarantees to Ukraine; and the boost of defence production. This is followed, in accord with the chapter structure adumbrated above, by consideration of the consequences of such measures, including acceleration of EU integration in Common Foreign and Security Policy/Common Security and Defence Policy, and the use of industrial policy to develop a defence production strategy. The chapter also reveals the constraints flowing from Common Foreign and Security Policy/Common Security and Defence Policy governance rules requiring unanimity in the Council, combined with the limited budgetary resources for defence production.

Chapter 3 is concerned with developments in economic and fiscal policy, which are conceptualised in Fabbrini's schema as relating to whether the EU constitution promoted general welfare. The chapter includes discussion of new funding mechanisms used by the EU, such as the European Peace Facility and the 2023 Macro-Financial Assistance Instrument for Ukraine (MFA+). The discussion of consequences focused on the ways in which EU action in this area drew on the experience during the COVID pandemic, empowering the Commission to raise resources on the financial market through the issuance of common debt. The constraints on EU action flowed principally, albeit not exclusively, from the fact that the decision-making rules accord each member state a veto on revisions to the Multiannual Financial Framework and the authorisation to issue common debt. Hungary duly exploited potential use of its veto to obtain concessions on matters unrelated to the war in Ukraine.

Chapter 4 considers developments in the field of justice and home affairs, thereby examining in Fabbrini's conceptual frame whether the EU constitution established justice. In terms of the measures taken, the chapter analyses EU sanctions imposed on Russia, and provisions designed to ensure that Russia should pay for its illegal aggression. The consequences of such measures included the addition of a new 'EU crime' to the list in Article 83 TFEU, and the adoption of EU secondary sanctions. There were nonetheless constraints on EU action in these areas, including legal challenges in terms of compliance with human rights and international law, thereby revealing tensions between support for Ukraine and adherence to some EU fundamental values.

Chapter 5 is concerned with developments relating to energy and industrial policy, conceptualised by the author in terms of the EU constitution ensuring domestic tranquillity. Russia unsurprisingly sought to weaponise its oil and gas, import of which had hitherto provided the EU with important energy resources. This in turn led to an energy crisis in the EU, thereby jeopardising its support for Ukraine. The chapter considers the measures taken by the EU in response to this problem, including those designed to mitigate rising energy prices and to speed up the green transition. Discussion of the consequences of such measures include analysis of the uses made of emergency powers provided under the Treaties, and

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strategies designed to strengthen the EU's economic security. This chapter, in line with the approach taken in other chapters, also revealed legal constraints on EU action, and the dangers posed to EU internal market policy by the relaxation of EU state aid law.

Chapter 6 is concerned with enlargement and reform, which is conceptualised by Fabbrini in terms of whether the EU constitution secured the blessings of liberty. War is not infrequently the catalyst for change, whether internal or external. The Ukraine war has been no exception in this respect. The EU promised membership to Ukraine, as well as to Moldova, Georgia, and Bosnia Herzegovina, and revived the enlargement process towards Albania, Kosovo, Montenegro, North Macedonia, and Serbia. The EU sought, moreover, to create a new European Political Community, which would bring together 47 countries of Europe. The principal constraint in this respect is said to be the unanimity rule required for Treaty changes, which thereby hampers Treaty amendment designed to render the EU more efficient and can operate as a block on enlargement.

The argument: broader issues

The book is interesting not only for its detailed discussion of the EU's response to the Ukraine war, but also because it raises broader issues that are relevant to the EU and EU law from a more general perspective. The discussion therefore turns to the broader issues articulated at the outset of this review.

The US Constitutional preamble as conceptual frame

We begin with consideration of using the preamble to the US Constitution as the conceptual frame for the book's analysis. Federico Fabbrini uses the preamble from the US Constitution as the central architectural frame for the book. It informs in a literal sense the title of each chapter, and informs – sometimes directly, sometimes indirectly – the substantive analysis therein. Fabbrini's rationale for this conceptual focus is eclectic.[2] It is in part because in Fabbrini's words, 'the US Constitution is – like it or not – the global benchmark of constitutionalism',[3] the consequence being that it makes sense for the EU as a union of states to measure itself to that standard, given more especially that there has been comparative work between the EU and US systems. It is in part because the EU Treaties are said to lay out constitutional objectives that 'largely correspond' to those listed in the US Constitution, albeit in a more 'legalistic and

[2]Ibid., pp. 10-11.
[3]Ibid., p. 11.

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verbose manner'.[4] I do not, with respect, find these rationales intellectually or normatively convincing. This is no disrespect to the US Constitution. There are two reasons for scepticism in this respect.

On the one hand, Fabbrini's proffered rationales for the conceptual architecture that informs the book do not justify the chosen methodology. To be sure, the US Constitution warrants respect and study, but to regard it as the global benchmark of constitutionalism that demands its deployment in this kind of study of the EU is a *non-sequitur*. This is more especially so given that there are many member state constitutions that have considerable lineage and sophistication. The fact that there have been comparative studies focusing on particular aspects of EU-US law does not justify the author's chosen conceptual frame for this book. The alternative rationale, to the effect that the EU Treaties embody constitutional objectives that largely correspond to those in the US, conceals more than it reveals. The US Constitution and the EU Treaties are very different, and to read the latter in the light of the preamble to the former is strained to say the least. The converse is also true in the following sense, since several issues discussed in the book would not be regarded as 'constitutional' in the US, or not in the same sense as in the EU. Insofar as the terminology of the US Constitution can serve as the headings for the subsequent chapters, this can only be achieved by treating those headings in an abstract manner, such that they could be imbued with almost any content, thereby undermining the rationale for the cross-reference to the US system. The strained nature of this analogising is particularly evident in relation to Chapter 5, where discussion of EU energy and industrial policy is placed within the US niche of 'securing domestic tranquillity', and Chapter 6 where EU enlargement and reform is said to reflect the commitment in the preamble of the US Constitution to 'liberty'. Moreover, while there is no doubt that the actions of President Trump relating to NATO, the EU and Europe have increased the relevance of Fabbrini's study, they have also served to emphasise the constitutional differences between the two legal orders. The US Constitution may well have been devised to embody checks and balances, but the stability of this constitutional ordering in the light of broad conceptions of unitary executive power and the extensive use made of executive orders concerning, *inter alia*, economic policy, immigration, the deployment of security forces on US soil, and foreign policy, further undermines the rationale for using the US Constitution as the conceptual framework for study of the EU.

On the other hand, from a constitutional/legal perspective the idea of using the preamble to the US Constitution as the conceptual frame for a book that places the idea of an EU 'living constitution' centre stage generates tensions. We shall consider the idea of the EU 'living constitution' in more detail below. The salient

[4]Ibid., p. 11.

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point for present purposes is that a prominent theory of constitutional interpretation in the US is diametrically opposed to treating the US Constitution as a living instrument in the way that the EU is regarded by Fabbrini throughout the book. A leading theory of constitutional interpretation in the US is originalism. There are multiple versions of originalism and a veritable library of literature on rival theories of constitutional interpretation. Originalism is nonetheless a prominent theory of constitutional interpretation espoused by many academics and judges, including the majority on the Supreme Court. The tension this produces for Fabbrini's book is readily apparent. Fabbrini's study of the EU as a 'living constitution' is self-evidently not premised on originalism. To regard the preamble to the US Constitution as the conceptual frame for a book on the EU as a 'living constitution' that is not based on originalism or anything akin thereto is problematic, given that many US constitutional theorists and judges would not accept the very idea of a 'living constitution' as espoused by Fabbrini.

The 'EU constitution'

We move now to consideration of the second issue. Federico Fabbrini frames the legal changes resulting from the war as exemplifying the EU as a living constitution that shows both its adaptability and limitations in the context of the Ukraine-Russian war. This raises two issues that are related, albeit distinct: the meaning accorded to the 'EU constitution'; and the meaning accorded to the idea of the EU as a 'living constitution', including the implications of such an appellation for the boundaries of legitimate Treaty interpretation. The former issue will be considered in this section, the latter in the section that follows.

This is not the place to engage in depth with complex issues concerning the nature of the EU constitution. This is more especially so, given that rival conceptions of the EU constitution have been the subject of recent heated academic debate.[5] Fabbrini regards the EU as having at the least a constitution with a small 'c', as compared to the failed Constitutional Treaty with a large 'C', and the language of 'EU constitution' informs the analysis throughout the book. The very title of the book and its constitutional frame therefore warrant some brief reflection on the idea of the EU constitution.

[5]*See*, eg, L.D. Spieker, *EU Values before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023); J. Bast and A. Von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New, Principled Constitutionalism', 61 *Common Market Law Review* (2024) p. 1471; A. von Bogdandy, *The Emergence of European Society through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024); J. van de Beeten, 'Unfulfilled Promises: Reconstructing EU Constitutionalism in Times of Crisis and Contestation', 21(1) *EuConst* (2025) p. 16; M. van den Brink, 'Constitutionalism without Principle: Article 2 TEU and the Doctrinal Construction of EU Values', *European Law Open* (2026) p. 1.

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It is helpful in this regard to begin by considering the role of national constitutions and then reflect on the idea of the European constitution against this backdrop. We can distinguish between the content of a constitution and the consequences of this appellation. They are related, albeit distinct.

We begin with consideration of content. Constitutions typically have a horizontal and a vertical dimension. The horizontal dimension concerns the rules that establish and regulate the main organs of government and their powers. There are substantive and procedural norms of this nature. Substantive norms tell us, for example, what constitutes the legislative, executive and judicial branches of government, and the nature and extent of their respective powers. Procedural norms stipulate, for example, how legislation is to be passed, whether special majorities are required and the like. There can be difficulties in defining the institutions that exercise certain types of power, and there can also be difficulties in deciding on the precise powers of a certain institution. This is especially so in relation to executive power. Constitutions are, in general, not good at defining the executive, or the scope of its powers.[6] This is not fortuitous. It flows in part from the very duality in the meaning of the term executive. It can connote the body charged with developing policy and the legislative agenda; it can also mean the body charged with implementing legislation. The difficulty in defining the executive is also in part a consequence of the diversity of bodies that exercise such powers, including ministers, agencies, boards and the like.

There are two principal aspects to the vertical dimension dealt with by constitutions, structural and individual. The former paradigmatically denotes the provisions of the constitution that identify the powers of the federal and state/regional governments. The latter typically capture the rules that regulate the interrelationship between citizen and state, as exemplified by rights-based constraints on government action, through a Bill of Rights enshrined in the Constitution.

Constitutions can vary significantly in the depth to which they cover these issues. They can in that sense be fat or thin or somewhere in between: some constitutions address the features set out above in great detail, while others are confined to relatively abstract statements of principle. There is also differentiation between constitutions as to what is included in the constitution in addition to the horizontal and vertical dimension considered above.

We turn now to consider consequences of the appellation 'constitution'. It is important for the sake of analytical clarity to disaggregate different aspects of this inquiry. We begin at the beginning, which is the concept of pre-commitment.

[6]P. Craig and A. Tomkins (eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press 2005).

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Constitutions are expressive of pre-commitment.[7] They embody attachment to certain precepts that are regarded as foundational for that political order. The precepts can be changed, but only through procedures for amendment that are axiomatically more difficult than the passage of ordinary legislation. It is in part for this very reason that most national constitutions do not stray too far into the terrain of substantive policy, since it thereby restricts the choices open to the ordinary legislature, as reflected in the appellation 'over-constitutionalisation'. The nomenclature of 'constitution' is also indicative of placement within the hierarchy of norms. The constitution sits at the apex of the hierarchy of norms. All legal norms are traceable, directly or indirectly, to the constitution; and all other legal norms must be compatible with the constitution. This in turn leads to inquiry as to the best/most legitimate theory of constitutional interpretation. Contestability in this respect is a facet of academic discourse in most, if not all, national constitutional systems. We shall return to this issue in the next section.

Turn next to a consideration of the EU. The EEC Treaty at its founding was regarded by the original member states as just that, a treaty that established inter-state commitments no different in kind than multiple other treaties in this respect. This is readily apparent from, *inter alia*, member state arguments before the European Court of Justice in the seminal case law concerning direct effect and primacy in the 1960s and thereafter. There is, however, no doubt that there are certain respects in which the Lisbon Treaties and the interpretation thereof represent the EU constitution. There are Treaty provisions dealing with the horizontal and vertical dimensions of power customarily found in national constitutions. There is also no doubt that the Court's jurisprudence constitutionalised the Treaties through, *inter alia*, case law on direct effect, primacy, pre-emption and the like that are not expressly mentioned in the Treaties. This case law was a necessary, albeit not sufficient, step in the constitutionalisation of the EU legal order, and remains central in this respect.

This is acknowledged in the literature, with books dealing with the constitutional law of the EU.[8] Indeed the very existence of this law review rightly attests to a field of European constitutional law. This literature, however, also embodies and reflects a duality of meaning as to the concept of the 'constitutional'. For some authors, such as Schütze and Douglas-Scott, the focus is on the institutions, direct effect, competence, primacy, fundamental rights and

[7]S. Holmes, 'Precommitment and the Paradox of Democracy', in J. Elster and R. Slagstad (eds.), *Constitutionalism and Democracy* (Cambridge University Press 1988) pp. 195-240.

[8]*See*, eg, K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell 1999); S. Douglas-Scott, *Constitutional Law of the European Union* (Pearson 2002); R. Schütze, *European Constitutional Law*, 3rd edn. (Oxford University Press 2021); A. Rosas and L. Armati, *EU Constitutional Law: An Introduction* (Hart Publishing 2012); A. von Bogdandy and J. Bast, *Principles of European Constitutional Law*, 2nd edn. (Hart Publishing 2009).

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the powers of the courts. For others, such as von Bogdandy and Bast, the discussion covers such terrain, but also includes all major domains of substantive law, with analysis of the economic constitution, the social constitution, the labour constitution, Economic and Monetary Union, the Area of Freedom, Security and Justice and competition law, as well as the relationship between EU law and international law. The narrower conception is predicated, in essence, on the assumption that the 'constitutional' covers the terrain covered by the horizontal and vertical dimensions of national constitutions, as exemplified by the chapter breakdown in Schütze's book. The broader conception is premised, in essence, on the assumption that the substantive dimensions of the Treaty should also be regarded as of constitutional significance, because they are part of the overall compact between the member states that can only be altered by Treaty amendment, and because the central constitutional precepts of direct effect, primacy, pre-emption, institutional ordering and the like are applicable to such areas.

Neither of these approaches is right or wrong in some absolutist sense. We should nonetheless be duly mindful of the differences between the 'EU constitution' and much else that goes under the nomenclature of 'constitution' if and to the extent that the concept of the EU constitution is held to embrace the totality of the constituent Treaties. The contrast is particularly marked in relation to the US Constitution, which is Fabbrini's conceptual frame for the book, given that the US Constitution is pretty thin as constitutions go in terms of number of articles and specificity of coverage. The TEU and TFEU have, by way of contrast, 413 articles combined, and that is not counting the multiple provisions of the 37 Protocols attached to the Treaties. In a related vein, it is common in all other systems for there to be a divide between constitutional analysis and other admittedly important legislation that may have some impact on the overall balance of power between the different branches of government.

Consider now the consequences of the appellation constitution. The precepts concerning pre-commitment and hierarchy of norms are in principle applicable to the EU Treaties theorised as a constitution. It should also be recognised that such constitutionalisation as applied to the substantive policy domain covered by the EU Treaties has placed strains on ideas of pre-commitment and the hierarchy of norms, both in relation to the member states and the EU legislative process. It has generated concerns as to over-constitutionalisation, reducing the scope for democratic choice at EU and member state level.[9] It has also placed strain on the very language of constitutional change, since if, as in Fabbrini's analysis, every

[9] *See*, eg, D. Grimm, 'The Democratic Costs of Constitutionalization: The European Case', 21 *European Law Journal* (2015) p. 460; F. Scharpf, 'De-constitutionalisation and Majority Rule: A Democratic Vision for Europe', 23 *European Law Journal* (2017) p. 315.

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'important' legislative and judicial development that is definitionally interpretive of some Treaty provision is regarded as 'constitutional', it thereby reduces the normative significance of the appellation; or to put the same point in a converse manner, it is difficult to identify what would not be regarded as constitutional in this respect.

It can be argued, by way of counterpoise, that this very strain has led to some judicial recalibration that has eased ideas of pre-commitment and the hierarchy of norms, thereby giving the EU legislature more scope for interpretation of Treaty provisions. This is evident most notably in the judicial recognition of what has been termed the 'legislative priority rule'.[10] There is a related debate as to the extent to which deference is accorded to national authorities when applying EU law.[11]

The following point can be made by way of conclusion to this brief analysis. The broader the coverage of the 'constitution', the greater the need to make some substantive differentiation between its provisions. The Treaties have equal value as stipulated by Article 1 TEU. However, insofar as the entirety of the TEU and TFEU are conceptualised as constitutional it is not textually or normatively plausible to regard all 413 articles as equally important. There must be some differentiation in this regard. This then brings us full circle to a point made at the outset of this discussion. While such differentiation may be necessary, there are difficult and contestable issues concerning the nature and consequences of the divide between different parts of the Treaty, as attested to by the heated academic debate referred to earlier.[12] These difficulties are exacerbated by the structure of the constituent Treaties. It would be a simple world if the TEU really contained all important provisions of a constitutional nature. It does not. This is readily apparent from comparison of the TEU with Part I of the Constitutional Treaty 2004, which was consciously designed to embody the foundational constitutional principles and came considerably closer in this respect than the Lisbon TEU. The upshot is that in the present Treaty ordering there are also

[10]E. Ní Chaoimh, *The Legislative Priority Rule and the EU Internal Market for Goods: A Constitutional Approach* (Oxford University Press 2022).

[11]*See*, eg, J. Zglinski, 'The Rise of Deference: The Margin of Appreciation and Decentralised Judicial Review in EU Free Movement Law', 55 *Common Market Law Review* (2018) p. 1341; J. Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020); J. Zglinski, 'The End of Negative Market Integration: 60 Years of Free Movement of Goods Litigation in the EU (1961–2020)', 31 *Journal of European Public Policy* (2024) p. 633; M. van den Brink et al., 'Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU', 32 *Journal of European Public Policy* (2025) p. 209. For an opposing view, *see* R. Schütze, 'Rising Deference, Declining Integration? Methodological Thoughts on Zglinski' (forthcoming).

[12]*See supra* n. 5.

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important constitutional principles in the TFEU, which were included in Part I of the Constitutional Treaty 2004. To ignore this in any ordering/hierarchy of provisions within the EU constitution is mistaken. This then leads in turn to consideration of the interpretive consequences of any such divide, an issue that is just as contentious as the nature of the divide itself.

The EU as a 'living constitution'

A recurring theme throughout Federico Fabbrini's book is the idea of the EU as having a 'living/flexible constitution', that is capable of adaptation to change and novel challenges, while acknowledging that there are limits as to what can be achieved either through EU legislation or adjudication. These limits are then the foundation for suggestions concerning reform that are considered below. There is force in the idea of the EU as having a 'living/flexible constitution' and Fabbrini guides the reader skilfully through this terrain in relation to the different subject matter areas that comprise the book.

The following thoughts are pertinent in this regard. There is a proximate link between the very idea of the breadth of the EU constitution and the idea that it should be regarded as a living/flexible constitution. The connection is simple and important in equal measure. Insofar as the EU constitution is regarded as embracing all Treaty provisions, which is the premise underlying Fabbrini's study, then there are multiple Treaty articles to work with when faced with a novel problem, thereby increasing the possibility that it can be 'resolved' through flexible interpretation of one or more such Treaty articles.

There are, however, three counter-considerations that are equally important. The first is a variant of the point made in the preceding section: if every 'important' legislative and judicial development that is definitionally interpretive of some Treaty provision in meeting a novel problem is regarded as evidence of a living/flexible constitution, it reduces the practical and normative significance of the appellation.

The second counter-consideration is just as important. There can perforce be contestation as to the meaning and scope of provisions in any constitution. Constitutional law is replete with case law embodying such challenges. This in turn generates academic scholarship for and against the particular judgment, which is grounded in more general debate as to the preferable theory of constitutional interpretation. Such contestation occurs where the national constitutional provisions are relatively thin and where they are articulated in greater detail. It should also be recognised that such controversy is prevalent in the EU, irrespective of whether one adopts a narrow or broad conception of the EU constitution, as adumbrated above. This is readily apparent concerning, for example, the scope of primacy and the interpretation of competences.

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Such disagreement can be equally present insofar as one takes a broad view of the EU constitution as embracing all Treaty provisions. There can inevitably be disputation as to whether the interpretation accorded to a particular Treaty article was legitimate or not, in the light of other Treaty provisions that touch directly or indirectly on the same subject matter. This is exemplified by academic disagreement concerning the legitimacy of the interpretation of, *inter alia*, Article 122 TFEU during the COVID crisis to justify funds given to member states. The details of the disagreement cannot be rehearsed here. The salient point for present purposes is that the disagreement was far-reaching and turned in large part on the legitimate scope of Treaty interpretation of, *inter alia*, Article 122 TFEU when viewed in the context of related Treaty provisions and the broader Treaty schema.[13]

The third point follows naturally from the second. Whether an EU legislative measure or judicial decision can be regarded as having interpretive legitimacy when addressing a novel problem necessarily depends on the logically prior issue as to the theory of interpretation that informs the EU legal and political order. Federico Fabbrini addresses this issue tangentially at various points in the analysis, principally when forming conclusions as to what cannot be achieved within the existing Treaty schema. It would, however, have been helpful to have considered this issue more directly. I fully accept that a thoroughgoing analysis of interpretive theory as applied to and in the EU would be beyond the scope of the book. It would nonetheless have been interesting if Fabbrini had opined on this issue at some greater length, thereby giving the reader a greater sense of whether his conclusions were informed by interpretive theory that was principally purposive, textualist, positivist, consequentialist or some other variant. This is more especially so given the headline thesis of the book, which is the way in which the EU living constitution reacted legitimately and flexibly to the novel problems posed by Russian aggression in Ukraine.

Proposed reforms

We turn now to consideration of the reforms proposed by Federico Fabbrini, in the light of his analysis of the difficulties faced by the EU in different policy domains engaged by Russia's war of aggression against Ukraine. He rightly points to the difficulties with attaining certain desired EU legal objectives relating to the Ukraine-Russian war within the framework of the existing Treaties. The problems

[13]B. de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', 58 *Common Market Law Review* (2021) p. 635; P. Leino-Sandberg and M. Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment', 59 *Common Market Law Review* (2022) p. 433.

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concerning unanimity, and the attendant blackmail possibilities that this gives to recalcitrant rule of law backsliding states, especially Hungary, is a problem that recurs throughout the book, although the EU has proved adept at circumventing such illegitimate pressure.

Fabbrini suggests a number of desirable reforms in this respect, including, *inter alia*: abolition of the unanimity requirement; EU power over direct taxation; full fiscal capacity; Court of Justice jurisdiction over the Common Foreign and Security Policy; and empowerment of EU to expend money on military operations. He points also to the fact that certain leaders, institutional and national, have at various times advocated for change of this kind. We should nonetheless be cautious in this respect in two quite different senses.

The first is obvious. In empirical terms it is unlikely that the member states will agree to changes of this dimension. Each suggested reform would require Treaty amendment, which means 27 potential veto points. Each of the suggested reforms involves a major change, institutional and/or substantive, to the *modus operandi* of the EU. The dynamics of any such Treaty change are rendered more complex because the actual/potential coalitions of member states that favour or oppose such change will differ with regard to the particular proposed reforms. Thus, for example, the considerations that shape member state views concerning extended European Court of Justice jurisdiction may be very different from those that shape their respective views as to EU competence over direct taxation.

The second point is less obvious: be careful what you wish for. The suggested reforms are predicated on an EU where the 'good guys'/liberal democratic states remain in the ascendancy, with the 'bad guys'/right wing populists/democratic backsliders confined to the annoying minority. We should not, however, regard this as fixed in stone. It is not beyond peradventure that we could have an EU with the ascendancy of the far-right 'Alternative for Germany' party in Germany, and Le Pen et al in France. The prospect of an EU with no veto power, power to tax, full fiscal capacity, power to spend on military operations etc begins to look a whole lot different when viewed from this perspective. It may be argued that such fears concerning the political composition of the member states are unfounded, and/or that if they do eventuate they will be imbued with a democratic mandate and should be respected. These are important issues that cannot be fully explored here. Suffice it to say that in relation to the former point, the shift to the right in many member states is a reality and the chances of this occurring in larger member states is not fanciful. In relation to the latter point, it is true that if this were to occur it would be expressive of the electoral will. This is, however, subject to possible qualifications flowing from democratic backsliding,[14] which 'denotes

[14]There is a large literature: *see*, eg, N. Bermeo, 'On Democratic Backsliding', 27(1) *Journal of Democracy* (2016) p. 5; D. Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism

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the state-led debilitation or elimination of many of the political institutions that sustain an existing democracy'.[15] Since there are many institutions that sustain democracy the term can embrace multiple processes, including undermining the independence of the judiciary, which has generated much case law concerning the rule of law crisis in the EU.[16] An EU dominated by such right wing parties would be very different from the EU of the last half century, and the impact of the proposed reforms would then have to be thought through in the context of this changed political ordering.

Conclusion

Federico Fabbrini's book is, as stated at the outset of this review, a scholarly and thought-provoking book. It draws together the legal and political considerations raised by Russian aggression against Ukraine. It reveals the steps taken in response to war on the doorstep of the EU. The chapter ordering covers developments in foreign affairs and defence, fiscal and economic policy, justice and home affairs, energy and industrial policy, and enlargement and reform. The analysis is crisp, succinct and insightful.

The book also raises broader issues concerning the suitability of the chosen comparative architecture, the very nature of the EU constitution, the import and significance of regarding the EU as a living constitution, and the feasibility of the reforms advocated by the author. These issues are raised by the book, but are also of broader significance for EU studies.

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in Europe's Democratic Union', 52(2) *Government and Opposition* (2017) p. 211; K.L. Scheppele, 'Autocratic Legalism', 85 *University of Chicago Law Review* (2018) p. 545; S. Levitsky and L. Way, 'The New Competitive Authoritarianism', 31(1) *Journal of Democracy* (2020) p. 51; P. Craig, 'The Politics of Constitutional Meltdown', in M. Tushnet and D. Kochenov (eds.), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar 2023) Ch 37.

[15]Bermeo, *supra* n. 14, p. 5.

[16]*See*, eg, L. Pech, 'The Rule of Law', in P. Craig and G. de Búrca (eds.), *Evolution of EU Law*, 3rd edn., (Oxford University Press 2021) Ch 10.

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