THE JEAN MONNET PROGRAM

Professor J.H.H. Weiler
European Union Jean Monnet Chair

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Laurance S. Rockefeller Professor of Public Affairs

Altneuland: The EU Constitution in a Contextual Perspective

Jean Monnet Working Paper 5/04

Neil Walker

Europe's Constitutional Momentum and the Search for Polity Legitimacy

Papers included in this collection should be cited according to the following format.

Neil Walker, Europe's Constitutional Momentum and the Search for Polity Legitimacy, *in* Weiler and Eisgruber, eds., Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper 5/04, [http://www.jeanmonnetprogram.org/papers/04/040501-01.html]

Europe's Constitutional Momentum and the Search for Polity Legitimacy*

Neil Walker

1. Introduction

To suggest that the European Union in 2004 possesses constitutional momentum may at first glance not be a particularly bold claim to make. Indeed, it might seem self-evident that an entity going through a high-profile, self-styled constitutional phase or moment – in the busy sequence of events which has led from the Treaty of Nice[1] to the Laeken Declaration[2] to the (Constitutional) Convention on the Future of Europe[3] to the Draft Constitutional Treaty,[4] and, finally, following failure at Brussels in December 2003,[5] to the agreement of a text by the Intergovernmental Council in

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[1] Treaty of Nice, Annex IV, Declaration on the Future of the European Union

[2] Laeken Declaration on the Future of the European Union, Annex I to the Conclusions of the Laeken European Council, 14-15 December 2001, SN 300/101 REV 1. separate (Civic) Forum received information from the Convention and contributed to its debates

[3] The Convention established by the Laeken Declaration was made up of a chair and two Vice-Chairs, one representative of the government of each Member (15) and (then) Candidate (13) State, two representatives of the national Parliaments of each Member and Candidate State, 16 members of the European Parliament and two members of the Commission. In addition, a number of other agencies attended as observers, and a separate (Civic) Forum received information from the Convention and contributed to its debates.

[4] OJC 189, 18 July 2003. Unless otherwise indicated, reference to specific constitutional provisions in the text below will be to the Draft Constitutional text (DCT) prepared and agreed by the Convention, even though this had been changed in some modest respects by the time of the conclusion of the IGC in June 2004.

[5] Negotiations broke down in the Brussels European Council in December 2003, apparently over the proposal in Art. I-24 of the Draft Constitutional Treaty (DCT) to eradicate the system of national weighting in the context of qualified majority voting in the Council and replace this with a new double threshold of a simple majority of states representing two-thirds of the population of the EU. At that stage, Poland and Spain, who had both received favourable treatment in the reallocation of weighting provided under the Treaty of Nice in 2000, were not prepared to sacrifice their recently won advantage. With Ireland succeeding Italy as the seat of the Presidency of the European Council in the first half of 2004, against early predictions that the failure at Brussels would postpone resolution of the IGC for at least a year, sufficient new progress was made in the early months of 2004 to allow a compromise solution on the voting threshold question and other outstanding issues – such as the composition of the

June 2004[6] to be put to the Member States for ratification in accordance with their domestic constitutional requirements– is imbued with constitutional momentum.

But first impressions would be deceptive. There is indeed a thin and tautologous truth implicit in the proposition that the EU has constitutional momentum, for the generation and sustenance of a self-defined constitutional event *does* presuppose some degree of short-term constitutional impetus. But there is a harder and more important series of questions to ask about constitutional momentum, which distinguish between the short-term, event-framed horizon and the *specific* constitutional product associated with that horizon on the one hand, and a longer-term horizon and what might be termed the *general* constitutional aspiration of polity legitimation on the other. On the short-term view of momentum, we are only concerned with whether the constitutional conditions are sufficiently propitious to ensure the promulgation and ratification of the constitutional document – which itself can by no means be taken for granted.[7] Within this telescoped timeframe any analysis of the effect and impact of the constitution must perforce be closely and modestly tied to basic legal *output* functions - to what can be delivered in terms of the text itself and what flows more or less automatically from that. It is only on a longer term view, one that looks beyond the present constitutional phase and considers the prospect that, far from exhausting constitutional momentum, the present phase may act as a stimulant to a more sustained constitutional dynamic, that we can be concerned as well with more general social and political *outcomes*, primary amongst which is the generic outcome associated with polity legitimation. By polity legitimation is meant the very acceptance of the entity in question as a legitimate

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Commission and the scope of qualified majority voting – at the concluding summit of the Irish Presidency on June 19th 2004.

[6] For an early version of the final consolidated text of June 2004, see
http://ue.eu.int/cms3_fo/showPage.asp?id=251&lang=en&mode=g

political community; that is to say, as an entity that both possesses the authority to render matters that significantly affect the life-chances of members of the putative community in question subject to collective decision, and relatedly – since the authority of legal and political power is inseparable from its social acceptance – that identifies a community with sufficient "we feeling" [8] - however modestly or ambitiously the threshold of sufficiency be set - to accept and render effective collective decisions made on its behalf.[9]

It is with the prospects for that longer term constitutional momentum or impetus in terms of the general constitutional function of polity legitimation that I am here concerned.[10] The article has both explanatory and normative purposes, and, as we shall see, these purposes are closely linked. It is explanatory in outlook in seeking to investigate the question of 'constitutional momentum' more closely and to understand why it may be difficult to conceive of the present phase as triggering a constitutional dynamic that will impact significantly on the question of polity legitimation. It is normative in outlook in that in the course of arguing that the window for viewing the EU as possessing such constitutional momentum remains open, even if that window is more narrow and more elusive than first impressions would suggest, it looks in more detail at what is at stake in the projection of EU constitutionalism in terms of its long-term effects on polity legitimacy and suggests that there is something of value in such a prospect, and, therefore, in its endorsement

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[7] See n. 102 below.

[8] K. Deutsch, S. Burrell, R. Kann, M. Lee, M. Lichtermann, F. Loewenheim and R. Van Wagenen, *Political Community and the North Atlantic Area*, (Princeton: Princeton University Press, 1957) p.36.

[9] See e.g., N. Walker "Constitutionalizing Enlargement, Enlarging Constitutionalism" (2003) 9 *European Law Journal* 365

[10] For other treatments of the idea of polity legitimacy, see, for example, J. Shaw and A. Wiener, "The Paradox of the European 'Polity'", in M. G. Cowles and M. Smith (eds) *State of the European union, Volume 5: Risks, Reform, Resistance and Revival* (Oxford: OUP, 2000); R. Bellamy and D. Castiglione, "Normative Theory and the European Union: Legitimising the Euro-Polity and its Regime," in L. Tragardh (ed) *After National Democracy: Rights, Law and Power in the New Europe*, (Oxford: Hart, 2004).

and encouragement. In concentrating on the holistic question of polity legitimacy and on the role of constitutionalism in contributing to this, the article does not seek to suggest that forms of legitimacy other than those which concentrate on the overall justification of the polity *qua* polity– such as the legitimacy of its general institutional regime or the performance legitimacy associated with the content of the actual polices pursued in accordance with institutional norms - are unimportant, or that the constitution's contribution to these other forms of legitimacy is insignificant.[11] Indeed, it is a central feature of the argument that these other forms of legitimacy are inseparable from polity legitimacy. However, it is precisely because of this inseparability – the fact that the dimension of polity legitimacy cannot be left out of any general assessment of legitimacy or treated as an expendable dimension thereof – that polity legitimacy merits sustained treatment in its own right.

The explanatory and normative dimensions to my argument possess a single root, which we may begin to trace by exposing a paradox of constitutional praxis in the current politics of the European Union. Simply put, this paradox holds that the reason why it is *difficult* to conceive of the present constitutional moment as having sustained momentum in addressing the secular process of polity legitimation (i.e. the explanatory question) is the very same reason why it may also be *desirable* to conceive of the constitutional moment in these terms (i.e. the normative question). That common reason for the elusiveness and the desirability of constitutionalism's contribution to the general aspiration of polity legitimation in the EU may be identified by reference to a more basic paradox applicable to all processes of

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[11] For discussion of the variety of bases of legitimacy of the EU, see Walker above n.9;; D. Beetham and C. Lord, *Legitimacy and the European Union*, (Harlow: Longman, 1988); R. Bellamy, 'The "Right to Have Rights": Citizenship Practice and the Political Constitution of the EU," in R. Bellamy and A. Warleigh (eds) *Citizenship and Governance in the European Union*, (London: Continuum, 2001); R. Bellamy and D. Castiglione, above n.10; G. de Búrca, "The Quest for Legitimacy in the European

constitution-making, or, indeed, of constitutionalization more generally – but one which has a particularly pressing significance in the context of the EU. In the following three sections I will, first set out the general terms of the paradox, secondly, explain why it takes such an acute form in the context of the EU, and, thirdly, say something about how the paradox has in fact coloured the present debate around the draft Constitutional Treaty and in significant respects frustrated or impeded the prospect of addressing the secular problem of polity legitimacy through constitutional means. In the final sections I will sketch an argument to suggest why the present constitutional process and product may nevertheless provide the seeds and supply the momentum for a more constructive, and indeed constitutive, long-term engagement with the question of polity legitimation in the European Union

2. Five Orders of Disagreement and the Paradox of the Constitutional Polity .

We may set out the general terms of the paradox of the constitutional polity through a metaphor of spatial edifice, one which situates the task of constitutional framing of the polity at the apex of a pyramid that embraces five levels of pluralism of perspectives and preferences, with of each of the lower orders necessitating recourse to a higher order and deeper frame of debate that in turn embraces its own pluralism of perspectives. The first order of pluralism is concerned with these forms of difference and of potential contestation or conflict which rest on the basic diversity, first, of interests, secondly, of ideologies or values, and, thirdly, of social and political identities, which different individuals and groups embrace, and which, in descending

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Union", (1996) 59 *Modern Law Review*, 349; C. Lord and P. Magnette, "Ex Pluribus Unum? Creative Disagreement about Legitimacy in the EU" (2004) 42 *Journal of Common Market Studies*, 183.

order of amenability to negotiation and reconciliation,[12] these individuals and groups necessarily bring with them into the political process.

The second order of pluralism concerns the nature of the institutions of justice necessary and appropriate to address and decide upon the resolution of these first order differences - which institutions address the division and inter-relationship of decisional competences as between   different organs of government, as well as whatever basic negative and positive rights the citizen can claim against these government organs and whatever basic duties he or she holds towards these government organs as   are deemed to be (whether presumptively or categorically) prior to and protected from the vicissitudes of political decision. Famously, Rawls specified "reasonable pluralism" over first-order preferences, together with moderate scarcity and limited altruism, as being the elementary "circumstances of justice," [13] - the basic framework of constraint and opportunity within which we seek this second order agreement, which agreement is often crystallised in the norms of a constitutional document or in other undocumented or differently documented provisions of what Kelsen and others term the "material constitution."[14] However, as it seeks to provide just and effective ways of resolving first order differences, this second order institutional framework is itself never safe from controversy. Whether or not it is in principle possible to develop a conception of self-standing just institutions unconnected to any first order comprehensive conception of the good or indeed any other first order conception of basic preferences – and many disagree with Rawls that this is even a theoretical possibility – certainly as a matter of political

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[12] See C. Offe, "'Homogeneity' and Constitutional Democracy: Coping With Identity Conflicts Through Group Rights" (1998) 6 *Journal of Political Philosophy* 113, 119-24.

[13] *Political Liberalism* (New York: Columbia University Press, 1996) 66

[14] H. Kelsen, *General Theory of Law and State*(Cambridge, Mass.: Harvard University Press, 1945) 258-59.

practice we typically find a residue of irreducible disagreement about what constitutes a just framework for dealing with first-order differences.[15]

This area of contestation, therefore, leads to a third level and order of debate. Waldron describes this third level as being framed by the elementary "circumstances of politics",[16] which he identifies as the "existence of… disagreement [over the politics of justice] and the *felt need* [my emphasis] for a common decision notwithstanding the disagreement." Yet, this frame, too, in seeking to rescue and give effect to a generic sense of politics as standing behind and underwriting the second-order institutional framework, also begs key questions. Although there may exist relatively settled mechanisms for channelling and engaging in the kind of deeper contestation that this more elemental level of politics implies, ranging from formal constitutional amendments procedures to judicial and other presumptively authoritative interpretations of disputed second order provisions, this third order of contestation in its turn involves certain presuppositions whose questioning point us to a fourth order or level of debate: namely who are the "subjects" and what is the nature of their subjective bond to this "felt need" to put things in common, and what is the proper "sphere"[17] and legitimate scope of this common enterprise? In other words, which constituency is appropriate and apt to put things in common - to bring matters to collective decision - and to what extent and in what domains is it prepared to do so?

The answer to both of these fourth order questions today are typically deeply embedded and presupposed in an existing institutional complex which conforms to a

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[15] See e.g., . J. Waldron, *Law and Disagreement* (Oxford: OUP, 1999) esp. chs.7-9; F. Michelman "Constitutional Authorship" in L. Alexander (ed) *Constitutionalism: Philosophical Foundations* (New York: Cambridge University Press, 19980 64-98.; "Morality, Identity and" Constitutional Patriotism," (1999) 4 *Denver Law Review*, 1009-28; J. Tully, "The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy," (2002) 65 *Modern Law Review* 204.
[16] Above n. 15, 159

recognised template, namely that of the state. To the extent that the world order remains a "states system",[18] the state both defines the relevant subjects of political community and the relevant spheres of their collective decision-making capacity – a domain which under the sign of state sovereignty knows no limitation other than those limitations decided by the political community itself or those visited upon it by external constraint. Just because the statist template remains so deeply embedded, it is often taken for granted and does not rise to the surface of conscious debate or active contestation. However, its regular taken-for-grantedness does not mean that it is free from difficulty or active controversy. Both internal claims and pressure from classes and constituencies who perceive their interests and values to be subordinated[19] and from national and other minorities who feel their identities marginalised,[20] and, increasingly, external claims and pressure from those, whether other states or organisations or communities of practice or interest, who – in a globalizing world in which the "externalities" of state decisions are increasingly significant – are affected by but do not contribute to state decisions, or, conversely, are capable of influencing or compromising the effective decision-making capacity of the state despite not being its subjects, bring to the surface questions about the appropriate subjects and forms of subjective representation and about the effective domain of the state as a political community.

Finally, then, insofar as disagreement and controversy over who are the subjects and what is the proper domain of the "felt need" to put things in common (fourth order) and how, in turn, this political collectivity is allowed to monitor, reform

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[17] Bellamy and Castiglione, above n.10.

[18] See e.g. R. Falk *Predatory Globalization: A Critique* (1999, Cambridge: Polity) ch.2.

[19] See e.g. S. Chambers, "Democracy, Popular Sovereignty, and Constitutional legitimacy," (2004) 11 *Constellations*, 153

[20] See e.g. See M. Keating, *Plurinational Democracy: Stateless Nations of the United Kingdom, Spain, Canada and Belgium in a post-Sovereign World* (Oxford: OUP, 2001).

or interpret (third level) the framework of just institutions (second order) put in place to resolve basic differences over interests, values and identities (first order) is raised to the level of theoretical awareness and political consciousness and not simply assumed or imposed as a default framework, we may conceive of a fifth order which seeks to provide a framework to address that controversy. This is where the relationship between constitutionalism and polity legitimacy reaches its critical point of convergence, the stage at which the "who decides, who decides"[21] question is either fated to infinite regress – to an irresolution which leaves political community impossible or inherently unstable, or receives some kind of institutional resolution through an authoritative constitutional settlement. The paradox of constitutionalism lies precisely in the fact that, while the very viability of political community depends upon this matter in fact being addressed and a line being drawn over the process of regression, any such line will itself involve a particular group of people, whose identity cannot be self-legitimating, making particular decisions, whose content cannot be self-legitimating, that have particular implications for the resolution of lower level disagreements, and will perforce fail to accommodate all the particular disagreements implicit in the various other levels of contestation and which push the debate inexorably to this higher level in the first place. For there is no good reason, other than the demands of viable political community, why the process of regression should not continue to infinite. There can be no finally and decisively fair manner, and certainly no method which can guarantee acceptance by all affected, of deciding who and in accordance with what procedures gets to decide who are the proper subjects and what is the proper scope of a political community, which defining criteria of authorship and domain shape the establishment and oversight of the

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[21] M. Maduro, "Where to Look for Legitimacy?" in E.O. Eriksen, J.E. Fossum and A. J. Menendez (eds) *Constitution Making and Democracy* Arena Report No, 5(2002) (Oslo: Arena) 81, 91.

institutions through which the diversity of primary interests, values and identities are politically articulated and negotiated.

3. The Paradox of the EU Constitutional Polity

As should be apparent from the above discussion, politics, even constitutional politics, does not often consciously engage on the fifth level, but rather is implicitly framed by the prior resolution, however contingently and partially settled, of that highest order question. The stuff of everyday politics is the set of the concerns we find articulated at the first level and negotiated within the framework set at the second level. Even the stuff of what is commonly conceived of as constitutional politics typically does not go beyond specific assertion or questioning of elements of that second order institutional frame, and usually by resort to mechanisms, whether judicial interpretation or explicit procedures of constitutional amendment, that provide already institutionalised answers to the third order question of what the more basic circumstances of "our" politics require by way of appropriate mechanisms for questioning our second order arrangements. That is to say, constitutional politics usually does not put in question who are the appropriate authors and what is the appropriate extent of the felt need to put, or rather, to keep things in common at the first and second levels, but instead falls back on the institutional solutions that "we" have already found to resolve questions where the meaning or content of existing second order solutions is disputed. In sum, constitutional politics typically takes place at the level of the second order institutional operation of the polity, with occasional but institutionally framed resort to the third level..

Only exceptionally in the context of state politics are the higher order questions at the fourth level put squarely at issue in a fifth order constitutional context, although short of these framing moments there may of course be a more or

less significant undercurrent of discontent or instability due to the internal or external forces listed above – whether through the claims posed by indigenous constituencies who believe their interests, preferences and identities to lack proper recognition and articulation in the present settlement or through external pressures on legitimate or effective state capacity. The framing moments happen where the entirety of the constitutional order becomes the object of political (re)consideration, whether in the context of new beginnings – of renewal of political community - or at first beginnings.[22]

Take, first, the situation of renewal of political community. This renewal may be more or less simultaneous with the demise of the old constitutional order, without significant discontinuity of the polity as such, where, for example a particular second order institutional regime has failed and/or where a particular dominant political configuration has been ousted by internal revolution or external force. Or renewal may be after a period of time, where the polity has reformed after a period of interruption, as is the case with many of the post-Soviet states of Central and Eastern Europe.[23] However, we should be careful not to exaggerate the degree of higher order debate which need go on in either of these contexts of renewal. Certainly, the new Constitution may be important as a symbolic endorsement of the continuation or revival of the polity, as well as of a change of political leadership and./or second order institutional regime, but just because we are dealing with renewal of an already existing political community with a discernible historical lineage of authority and self-identification as a political community, this endorsement will often be without much reflection on the proper subjects and forms of subjective identification and representation or the appropriate domain of that political community. Indeed, the very

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[22] For discussion of the different forms and contexts of constitution making, see A. Arato, *Civil Society, Constitution and Legitimacy* (Oxford: Rowman & Littlefield, 2000) ch.7.

point of such endorsement, and a large part of the motivation behind constitutional renewal, often to the frustration and disillusionment of certain minority communities and subordinate constituencies, may well be to project the settled and presumptively legitimate nature of the definition of the subjects and domain of the polity. [24]

There is, of course, more scope for fifth order deliberation in the context of first beginnings. Here is the first opportunity for the constitutional endorsement of a political community, and so by definition the question of the proper subjects and domain of the political community will not have been definitively settled in advance. However, here too, we should not overstate what is put at issue. Often, a prior sense of "we feeling" - of a national or proto-national[25] community of attachment, will be appealed to and *re*presented.[26]. Often, where some degree of mobilisation of political community is nevertheless required, this may be facilitated by some kind of catalytic event; for example, as in the US or modern post-colonial context, a war or struggle for independence. Often, then, because of these factors, the first Constitution will, at least as far as the preferences and predilections of those who succeed in asserting themselves as its framers are concerned, be more by way of ratification and enforcement of the claimed prior sense of community or of the legitimacy of the struggle through which the sense of community was begun or deepened, and of the working out of the second-order institutional details through which the "felt need" to put things in common should be legally articulated, than a reflection on the need for, viability of and appropriate boundaries of political community in the first place. What

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[23] See e.g. J. Zielonka (ed) *Democratic Consolidation in Eastern Europe* (Oxford: OUP, 2001).
[24] See e.g. Chambers, n.19 above.
[25] As Rosenfeld points out in the context of the founding of the United States, this sense of nascent community may be based as much upon a common immigration source and experience amongst the framers and those they represent, as upon indigenous factors. See M. Rosenfeld, "The European Convention and Constitution Making in Philadelphia" (2003) 1 *International Journal of Constitutional Law* 373

is more, sometimes there will have been a degree of institutional autonomy in advance of independent statehood, prototypes of many of the second order institutions will exist, and so even this lower order exercise of institutional design will not take place in a vacuum.[27] Finally, and to recall an earlier point, it is *always* the case that, if we are dealing with the foundation of statehood, there will be a *general* template of the proper domain of authority – namely the very idea of an authority unlimited in the spheres to which it refers except through the self-limitation of the state itself – to guide the project of constitutionalizing this *particular* state.

If we turn to the European Union, ironically enough, its very existence as a supranational order is itself closely linked to the problems of collective action which arise when the interdependence and reciprocal externalities of state decisions have reached a certain pitch of intensity. That is to say, the European Union is both product, - and, in some measure at least, reinforcing cause, of the kinds of external pressures on states in the face of more intense transnational circuits of economic power, communicative capacity, cultural diffusion and political influence which render increasingly problematical the received Westphalian model of constitutional statehood. It is a product of these 'globalizing' pressures in the sense that a series of decisions of states to deem various matters apt for common resolution where their interests appeared increasingly interlocked was initiated partially on account of the aforementioned strengthening of transnational circuits of influence.. It is a reinforcing cause in the sense that the very creation of the new supranational order, with all the self-reinforcing concentration of political power in a new institutional framework of

[26] On the necessarily active or *re*presentative character of any constitutional recognition of prior political community, see H. Lindahl, "Sovereignty and Representation in the European Union " in N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003) 87.

[27] Where there has been a degree of self-government prior to independence, as, for example, to take three examples from the new post-Enlargement membership of the EU, in the case of the Baltic states

authority it has brought, clearly adds to the external challenges to state authority. Be

that as it may, the instant point is that, for all that its very existence reflects and

reinforces a measure of vulnerability in the template of authority which traditionally

has permitted a relatively settled set of answers to the higher order questions of the

constitutional polity at the state level, the EU itself is now confronted with these

problems much more intensely. We can tease this out by comparing the EU, first,

with a state in a process in a stage of constitutional renewal, and secondly with a state

at the stage of first constitutional beginnings.

To what extent can we compare the EU to a state polity in the process of

renewal? Certainly, in terms of its extensive decision-making jurisdiction over first

order issues, in its sophisticated second order institutional complex for deliberating on

and resolving first order issues differences, and in is self-assertion of the principles of

supremacy and direct effect to ensure the superiority and bindingness of the norms

which are legislated, executed and adjudicated upon within this institutional complex,

the European Union already covers much of the profile of the "material constitution"

of a state constitutional polity. Indeed, this is reflected in the EU's long if sketchy

history   of constitutional self-description   prior to the present documentary

constitutional phase.[28] Yet for all this 'lower order' similarity of constitutional norms

and practice and the familiarity of the reference to or presupposition of a prior

constitutional tradition, this does not mean that the EU in its present constitutional

moment is engaged in a process of polity renewal analogous to that exercised by

states in the phase of constitutional renewal. For the EU clearly lacks the settled

sense of its subjects and of their ties to the political community and of the domain of

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prior to the break-up of the UUSR, or to Slovenia in the case of ex-Yugoslavia, or the Czech Republic
and Slovakia in the succession to Czechoslovakia.

that political community that form the "higher order" credentials of a pre-established state as a constitutional polity. Neither is the fact that it is absent these credentials simply a matter of its lack of any prior explicitly constitutional document to resolve or confirm the resolution of these higher order questions. To illustrate this point, if, as the last remaining developed state to lack one, the United Kingdom were to move to establish a written constitution, then by contrast to the EU it would not have to resolve the polity question *ab initio*, but would start from the default premise that its subjects were defined by the acknowledged territorial boundaries of the United Kingdom and by their prior investment in that political community and that its domain of authority was the potentially unlimited jurisdiction associated with all states.

Accordingly, although there are certain lower order similarities between the EU in its present constitutional phase and a continuing but renewing state, at the higher order level it is more akin to a polity at the stage of first constitutional beginnings, for in neither case has the question of the political identity of the subjects and the proper domain of the polity yet been definitively resolved. Yet the starting position of the current EU remains distinct from that of the new constitutional state in four significant respects. First, unlike many states at their founding constitutional moment, it lacks the strong identitive traits or sources of "we feeling" of common language, traditions, affective symbols and developed civil society and public sphere to which the claim to form political community can refer and appeal, and so it cannot count upon the active endorsement or even in some cases the acquiescence of its putative subjects in the existence still less the proper domain of the need to put things in common. Secondly, unlike many of these states, it lacks the mobilising dynamic of some obviously and immediately catalytic event, whether a struggle for independence

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[28] This history is not restricted to the ECJ, but clearly they have been the most influential (if only occasional) pronouncers on the constitutional status of the Union prior to the current phase, starting

or a political revolution, to help forge that sense of political community.[29] Thirdly, unlike all states in their founding phase, the type of political community the EU seeks for its putative members neither claims to be already exclusive of or dominant over other forms of mature and independent political community at the moment of foundation, nor does it seek by that act of foundation to reinforce itself as or even become the exclusive or dominant source of such mature and independent political community for its members. For the EU is entering its phase of documentary constitutionalism at a point where all its citizens also remain citizens of its sovereign member states, and except perhaps on the most ambitiously "statist" projection of the European Union,[30] it is not seriously intended that the documentary Constitution replace these states as the sole source of political community of its member states or to reduce these states to a subordinate status – downgraded to the provincial parts of the federated whole of the European Union. Rather, insofar as autonomy is sought for the EU polity, it is "autonomy without territorial exclusivity"[31] – a claim to original or non-derivative authority over a territory that is contiguous with the territories of other original or non-derivative (state) political communities and over populations that continue to understand themselves also as members of these other original political communities. Fourthly and finally, therefore, that the European Union is added to a map of political authority already coloured without remainder by states and their populations means that, unlike all such states in their original phase, it also lacks the critical standard and background presumption supplied by the idea of a potentially unlimited and so only self-limiting domain of action as a general template for the

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with *Parti Ecologiste 'Less Verts' v Parliament* [1986] ECR 1339.

[29] See Rosenfeld, above n. 25.

[30] See, for example, F. Mancini, "Europe: The Case for Statehood," (1998) 4 *European Law Journal* 29.

[31] N. Walker, "Late Sovereignty in the European Union" in N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003) 3, 23.

proper sphere of its action. There may be many examples of "failed states,"[32] of states which lack or lose the capacity to harness effectively the reins of authority, but here there is at least a model and a benchmark against which success or failure may be measured. The EU, by contrast, has no similar general model to guide or vindicate its frame for accommodating whatever "felt need" it possesses to put things in common. There is, in short, no genus of the polity of which it can confidently identify itself as a species.

If we brings these point together, the singularity of the paradox of the European Union constitutional polity would seem to lie in its particular mix of epistemic and motivational problems, which problems map onto the 'authority' and the 'community' dimensions of political authority respectively. Moreover, just as the 'authority' and 'community' dimensions of political authority strongly presuppose one another, so, likewise, do the epistemic and the motivational problems. Epistemically, the EU struggles to find a basic grammar for the new language of political authority it must speak. If its position as a constitutional polity can only be as one situated alongside and overlapping state constitutional polities without being either superordinate or subordinate to these state constitutional polities, how and on the basis of whose legitimate authority and active support is the EU to conceive of the nature and limits of its authoritative domain in relation to the continuing original authority of the states, and, relatedly, of its relationship with its citizens all of whom are also prior members of these state communities? Motivationally, just because, looking backwards, the EU lacks a thick basis of common attachment on the basis of which to put things in common and, looking forwards, it lacks an urgent sense of shared predicament to supply this deficient social glue and to provide a sense of the

[32] See e.g. R. Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: OUP, 2000) ch.1.

legitimate   domain of the polity, how else is it to find and nurture the sense of common engagement necessary to identify that legitimate domain and effectively mobilise political effort within it?

Moreover, not only do the epistemic and motivational problems seem to be the two sides of the same conceptual coin of polity legitimacy, but in practical terms, too, they are locked into a relationship of mutually reinforcing cause and effect. If we return to the epistemic problem of how to conceive of the subjects and domain of a novel type of political community where neither territory nor population is exclusive or predominant to that community, then the motivational problem of non-predominant membership and so the prevalence of variously absent, weak, reluctant, subordinate and in any case collectively disputed ties of membership is, on the one hand, not only a constituent element of the epistemic puzzle to be solved, but on the other, also political cause and effect of that puzzle – both a reason why it is not easily brought to common engagement and resolution and a reinforced outcome of that irresolution.

This, then, is the reason why constitutional momentum may seem both elusive and vital in the EU constitutional context. It is elusive just because the epistemic and motivational problems at the heart of the EU constitutional paradox are mutually-reinforcing, and so suggest no firm starting point for establishing constitutional momentum. It is vital because there exists in that very same intimacy of the relationship between the epistemic and the motivational issues a positive as well as a negative potential. Just as the problems are mutually reinforcing, so in theory might their solutions. The key to the reversal of the process – to transforming the vicious circle into a virtuous circle - lies in establishing a dynamic whereby the epistemic and motivational problems may begun to be treated in a cumulative and mutually supportive manner. It depends, in other words, on the emergence of conditions in

which the question of how to form and where to draw the limits of a novel type of political community situated alongside states and whose members are all   dual citizens is a question that these dual citizens and other putative members are broadly persuaded is worth pursuing and answering in common.

So, in practice, can the fifth order constitutional frame, which reflects and highlights the paradox of the constitutional polity in its particularly elusive transnational guise, also be the basis for its overcoming? Can the constitution be not only the problem but also the solution? First, let us look in more concrete terms at the ways in which the constitution may with some persuasiveness be viewed as merely the reflection or repository of the problem of polity legitimacy in the EU context, and then let us look at how it might nevertheless be the source of the solution.

4. **The Constitution as the Problem. The Diversity of Polity Oriented Constitutional Strategies**

(a) *The Constitution as condensing symbol*

So far, we have conceived of the fifth order constitutional resolution of the problem of polity legitimacy as a conceptual possibility, one which has been resolved in different ways and against different backgrounds in various moments of constitutional foundation or renewal. But of course, those involved in constitution-making do not approach their task as a conceptual possibility, as a disinterested exercise in the nature and limits of political theory. Rather, they have their own agendas, their own 'lower order' and/or 'higher order' reasons for addressing the question of the nature of the subjects and domain of the political community in particular ways, and their polity-oriented constitutional strategies, to the extent that they are at all explicit, will reflect these agendas   Nor, and certainly not at the moments of first beginnings of

documentary constitutionalism, is the outcome of the struggle between these different polity-oriented strategies likely to be made clear simply by the mere fact of signing and ratifying the constitutional text. The struggle over the meaning of the text as a whole and of its various parts will continue, and, as in the case of the division between federalists and anti-federalist at Philadelphia, it may take many years and much bloodshed before it is resolved, or at least before a dominant meaning is consolidated. But in the instant case we do not have the luxury of retrospective wisdom, of knowledge of the terms on which and the extent to which the EU has succeeded or failed as a mature polity. All we have, instead, is the variety of polity-oriented constitutional strategies jockeying for position and struggling for ascendancy in the here and now, and our estimation of how that struggle is likely to become engaged and to progress.

In the present section, I want to argue why the polity-oriented constitutional strategies in the EU debate are particularly diverse and why they may be particularly resistant to the development of an ongoing constitutional momentum which holds out the prospect of the emergence of a dominant and reasonably consensual answer to the higher order polity question. Before this argument, can be developed, something must be said about polity-oriented constitutional strategies and the social meaning and symbolic implications of constitutionalism more generally.

By polity-oriented constitutional strategies I mean the range of strategic roles which may be accorded to the putative EU Constitution, and towards EU constitutionalism more generally, as a means towards the sustaining or realisation of a particular overall vision of the legitimacy of the EU as a political community. Each polity–oriented strategy, therefore, contains an implicit or explicit answer to two types of question. First, there is the question we have concentrated on so far. What kind of

polity is it envisaged it is possible and appropriate for the EU to be? Secondly, in the realisation of that polity vision or "structural ideal",[33] what kind of contribution is possible for and appropriate to constitutionalism in the EU, including, most urgently, the contribution, if any, of a written constitutional settlement? Just as we can break the strategic question down into two parts, so this suggests that the possibility of conflict and disagreement over the question of the relationship between the constitution and polity legitimation may also occur at two levels – both over the fourth order polity vision and the fifth order constitutional means of realising that polity vision

Of course, conflict over means is intimately related to conflict over ends, and to that extent the latter is reducible to the former. Yet, to complicate matters, the possibilities of conflict and disagreement over the *constitutional* framing of the debate and its instrumentalization of a resolution is by no means exhausted by the different polity ends towards which the debate is directed. For what is potentially at stake in the constitutional debate is nothing less than an entire register of meaning about the relationship between politics and society. Political thought and rhetoric in all modern societies, once it rises above the first-order bare articulation of interests, values and identities and becomes about the making or presupposition of political community, is suffused with constitutional symbolism. To put it another way, constitutionalism in modern societies provides a key "condensing symbol,"[34] a   modality of thought, affect and discourse   which enables individuals and groups within a political community both to make sense and to articulate a sense of their common past, to form and pronounce judgements about their common present, and to plan and project

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[33] N. Walker, "Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism" in T. Campbell, K. Ewing and A. Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford: OUP, 2001) 139.

various imagined common futures. Three points of immediate significance flow from this.

First, there is the sheer open-ended inclusiveness of what may be signified under the constitutional sign. All the questions that citizens and politicians may have about how to put things in common, about how to do politics together, while they are in fact framed in a variety of different discourses, are also capable of being brought together, or condensed, under the wide umbrella of a constitutional register. Just as in the conceptual pyramid set out above to trace the ultimate paradox of the constitutional polity we see close connections between the various levels, so too in the world of social and political meaning citizens and politicians often do not make a general category distinction between questions concerning the particular meaning of a specific right framed or competence delimited under the extant framework of just institutions on the one hand, and questions concerning the legitimacy of constitutional amendment procedures or the general foundations of legitimacy of the polity on the other. All are seen as constitutional questions, issues amenable to debate 'in the name' of a particular positive constitutional norm or a framework of general constitutional aspirations.

Secondly, social meaning is also always historically constructed and mediated meaning. The meaning of constitutionalism, or, indeed, of any "condensing symbol" in the here and now, cannot simply be divorced from the sense of constitutionalism that the participant have brought from other situations and from their received understanding of earlier social understandings of constitutionalism.

Thirdly, the fact that, like all "condensing symbols," constitutionalism speaks to the possibility of a widely shared and a broadly communicated register of meaning,

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[34] V, Turner, *Dramas, Fields and Metaphors: Symbolic Action in Human Society* (Ithaca: Cornell University Press, 1974).

means that the symbolic implications of constitutionalism will be as much ideological as ideational. Constitutionalism, is both a means to make sense – individually and socially – of the relationship between politics and society, and a means of conveying or communicating that sense more or less persuasively to others. It is, in other words, a form of social power as much as a code to social understanding. Again, the greater or lesser influence, or ideological impact, of particular constitutional interpretations can be traced at various levels of the constitutional order and in accordance with a variety of different mechanism and authoritative 'voices' (judges, constitutional councils, legislatures, executives etc.), but what we are primarily concerned with here is how the constitution conceived holistically can provide a socially legitimate vision of the kind of political society it seeks to construct. As one writer puts it, "[I]n so far as constitutions are themselves considered authoritative this is because they construct, focus, organise or affirm in certain ways plausible images of the general nature of the society comprised of those whose allegiance to the constitution is required." [35] Particular holistic interpretations of constitutions, in other words, will seek to present the constitution as conveying an image of society (popular republic, monarchy etc.) which, if accepted, will create a receptive audience for just the kind of authoritative claims the constitution makes.

Clearly, there is a self-projecting and, if successful, a self-fulfilling element to this kind of constitutional symbolism, and we will have more to say on the positive dimension of this later. For the moment, however, as with the other two dimensions of constitutional meaning or symbolism highlighted – its capacious reach and protean quality in the first place and its situation in a historical tradition in the second, this self-fulfilling projection of constitutional meaning is important for what it tells us

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[35] R. Cotterrell, "Some Aspects of the Communication of Constitutional Authority" in D. Nelken (ed) *Law as Communication* (Dartmouth, Aldershot, 1995). 129.

about the scope for and the implications of the diversity of polity-oriented constitutional strategies in the EU.

In the first place, then, the sheer capaciousness of the field of constitutional reference means that the motivations and strategies of actors in the EU constitutional debate need not directly connect with the higher order questions of the subjects and domains of the political community at all. As already noted, the EU already has a well developed second-order institutional framework, which makes it possible in the name of constitutionalism for some to concentrate their efforts in the constitutional phase on the affirmation or reform of the "material constitution", or at least to minimise the independent significance of the higher-order questions in the light of the greater urgency of particular institutional questions and their general satisfaction with the existing default solution to the higher order questions. In the second place, that the social meaning of constitutionalism is grounded in a set of historical experiences and memories, means in particular that the *state* tradition of constitutionalism provides a powerful backdrop for the attempt to make sense of the EU in constitutional terms. Many of the general categories of constitutional thought, from sovereignty, fundamental rights and representative democracy to the federal layering of competences and the separation and the balancing of the central organs of government have been honed in a state context, and the understandings taken from that context cast a long and sometimes distorting shadow over attempts to apply constitutionalism to the transnational or supranational level.[36] Thirdly, and relatedly, in the EU context, regardless of the particular content of the self-projection of political community through the constitutional instrument, the prior fact that the projection takes place in a *constitutional* frame at all is not innocent of social meaning. The invocation of a

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[36] Shaw and Wiener, n. 10 above.

constitutional frame already conveys the message that the EU is the kind of entity which is suitable for constitutional treatment. And since, in historical terms, the paradigm case of the kind of entity suitable for constitutional treatment is the state, such an invocation may relay the controversial message that the EU has or aspires to state-like qualities, or at least that it is a political community of standing equivalent to or comparable to that of a state.

(b) strategic diversity

With these points, in mind, let us try to examine and appreciate the depth of diversity of polity-oriented strategies brought to the current EU constitutional debate. But first a caveat. For all the attractions of taxonomy in providing a categorisation of strategies, we should be careful not to read the panorama of constitutional aspiration brought to the present debate as fitting neatly into self-contained and mutually exclusive polity-oriented strategies. Some strategies shade into one another, others though quite distinct are not necessarily mutually inconsistent but may be held concurrently with greater emphasis on one or the other, or may be asserted consecutively by the same party. This fuzziness is a product both of the complexity and uncertainty of the choices of constitutional strategy available and relevant to the Europolity debate – given precisely that we are operating in the largely uncharted territory of the constitutionalization of a transnational polity as opposed to the more familiar *state* polity – and of the variable interest in and appreciation of the strategic possibilities of the participants in the debate. As noted (and, indeed, this is a contributory factor towards the deep diversity of the present debate and its resistance to the development of constitutional momentum), many participants may be 'constitutionally' motivated by the institutional securing or favouring of discrete interests and values. And even where there is a degree of extrapolation from these

more discrete preferences to a more holistic sense of the constitution and its role in polity-making, discursive awareness of this may be limited and commitment weak and uncertain, or may even trigger a secondary strategic preference not to highlight the higher order questions either from a self-interested attachment to the existing default settlement or from a more pragmatic concern not to invite the conflict which the raising of such questions threatens. . Nevertheless, the following classification serves a certain heuristic value in setting out the obstacles to a more positive reading of the constitution's potential to address the problem of polity legitimacy.

First, then, we may consider the strategy of *constitutional denial.* This is the default attitude of the constitutional sceptic. There are a number of variants of scepticism,[37] but of most immediate relevance are two forms specific to the EU. There is, first, an attitude of deep scepticism, which simply holds that the EU is just not the kind of entity that is worthy of characterisation in constitutional terms.[38] There is also a more contingent scepticism, which often shades imperceptibly into the deeper scepticism.[39] The more contingent version of scepticism holds that while we should not rule out the possibility of a 'truly' constitutional status for the EU, and so should not entirely dismiss the prospect of a constitutional moment, no such status is yet appropriate and no such moment has yet arrived.

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[37] In particular, there is a kind of generic constitutional scepticism which, from a number of quite diverse starting points, holds that constitutionalism in any guise is incapable of making a significant positive difference to the legitimacy or effectiveness of the political domain This tends to be associated with a critique of the supposed " public institutional prejudice" or bias of much constitutional thinking, and a corresponding belief that private, or market-based or other micro-political forms of ordering are the more significant - and, indeed, more appropriate - regulatory modalities. See N. Walker, "The Idea of Constitutional Pluralism" (2002) 65 *Modern Law Review* 317, 323-4. For a good example of this kind of generic constitutional scepticism, but applied to the EU, see K.-H. Ladeur, "Towards a Legal Theory of Supranationality- The Viability of the Network Concept" 1997) 3 *European Law Journal*, 37. Needless to say, EU constitutional sceptics tend *not* to be generic sceptics, as their scepticism of transnational constitutionalism tends to be closely connected with their strong affirmation of state constitutionalism.

[38] See, e.g., D. Grimm, "Does Europe Need a Constitution?" (1995) 1 *European Law* Journal 282.

[39] For example, the famous decision in *Brunner* v *The European Union* [1994] 1 CMLR 57 is ambiguously poised between contingent and deep scepticism, being amenable to either interpretation.

These attitudes are closely associated with a state-centred view of constitutionalism, one in which states are not only the exclusive or dominant *bearers* of the constitutional tradition but also the exclusive or dominant *heirs* to that tradition. It is a view that reflects the idea that because the EU lacks certain key legitimacy and functional prerequisites of polity status, in particular a *demos* - a prior political community which identifies itself as such and which has the sense of common attachment necessary to make decisions in a manner and commit resources to an extent seriously capable of addressing matters of common interest, and, moreover, is broadly perceived as legitimately possessing that capability - then it cannot be a genuine candidate for constitutional status. [40] On this view, the formal rituals of constitutionalism - documentary or otherwise - are seen as just that, as so much rhetoric and ceremony, without the social and political substrata necessary for their effective operationalization and legitimation. The Constitutional Treaty, for all its forensics and fanfare, can be nothing more than a false or *ersatz* constitutionalism, a text which illegitimately frames an essentially state-derivative legal configuration in autonomous and original terms, rather than a event which recognises or brings into being a new *pouvoir constituant* for the European Union.

For all that the successful establishment of a constitutional process in the Convention on the Future of Europe might suggest otherwise, the continuing influence of the strategy of constitutional denial should not be discounted. To begin with, it at least partly accounts for the extremely modest extent to which the work of the Constitutional Convention penetrated popular consciousness. For example, a Flash Eurobarometer Poll conducted on the very weekend that the fruits of the Convention were presented to the European Council in Thessaloniki in June 2003

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[40] Indeed, constitutional scepticism shades into a broader Euroscepticism, according to which the EU does not even posses the legitimacy to match it present (sub-constitutional) capacity, still less to

reported that 55% in a transnational survey had not even heard of the Convention, and that only 32% could accurately characterise its product as a Constitutional Treaty, as opposed to some lesser species of text.[41] Whether and to what extent the result of ignorance in the face of an apathetic press coverage, or of indifference, or of hostile denial, it is difficult not to see these and similar figures later in the process,[42] and indeed a similar disengagement from or at least ambivalence towards [43] the constitutional process amongst various organised political groupings, as at least in some parts an indication that denial of the viability of European political community and of the value or legitimacy of a constitutional settlement for that community remains well-founded in the attitudes of some members of that putative community.

Paradoxical as it may seem, constitutional scepticism also provided some of the motivation behind the Convention and its product, and this points towards a second polity-oriented constitutional strategy which remains sceptical in principle but which finds pragmatic grounds for not refusing to engage, namely the strategy of *constitutional truncation*. Many constituencies historically opposed to the idea of the European Constitution as an inspiration towards and mark of European political community became in the pre-Convention phase converted to the constitutional process *not* as a polity-making or polity-consolidating device, but as a polity-limiting device. Groups such as the German Lander with their commitment to a strong

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extend that capacity.

[41] "Convention on the Future of Europe" Flash EuroBarometer, 142, (2003) (EOS Gallup Europe).

[42] Including the results of the European Parliament elections in June 2004, just one week before the Brussels Summit which agreed the text of the Constitutional Treaty. These elections produced both a record low turn-out, and a record high support for parties committed to withdrawal from the European Union.

[43] To take but one example, the attitude of many European regional groups and umbrella organisations towards the Convention was highly ambivalent, torn between a desire to have their voice represented and a wish not to underscore the authority of a process about whose legitimacy they were highly sceptical. In turn, this ambivalence was reflected in the attitude to the Convention taken by the Committee of the Regions. See e.g. M. Keating,"Regions and the Convention on the Future of Europe" (2003) 8(4) *South European Society and Politics*

competence catalogue[44] or the various other Eurosceptic voices who supported a Charter of Rights[45] as a power-constraining rather than a power-enabling device, became strategically reconciled to the constitutional process as a way of freezing the process of integration and cutting off the possibility of future development. They did so in the name of that important dimension of the constitutional tradition devoted to the *limitation* of government power, rather than as a mark of their conversion to the idea of the EU constitution as *constitutive* of a robust self-standing polity.[46]

A third strategy, or series of strategies, while not sharing the 'in–principle' hostility of the first two approaches to the very idea of the EU Constitution as a claim to full polity status, is at best indifferent to that claim and at worst sees it as a distraction or a strategic impediment. This covers the whole range of approaches which view the Constitution as no more than a timely opportunity to change or affirm particular aspects of the "material constitution" – the second order rules for the reconciliation or negotiation of first order differences. Two particular variants of *constitutional materialism* may be identified.[47] On the one hand, there is a whole range of processualist approaches which hold that constitutional discourse and practice within the European Union should not be seen exclusively or even mainly as a matter of Treaties and self-styled constitutional documents. Rather, the test of constitutional relevance should be functional rather than formal, and *any* activity and

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[44] See, for example, U. Leonardy, "Kompetenzabgrenzung: Zentrales Verfassungsprojekt fur die Europaische Union" in P. Zervakis and P. Cullen (eds) *The Post-Nice Process: Towards a European Constitution?* (Baden-Baden: Nomos, 2002).

[45] See, e.g. . *The Economist*, 4 November 2000. The conversion of the traditionally Eurosceptic *Economist* magazine to the idea of a European Constitution was highly contingent upon the endorsement of a power-constraining version of the Charter of Rights

[46] This is not to suggest that limitation of government power is an illegitimate constitutional function. It is a necessary constitutional function, but arguably it is inseparable from, and should be balanced by a second task of constituting government power. The attitude of many whose strategy is one of truncation is to ignore the constitutive element and concentrate only on the limitation of what had already been constituted.

[47] I discuss these two variants at greater length in N. Walker "After the Constitutional Moment" in I. Pernice (ed) *The Draft Constitutional Treaty* (Baden Baden: Nomos , 2004)

any form of reflection that is concerned with the overall legitimacy of the European juridico-political order should be seen in terms of a constitutional register. If this view is taken, large public events, and, indeed, general constitutional doctrine and institutional arrangements are merely the tip of the iceberg. Underneath, other 'constitutional' practices are seen as unfolding, and it is this ongoing dispersed process of articulation and re-articulation of various parts of the constitutional whole which supplies the key dynamic rather than the surface movement of 'grand' constitutional events and outlines.

Of course, to downgrade the making of the documentary Constitution or the large institutional structures which are its progeny in favour of the more detailed machinery and processes of governance is to make a normative rather than an empirical judgement. Underwriting that normative judgement will be both negative considerations against constitutional 'surfaces' and positive considerations in favour of constitutional 'depths' In turn, these considerations embrace a complex range of factors, but one important one, once again, is the attitude to democracy and its optimal constituencies and forms. Negatively, a Europe-wide constitutional event is not seen from the processualist perspective as especially conducive to the development of a Europe-wide demos, either because the kind of state–centred democratic approach which is resistant to the very possibility of a European-wide demos is endorsed, just as it is in the two forms of constitutional scepticism discussed above, or because the making of a Europe-wide demos is seen exclusively or largely as a matter of the accumulation and progression of micro-processes located in a myriad of different levels and sites of governance. Positively, however, this scepticism about the transnational democratic collective and about the role of the documentary Constitution in recognising or constituting that collective does not in the case of the

processualists translate into a generic constitutional scepticism. This is either because, if they start from a state-centred conception of democracy, the processualists nevertheless see other important forms of legitimation, often of a technocratic and/or procedural nature, as being important to the Euro-polity and as capable of being shaped and encouraged in constitutional micro-processes,[48] or because their more "bottom-up" conception of European-wide democratic process is seen as requiring its own kind of "bottom-up" constitutional register, one in which constitutional concerns about the overall democratic legitimacy of the polity organism are inseparable from the production and reproduction of each of its individual cells.[49] Whichever the underlying orientation and motivation, the processualist tends to focus on mechanisms which are given little direct recognition within the Treaty structure, such as comitology or the Open Method of Co-ordination (OMC) or local partnership agreements or other "new" forms of governance[50] which are then viewed, by dint of the pervasiveness of their practice and their actual or potential cumulative transformative effect upon the general structural and cultural template of European regulation, as vital constitutional processes which are in danger of being obscured by the focus on surface activity. Insofar as there are opportunities for these matters being dealt with at the formal constitutional level, of them coming to the surface, then that opportunity should be taken, but this should at best be seen as one level of a multi-

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[48] See, e.g., G. Majone, "The Credibility Crisis of Community Regulation" (2000) 38 *Journal of Common Market Studies* 273; C. Joerges, " 'Good Governance' Through Comitology" in C. Joerges and E. Vos(eds) *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999) 311.

[49] For an excellent assessment of the dangers and potential irrelevancies of 'top-down' constitutionalism from a 'bottom-up' democratic experimentalist perspective, see O. Gerstenberg and C.F. Sabel "Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?" in C. Joerges and R. Dehousse (eds) *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002).

[50] For an overview, see G. de Burca, "The Constitutional Challenge of New Governance in the European Union" (2003) 28 *European Law Review* 814.

level strategy rather than a focal concern,[51] with the danger persisting that this will prove to be a false window of opportunity which misallocates political energies and marginalises the real constitutional debate for a post-state political configuration.[52]

A second main variant of materialism we may term constitutional serialism. On this view, constitutional development at the level of general second –order rules is cast in more positive terms. The reservation of the serialist, unlike the processualist, does not concern the significance of the second-order rules as such, but rather their entrenchment as rules of superordinate status with few opportunities for and difficult thresholds of reform. For the serialist, institutional redesign is best done in an iterative series, as regular links in an indeterminately extended chain rather than in rare and axiomatic moments of constitutional figuration and reconfiguration. The endorsement of an iterative pattern is, moreover, supported by the recent history of structural reform in the Union. After 30 years of relative Treaty stability, the 1990s and the early years of the new century have seen two rounds of Enlargement (the latter by far the largest to date), three Intergovernmental Conferences and subsequent Treaty revisions - the last two of which have in part been in response to the enlargement process, a Charter of Fundamental Rights, and a plethora of other major institutional initiatives which were arguably 'constitutional' in their concentration on second-order institutional design if not in name, [53] - all before the present *Constitutional* Treaty (which, as another indication of its unexceptional status, shows strong similarities to its two predecessors in numbering Enlargement amongst its

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[51] See e.g. C.F. Sabel and J. Zeitlin "Active Welfare, Experimental Governance, Pragmatic Constitutionalism," Paper for the International Conference of the Hellenic Presidency of the European Union, Ioannina, Greece, 21-22 May 2003.
[52] See e.g. R. Bellamy, "Which Constitution for What Kind of Europe? Three Models of European Constitutionalism" *EU Jurist*, Thinking Outside The Box Editorial Series, paper 04/2003.
[53] Notably, the 2001 European Commission document *European Governance: A White Paper* (2001) 428

proximate causes)[54] was even a gleam in the drafter's eye. The serialist sees in this contemporary move towards a "semi-permanent Treaty Revision process"[55] a reasonably healthy reflection of ongoing structural debate within a polity-in-the-making - a sign of an entity pragmatically responsive to the dynamic expansion in the reach of European policy-making and seeking to come to terms with the diverse and changing aspirations of its citizens. On this view, there is no reason to regard the present process as anything other than the latest in a long series, and one which should not be treated with any special reverence or preserved with any special care.

Alongside these three approaches, each of which with greater or lesser emphasis declines to endorse the idea of the present constitutional phase as a polity-defining event, we find three other strategies which in their different ways seek to cash the larger symbolic dividend of constitutionalism. One such strategy is that of *constitutional stealth*. By and large, this strategy was exhausted by the time the Constitutional Convention was in full flow, but it remains of interest for the bridge it provided towards and its continuity of orientation with certain other approaches to be considered below. By constitutional stealth is meant an attitude where the extent and motivation of the strategy to achieve constitutional status is not fully acknowledged or explicated in public discourse. In this regard, the drive towards consolidation of the Treaty texts in recent years has been an important medium. One important factor in keeping constitutionalism on the political agenda in a relatively uncontroversial manner in the years between Amsterdam and Laeken, and indeed one of the four themes in the 2000 Nice Declaration which paved the way for the establishment of the

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[54] See e.g. B. De Witte, "The Impact of Enlargement on the Constitution of the European Union" in M. Cremona (ed) *The Enlargement of the European Union* (Oxford: Oxford University Press, 2003).

[55] B. De Witte, "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permament Treaty Revision Process, " In P. Beaumont, C. Lyons and N. Walker (eds) *Convergence and Divergence in European Public Law* (Oxford: Hart, 2002) 39.

Convention at Laeken in December 2001,[56] was the commitment to reorganisation and simplification of the Treaties.[57] To some extent, this is an idea which has to be taken on its own merits – as a modest contribution to providing a more legible and accessible framework for the EU's labyrinthine "print community"[58], but that does not exhaust its strategic significance. The idea that mere consolidation and a commitment to rationalisation and reorganisation should provide a significant rationale for a *constitutional* text (as opposed to a more modest revision instrument) provided a convenient pretext for those with more ambitious objectives; a low-key mechanism, "lawyerly" and politically uncontentious, for gradually manoeuvring a larger project of constitutional reform into the political frame.[59] . The same attitude of stealth, or at least of prudence, continued to animate the preparatory stages of the Convention. We witness only a cautious widening of the agenda from consolidation at Nice, to proto-constitutional in the Laeken text[60] and then to fully constitutional only once the Convention, having accepted far more diffuse initial terms of reference, was well underway. The Convention's final product may not, as one commentator suggests, have been an "accidental constitution"[61], but the obliquity of the decision-making sequence suggest that some at least were happy for it to look like an accident!

The full significance of the strategy of stealth becomes clear when we turn to a fifth, and certainly among the main players and supporters of the Convention, dominant polity-oriented constitutional strategy, namely that of *constitutional vindication*. Central to this approach is the idea that the present constitutional phase

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[56] Treaty of Nice, Annex IV, Declaration on the Future of the European Union.
[57] See e.g. B. De Witte, "Simplification and Reorganization of the European Treaties" (2002) 39 *Common Market Law Review* 1255-87.
[58] A. Williams, "Mapping Human Rights, Reading the European Union," (2003) 9 *European Law Journal,* 659, 666.
[59] See Walker, n.47 above.
[60] Laeken Declaration on the Future of the European Union, Annex I to the Conclusions of the Laeken European Council, 14-15 December 2001, SN 300/101 REV 1.
[61] P. Norman, *The Accidental Constitution* (Brussels: EuroComment, 2003).

represents a kind of constitutional coming-of-age for the EU polity, a recognition and affirmation of its hard-won maturity. On this view, the Constitutional phase represents a significant symbolic discontinuity with the past, an earnest of the Member States' integrated commitment to "attain objectives they have in common."[62] Yet, not only does symbolic *discontinuity* here stand in contrast to a notion of substantial material *continuity* with the record of past practice, but it is precisely from this contrast that the symbolic idea draws much of its potency. For the meaning that is conveyed in the vindication approach is that the main 'added value' of the constitutional process is the very act of constituionalization itself rather than its material consequences. The message conveyed is that "Europe" has confirmed its identity as a polity by its very capacity to mobilise to endorse what it already held and has achieved in common, and that in this agreement to crystallise and consolidate lies the proof of its status as a political community and all the answers necessary to the higher order question of the epistemic and motivational basis of that political community.

As with the earlier approach of constitutional materialism, we can identify two variants of this strategy, although more markedly than the earlier case they have a tendency to shade into one another and are probably best viewed as different points on a continuum rather than discrete approaches. In the first place, and most obviously continuous with the stealth or prudential approach, there is a historical contextualist approach[63] which points to the gradual development of a constitutional register of debate and self-interpretation by the ECJ and, in time, by other European institutions over the past 30 years, as well as to the basic 'material' continuity of the institutional architecture of Council, Commission, Parliament and Court as evidence that the EU

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[62] Art. I-1(1) DCT
[63] See Walker, n. 47 above.

already has its own distinctive and deeply-rooted constitutional heritage.[64] On this view, the Constitutional Treaty should be and indeed palpably has been concerned mainly with ratification of the *status quo ante*. Part III of the Constitution maintains a commitment to *droit constant*. Part II on Fundamental Rights merely formalises the legal status of another event, the declaration of the Charter of Fundamental Rights in 2000,[65] which is itself a mere restatement of existing principles. Even Part I, which deals with major institutional and authority-generative provisions of the new Constitutional settlement, may be viewed largely as a distillation of existing practice and arrangements. The innovation of a self-styled Constitutional Treaty, on this view, is seen predominantly as an exercise in documentation, with the new text much more a repository or record of existing constitutional doctrine and practice than a source of something new - and indeed this line was taken by many of the key Convention figures when presenting the final text.[66] Implicit in this affirmation of past practice is a normative caution. If there is indeed a pre-Constitutional Treaty constitutional tradition, and one which, somewhat like the British common-law,[67] has grown slowly and incrementally and has thus become embedded in a conception of practical reasoning distinctive to the supranational situation, this is a tradition that we should perforce handle with care and dismantle at our peril.[68]

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[64] For a useful recent overview, see, for example, P. Craig, "Constitutions, Constitutionalism, and the European Union" (2001) 7 *European Law Journal*, 125, at 128-35.

[65] Charter of Fundamental Rights for the European Union, [2000] OJC364/1.

[66] This conservative theme was especially striking in the Oral Report Presented to the European Council in Thessaloniki By the Chairman of the European Convention on 20 June 2003 (EN, SN 173/03) - on the key occasion of the presentation of the draft document in accordance with the Laeken timetable and mandate. See also, in even more conservative vein, the views of Sir John Kerr, the secretary general of the European Convention, in his preface to the *Prospect* magazine's publication of the DCT (www.propsect-magazine.co.uk). As the IGC proceeded, this approach retained or even increased its prominence, as national leaders began to weigh the chances of ratification of a text by national political communities who had been only marginally engaged in its formulation. See further n.102 below.

[67] An analogy explicitly drawn by the then more Constitutional Treaty-sceptic British Prime Minister, Tony, Blair, in his Warsaw speech of 6 October 1999.

[68] For one sophisticated version of the historical-contextualist argument, but one that decidedly does not view the documentary constitution in vindicatory terms, see Joseph Weiler's conception of

A rather different, and somewhat less conservative version of the strategy of vindication, can be seen in the approach, highlighted in an influential speech by the German foreign minister Joschka Fischer in the lead-up to the present constitutional debate,[69] of viewing the constitution as the emblem of commitment to *finalité politique.*[70] On this view,[71] the task of the Constitution is not one of mere consolidation, but of ensuring that the EU makes the reforms to its institutions and to its legitimating foundations necessary for it to capitalise on its progress to date and to *achieve* a final political form appropriate to its polity maturity. The Constitution, accordingly, is not itself a vindication of the polity status of the EU, but rather a means to take the steps necessary to ensure final vindication. In turn, this line of thinking helped direct attention towards the introduction of measures into the Draft Constitutional Treaty which might provide the 'final push' for the EU to meet its 'destiny' as a fully-fledged polity, whether through the capacity and efficiency gains

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"Constitutional Tolerance." For Weiler, a precious part of the European constitutional tradition is precisely the absence of the notion of subjection to one single constitutional discipline. This absence, for Weiler, is key to the negotiated quality of the common constitutional tradition, and, for him, it is an absence which a documentary Constitution, or at least the constitutional culture which would grow up around a documentary Constitution, is unfortunately bound to fill. See e.g. "Europe's constitutional *Sonderweg*" in J.H.H. Weiler and M. Wind, *European Constitutionalism Beyond The State* (Cambridge: CUP, 2003) 7, at 15-23. As I argue in Section 5 below, however, we need not necessarily view a European documentary Constitution in these terms. On one reading at least, a single Constitutional Treaty for the EU does not entail a single constitutional discipline for Europe.

[69] J. Fischer, "From Confederacy to Federation: Thoughts on the Finality of European Integration" reprinted with a series of responses in C. Joerges, Y. Meny and J.H.H. Weiler (eds) *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*(Florence: Robert Schuman Centre, 2000).

[70] See e.g. N. Walker, "The Idea of European Integration and the *finalité* of Integration" in B. De Witte (ed) *The Emerging European Constitution* (Oxford: OUP, forthcoming).

[71] Some writers have suggested important continuities between the idea of remorseless progress towards *finalité politique* and constitutional maturity on the one hand, and on the other the neo-functionalist logic of step-by-step integration in accordance with a technocratic logic of good governance which has often been a explicit or tacit premise of institutional thinking in the EU – particularly but by no means exclusively in the Commission. Despite these similarities, however, functionalism and documentary constitutionalism of the finalist variety make uneasy bedfellows inasmuch as functionalist thinking has traditionally been associated with a more open-ended conception of institutional development – a conception,, indeed, that may fit more closely with the serialist understanding of European constitutionalism. . See D. Castiglione, "Reflections on Europe's Constitutional Moment" ; paper to the CIDEL Conference on 'Deliberative Constitutional Politics in the EU,' Zaragoza, 19-22 June 32003.

of streamlined legislative procedures,[72] increased use of qualified majority voting,[73] a stronger and more continuous European Council leadership, [74] a dedicated institutional capacity in external affairs, [75] a single legal personality [76] etc., or the citizen accountability gains of a stronger European Parliament,[77] more involvement of national parliaments,[78] a clear catalogue of justiciable rights [79] etc. However, as with the previous approach, the emphasis remains one of continuity, of the fulfilment of a historical mission and the final unfolding of a dynamic which has driven the EU from the beginning. In other words, the accent remains very much on the Constitution as a point of arrival rather than as point of new departure.

Finally, this brings us to those polity-oriented constitutional strategies which do instead understand the Constitution more emphatically as a point of departure, to what we might call strategies of *constitutional projection*. Unlike the strategies of stealth and vindication, this type of approach does not simply take for granted the existing polity frame and project and seek to build a constitutional framework that reinforces that existing frame and project. Rather, it seeks a more radical role for the Constitution, one in which its understanding of the polity question – the nature of the polity's relations with is subjects and the extent of its domain of action, is transformed and in which second order institutional provisions both reflect and steer that transformation. Two important observations may be made about this perspective. In the first place, such an approach did not explicitly surface within the Convention itself which, as noted, was instead dominated by positions which tended in their various different ways to emphasise continuity or constraint rather than discontinuity and

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[72] Arts I-32-33 DCT.
[73] Especially in the so-called Area of Freedom, Security and Justice; Part III, Chapter IV, DCT
[74] Art.I-21 DCT.
[75] Art.I-27 DCT.
[76] Art.I-6 DCT.
[77] Arts I-19 and I-26(1) DCT.

long-term potential. Secondly, insofar as a more transformative vision did surface at the margins of the Convention or in constitutional debate outside the Convention, it tended still to be dominated by a statist template, as a vision of a social democratic European federation.[80] There are various reasons for this, to do not only with the resilient power of the statist template, but also with the sustained influence of a kind of thinking about Europe which cannot imagine it solving its deficit of collective action capacity, especially these distributive problems which follow in the wake of the enhanced steering power of transnational capital and the EU own 'market–making' strategies of negative integration, without a regulatory wherewithal and legitimacy akin to that of a welfare state, however federally organised and committed to the principle of subsidiarity.[81] Whatever the merits of this approach, the instant point, however, is that it, too, is ultimately committed to a form of *finalité*, to a vision of how things should end up. It differs only from the more conservative vindicatory approach in that here the eschatological exercise projects forward to a different and desired future rather than seeking to consolidate or reinforce what already exists.

If we consider the range of policy-oriented constitutional strategies in the round – denial, truncation, materialism, stealth, vindication and projection, then it is not difficult to paint a bleak picture of the potential of the present constitutional phase to establish the momentum required to address and overcome in a progressive manner the motivational and epistemic problems associated with the nature and legitimacy of the European polity. This is due not just to the sheer diversity of the

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[78] Protocol on the Role of National Parliaments in the European Union, DCT.
[79] Part III, DCT.
[80] See, for example, J. Habermas, "Why Europe Needs A Constitution" (2001) *New Left Review* Sep-Oct (11), 5. For a critical perspective on the "Eurodemocracy" vision, see J. Cohen and C.F. Sabel, "Sovereignty and Solidarity: EU and US," in J. Zeitlin and D. Trubek (eds) *Governing Work and Welfare in a New Economy* (Cambridge: Cambridge University Press, 2002).
[81] For analysis of the resilient influence of the idea of a European model of social capitalism on which this projection is based, see C. Offe, "The European Model of " Social " Capitalism: Can It survive European Integration?" (2003) 11 *The Journal of Political Philosophy* 437.

strategies in play, but, more importantly, to the fact that each in its own way is engaged in an exercise of constitutional *closure.* The strategy of denial wants to foreclose the very option of a European Constitution because it links that option to what it sees as an illegitimate aspiration towards polity status. The strategy of truncation, although tactically reconciled to engagement in the constitutional debate, also wants to close off the wider polity-generative potential of constitutionalism and instead concentrate on its power-limiting properties. The various strategies of materialism limit themselves to the lower orders of constitutional debate, thereby closing themselves off either by default or design from engagement with the higher polity questions. The strategies of vindication want to elevate achievement to date or posit that which flows directly from current achievement to the status of the proper template for the European polity, thus marginalizing other options. And even the strategy of transformation tends to be closed-ended rather than open-ended, teleological rather than exploratory, premised upon one particular vision of the future of the EU polity rather than an uncompromised process of reflexive self-discovery.

5. The Constitution as the Solution: Gathering Constitutional Momentum

Even if we concede the apparent lack of scope for mutual engagement amongst the deep diversity of polity-oriented strategies brought to the Convention and to the present constitutional phase more generally, does this phase not in and through the very act of bringing these diverse perspectives together under a single frame of explicitly constitutional debate hold out the prospect for a gathering of collective momentum around the question of polity legitimacy? Insofar as it is possible to answer this question in the affirmative, it can only be in very tentative and highly provisional terms, since, as noted earlier, the success of the constitutional debate in triggering a constructive debate over polity legitimacy can by definition

only be judged retrospectively. Let us proceed, then, to make this tentative and provisional case, by examining afresh the epistemic and motivational problems at the heart of the polity legitimacy problem and investigating how, if at all, it may be possible on the basis of the new constitutional frame to imagine their relationship as a cumulative one of mutual support rather than as a stalemate of mutual prejudice.

(*a*) *the epistemic dimension and the authority question*

In the formal Kelsenian sense of the hierarchical structuring of legal norms, all state Constitutions confer, confirm or presuppose their independent and ultimate authority over that which they constitute. Except in the case of the first constitution of a new state, however, this does not necessarily register or reflect an act of transformative political significance, and even in the case of the first constitution, there is, as mentioned earlier, a recognised general template of exclusive and unlimited sovereignty upon which the particular state can draw. As the historical-contextualist would remind us, the European legal order from the outset, and with considerable help from its judicial organ the ECJ, has through its doctrines of supremacy, direct effect and implied powers, also presupposed and confirmed *its* own autonomy as a legal order. Yet if, as we also recall, the legal system of the EU departs from the state tradition in important respects, in that it cannot simply be conceived of as a self-referential structure, as an institutional monad with exclusive and unlimited formal authority, but must instead be viewed as an order located within a heterarchical constellation of polities in which questions of the boundaries of its domain and its relation with other authorities are controversial and contested,[82] then the question of grounding the claim to authority remains problematical.

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[82] See Walker, n. 31 above.

Does the draft Constitutional Treaty, then, advance understanding and agreement about the nature of the EU's domain of authority? Arguably, it does so – however modestly - for two reasons. First, the very fact of a self-proclaimed constitutional document, prominent amongst the authors of which are representatives not only of state governments, but also for the first time under the innovative Convention structure, [83] of national and European Parliaments, has a palpable symbolic significance in grounding whatever solution is arrived at to the question of the domain of authority *as* an authoritative solution. As we saw earlier, many constitutional sceptics only joined the EU debate for tactical reasons, as an opportunity to limit rather than to confer authority, but the fact remains that as a result of a process in which they did actively engage the EU now has the draft of a document which, more solemnly and with a much broader representation of institutions and constituencies both nationally and supranationally located than previously, does purport to set out the basis of is own authority.

Secondly, given that even with the symbolic weight of a constitutional imprimatur, any answer the Constitution might give to the historically divisive question of its own authority vis-à-vis the member states is likely to stray into politically sensitive territory, it is notable that the answer it does in fact provide manages to be neither dogmatic nor deeply controversial, but nevertheless to set certain clear boundaries within which the authority of the EU as a political community may *henceforth* be negotiated. Notoriously, and following the logic of our earlier discussion of the five orders of constitutional pluralism, the lack even of basically agreed outer limits to the authority question in the past has meant that EU politics frequently threatens to become a kind of meta-politics, with questions of

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[83] Although the model had already been road-tested in the Convention which drafted the Charter of Fundamental Rights in 2000.

policy programme and other lower order constitutional questions entangled with and sometimes hostage to unresolved questions about overall polity authority.[84] In this regard, the Constitutional Treaty represents a cautious step forward. On the one hand, the "primacy" principle in Art. I-10 of the DCT[85] which confirms the priority of EU law over national law within the proper domain of the former, may over time silence arguments that the EU can still plausibly be construed as no more than a massive *delegation* of state authority. On the other hand, the principle of "conferral" in Art. I-9 which acknowledges firm textual limits to the proper domain of EU law, together with the affirmation of Union respect for national identities and essential state functions in Art. I-5, may gradually dispel fears and quieten debate about whether the Union's impetus is in the direction of a federal state. Of course, there remain a vast array of options in the continuum of forms of specification of and relations between the respective domains of authority of the states and the EU between the two poles of intergovernmental delegation and federal superstate, but at least in ruling out these two extreme positions the new settlement seeks to overcome an unhelpful dichotomy with a destabilising heritage. In the future, debate on the relational principle on which the EU is and should be founded will doubtless remain fierce. However, the new constitutional settlement may provide a framework within which it can at least be recognised *as* a common debate with manageable boundaries and with polar options excluded - thus providing a safety-net encouraging the participation of those who might otherwise refuse engagement so as to avoid recognising and dignifying

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[84] See e.g. J.H. H. Weiler, *The Constitution of Europe* (Cambridge: CUP, 1999) ch.2.
[85] In the final text of June 2004, this is now Article I-5(a).
http://ue.eu.int/cms3_fo/showPage.asp?id=251&lang=en&mode=g

positions in polar opposition to their own - rather than leaving a deep fault-line which undermines the very ground on which debate might take place.[86]

(b) *The motivational problem and the community dimension*

For all that the constitutional text might provide a minimally stabilising frame and set of margins for approaching the problem of authority, any of the more particular candidate answers to emerge within these established margins will lack effective mobilisation, widespread endorsement or practical vindication without the motivational support of a wider constituency which begins to understand itself as a political community. In what ways, then, if at all, can the constitution help to supply this motivational thrust, and thus address the second dimension of the paradox of the polity?

That question requires us to address the significance of the Convention and, indeed, of the present constitutional phase as a whole, as a process - as a sociological means by which the very notion of a political community may be constructed or transformed.. For some commentators, perhaps Habermas most notably in the context of the EU, this prospect may be viewed as a "self-fulfilling"[87] prophecy to confound the constitutional sceptic, to suggest a degree of constitutional potential *of the whole* beyond the processualist's preoccupation with the parts or the serialist's pragmatic concentration on the virtues of iterative institutional reform, and to challenge the

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[86] There are many ways, apart from its contribution to self-understanding of the novelty of the EU's claim to authority, that the act of constitutionalism may alter the forms of reflexive self-understanding, or episteme, of the European political community. In particular, on account of the document's legitimation of a specifically constitutional register of argumentation located in a long tradition of practical reasoning often involving claims of a universal nature, debate over the ordering of the EU polity will now more easily refer to and draw upon 'constitutional' problem-solutions from many other times and places, or indeed abstracted from their contest and deemed to be of 'timeless" value. This will in due course substantially change the discourse of second-order reasoning about the EU's 'material constitution' in the courts and in the political domain more generally. See further, n. 47 above.

historical-contextualist's and finalist's assumption that the benefits of the gradually evolved constitutional heritage outweigh those of a more fundamental renewal. The Habermasian gambit, or, to put it in more general terms, the constructivist gambit,[88] is to the effect that to the extent that the European *demos* remains underdeveloped - a possibility that must be taken seriously by anyone who is concerned with whether the EU has sufficient collective political resources (in terms of mutual trust, common engagement and a general readiness to put things in common *as well as* legal-institutional capacity) to establish the social foundations for the framework of collective authority necessary to overcome the problems of collective action it confronts and to achieve the kinds of political objectives which its various overlapping coalitions of public support might want it to achieve,[89] *whatever these objectives might be* - then the Constitution-making act itself may act as a catalyst for its deepening and strengthening.

It is tempting to dismiss the constructivist gambit on either or both of two grounds; first, as being implicitly tied to a particular and partial teleology of integration, and secondly, as displaying a foundational naivety – as being in thrall to an unrealistic conception of the mobilising potential of a text. The first criticism may be dealt with briefly. It can be objected, recalling the critique of the strategy of projection in the previous section, that only those with a strong conception of European integration, one, indeed, that tends towards the idea of a entity with rules and resources akin to those of the social democratic state, have an interest in pursuing the constructivist solution. Certainly, it is undeniable that there is some correlation between the constructivist approach and a political vision of a Europe capable of

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[87] N. 80 above, 17.

[88] See e.g. L. E. Cederman, " Nationalism and Bounded Integration: What it Would Take to Construct a European Demos (2001) 8 *European Journal of International Relations* pp.139-174 .

putting redistributive as well as other regulatory questions in common, with Habermas himself as one prominent instance. However, the connection is a contingent rather than either a necessary or a exclusive one. The social democratic vision, can lead in more Eurosceptic directions, as testified by the long history of the Left's ambivalence towards supranationalism – as likely to be vilified as the destroyer of the social protection systems of the European welfare state as hailed as its potential saviour.[90] Further, as I have argued throughout the article, *any* perspective on integration, however modest or ambitious, which is concerned with the elusive question of the legitimate ties and domains of political community on the basis of which Europe may justify and motivate its present or future claim to put things in common should be interested in the higher-order mechanisms that address the EU's ongoing legitimacy deficit in that regard. What is more, regardless of the political agenda which may be brought to the task of constitutional constructivism, the very dynamics of that constructivist process, as we shall see, ensure that it escapes the control of any particular faction. To make this point, however, we must turn to the second objection, namely that of foundational naivety.

Does the idea of the constitution as a catalytic event not involve making false assumptions, both about the original influence of constitution-making generally as a matter of sociological significance, and about the particular priority of the so-called EU constitution in polity-building as a matter of specific historical causation in the here-and-now? Arguably, the constructivist case need not involve foundation assumptions in either of these senses. Let us revert to and extrapolate from Habermas to make this argument. In his own conception of how constitution-making contributes to European political community Habermas is decidedly *not* a foundationalist. Rather,

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[89] For a magisterial framing and exploration of the EU's collective action problems, see F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: OUP, 1999).

he locates the well-springs of European political community in the circular development of three features - a transnational civil society, a European public sphere of cultural and political debate in which a discursive context is found for discussions and proposals to be fed into the formal political process, and a common political culture which provides some kind of shared normative frame of reference.[91] The strength of this thesis is precisely not in its foundationalism, but in its depiction of a symbiosis between all three elements, with none having any necessary priority, and each depending upon the development of the other for its own strengthening. Law in general and the constitutional-law making process in particular is not located within this circular process, but nor is it treated as foundational of it. Rather, its catalytic potential lies in is capacity to connect with each of the three elements simultaneously. So, on this view, the constitution-making process itself, and in particular the more outward-involving and inclusive activities of the Convention, should have encouraged the mobilisation of civil society groups in terms of interests and aspirations which transcended national boundaries. The publicity and debate generated by the Convention process, and in particular the simultaneous and interlinked discussion of this event in various national media and associational contexts, however muted, should have promised some stimulus to the development of a European public sphere.[92] Finally the debate over values in the Convention, which finds its textual expression in the preamble and, in particular in Arts I-2, I-3, I-4 and I-7, should assume importance not so much as a means of guiding the polity towards certain substantive and pre-given ends, still less as a set of justiciable principles, but

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[90] Offe, n.81 above.

[91] Habermas, n. 80 above, 16-21.

[92] Habermas himself has made several media contributions of precisely this sort, in so doing avowedly setting out to galvanise wider debate. See, for example, J. Habermas and J, Derrida, "Unsere Erneurung Nach Dem Krieg: Die Widergeburt Europas" *FrankfurterAllgemeine*, May 31st 2003. Reprinted in

as a way of grounding and generating deliberation about what a common public culture might mean on a European scale and so helping in the creation of that very sense of a common public culture. On this view, in response to the prompts of the self-conscious constitutional debate, the circular process of mutual reinforcement of civil society, public sphere and common culture should gradually take over, develop its own separate momentum, and so escape and transcend the deliberative confines of the original constitutional phase.

Historically, too, the constitutional moment works not in splendid originalist isolation, but in a complex series of refractions backwards and forwards within a dynamically conceived framework of constitutional tradition.[93] Looking backwards, the first EU Constitution is not of course *the* first Constitution, but gains much of its initial resonance from the cumulative symbolic resonance of constitutionalism generally (thus the insistence upon and preoccupation with the Philadelphian imagery in the pronouncements of the Convention's chairman Giscard D'Estaing,[94] amongst others) and from the common ground which may be found between specific member state constitutional traditions in particular. Looking forward, the Constitutional Treaty may be seen as the self-conscious forging of a new branch of the constitutional tradition, and so as providing a resilient reference point of mobilisation of public and political argument about the meaning and significance of the European polity. That is to say, the symbolic value of the constitutional process does not expire with the process itself, but continues to provide a historical resource for the very discursive process which it has generated.

translation as " February 15, or What Binds Europeans Together: A Pleas for a Common Foreign Policy, Beginning in the Core of Europe" in (2003) 10 *Constellations* 291.

[93] See, e.g. J. Habermas, "On Law and Disagreement: Some Comments on "Interpretative Pluralism" " (2003) 16 *Ratio Juris* 187.

[94] For a detailed version of his thoughts on the Philadelphian analogy, see his Henry Kissinger lecture in Washington February 11 2003, available at http://ue.eu.int/pressdata/EN/conveur/74464.PDF

Of course, the fact that a European constitutional event *might* engage the circuit of community mobilisation and *might* have the kind of deep and lingering historical resonance sketched above does not mean that the particular constitutional phase with which we are concerned - the Convention, the Constitutional Treaty and its subsequent process of intergovernmental confirmation and national ratification - *will* have that kind of catalytic effect. In the first place, arguably the moment has simply failed to engage and to mobilise sufficiently to have the kind of impact that Habermas and the constructivists would have wished. Ironically, to the extent that this may be true, it hints at a number of self-fulfilling prophecies other than the one Habermas would endorse. The very diversity of the polity-oriented perspectives outlined earlier[95] has had a serious impact on the constitutional process itself, in turn threatening to compromise the possible range of significations of the Constitutional event. The hostility or indifference to the constitutional legacy of the sceptics and the materialists contributed their particular types of limiting effect. And even though they were more favourably disposed toward the Convention and in many ways its leading influences, the historical-contextualists and the finalists also contributed significantly to circumscribing its possibilities. The priority of form over content and the preference for vindicating past achievement and realising immanent possibilities over the development a more open long-term vision implicit in these overlapping brands of conservative incrementalism was the key to the setting of a disciplined timetable of text production in a Convention whose original terms of reference had committed it to no such definitive text, and this discipline clearly limited the breadth of participation and range of discussion deemed possible and appropriate.[96]

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[95] See Section 4 above.

[96] See, e.g., see J. Shaw, "What's in a Convention? Process and Substance in the Project of European Constitution-Building" (2003) Institute for Advanced Studies, Vienna, 89 Political Science Series.

Secondly, and relatedly, in a historical perspective perhaps the moment was simply *unripe* for such an audacious experiment. Perhaps the objective conditions for a constitutional event to have the kind of catalysing effect contemplated by the constructivists were not realised, with the strong presence of the more sceptical, pragmatic and cautious attitudes at the constitutional table one manifestation of this. On such a view, regardless of the theoretical merits of the constructivist techniques of prompting the circulatory process of community mobilisation, actual conditions have simply militated against the successful operation of such a dynamic.

Thirdly, it may be argued that there is in any case a kind of performative contradiction implicit in the idea of the Constitutional Treaty as a catalyst towards a more fully mobilised political community. According to this view, if the procedural imperative implicit in the idea of the Constitutional Treaty as a community-mobilising event is that of active participation of those affected by its remit, then it is vital that not only the form of the event itself but also the content of its textual product should advance the idea of participatory democracy. And if that is the test, then although the Treaty makes some gestures towards "enhancing the democratic life of the Union,"[97] overall it may have done little to disturb the *status quo ante* and correct the various dimensions of the long acknowledged 'democratic deficit' of the institutional design of the Union.[98]

These are powerful objections. They certainly explain why the emerging constitution in its own time and place appears to be an "unsung"[99] achievement, one that hardly begins to probe the various mutually exclusive closures impeding higher-

On the potential delegitimating effects of such constraining factors in the Enlargement states in particular, see Walker, n.9 above.

[97] The heading of Part I Title VI (Arts.44-51) of the DCT. Much of this is merely consolidation, but see, Art. 46, 'The Principle of Participatory Democracy', subsection (4) of which for the first time provides a mechanism for legislation by citizen's initiative,

[98] See. e.g., Weiler above n.84, ch.8.

order debate and that, partly on account of this higher-order impasse, can provide no more than the latest tentative and essentially conservative compromise at the lower-order institutional level. It may be viewed, in other words, as a Constitution which failed to engage many grand expectations in the first place, and which is destined to disappoint whatever grand expectations it did raise.

Yet the objections raised, and the low-key reception invoked as proof of the validity of these objections, need by no means be decisive against the case for transformative momentum. For in the final analysis, the constructivist gambit rests on a deep conviction that the meaning of the constitutional moment need not be fatally compromised by the conditions of its origin. If we take seriously the idea that the present constitutional phase involves the invention of a new tradition as much as a continuation of the old, and that, for all the diversity of polity-oriented strategies brought to the constitutional table the potential (and potentially resilient) "performative meaning"[100] of their representatives at least having been prepared to sit at that table together is that of a people founding a voluntary association of free and equal citizens committed to self-government - however partial and however complemented by other more traditional forms of self-government, then the force of the contemporary objections that the motivations were too mixed, that the time was not ripe, and that the Convention lacked the courage of its democratic form or convictions, is reduced. Instead, the test of its long-term credentials lies in the capacity of the common performative meaning implicit in the constitutional moment to provide a lasting focus - a historical anchoring - for the efforts of "later generations [to] critically appropriate the constitutional mission and its history"[101] – to understand and vindicate their "felt need" to engage in a common polity through the prism of a

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[99] A. Moravcsik, "The Unsung Constitution", *Prospect,* March 2004, 80-82.
[100] Habermas, above n.93, at 193

historical record and progression of such a felt need. The founding conditions are clearly not irrelevant to the prospects of future generations making the kind of confident shared investment in the performative meaning of the original act for this kind of process of self-reflection to unfold, nor to the likelihood of such a process being a broadly inclusive or consensual one, and in this regard the ratification debate to come between 2004 and 2006 may be as important for its quality and quantity of engagement as for its final result.[102] Yet these founding conditions surely do not rule out such a long-term prospect in advance either.

So, by way of conclusion, we may re-iterate that the idea of the present constitutional phase as a community-mobilising moment which may hold the key to the epistemic and the motivational problems of the EU polity – to both the nature and limits of political authority and the bonding of political community – and so to the paradox of the post-state constitutional polity, remains a long-term gambit. It might for some considerable time after the event, even if the process of national ratification is successful, simply be too early to predict its direction or assess its prospects for

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[101] *Ibid.*

[102] At the time of writing (July 2004), following a change of mind by the UK Prime Minister Tony Blair in May 2004, more and more countries (ten and rising) seem to be turning towards the referendum option. For both legal reasons (i.e. the incompatibility of a referendum on the EU constitution with national constitutional requirements in Italy and Germany) and political reasons (fear of failure!), a Union-wide referendum was not seriously considered by the Convention or IGC when deciding on the criteria for ratification of the Treaty, which instead follow the usual permissive formula of ratification in accordance with domestic constitutional requirements(Art. IV-8 DCT). On the one hand, if the aim and consequence is to mobilise public discussion around the Constitution, the gradual shift towards the referendum option can only be applauded. On the other hand, the lateness and unevenness of the trend towards to the referendum option on the part of pro-Constitution forces may play into the hands of the anti-European parties who recorded unprecedented levels of success at the June 2004 European parliamentary elections, who have thus gained an early advantage in their efforts to frame the debate in all or nothing terms (either Constitution or dissolution) and who may with some justification criticize the pro-Constitutional forces for the timidity or complacency of their earlier position. Given these circumstances, there can be no guarantee that the Constitution will be duly ratified in all 25 member states, in which case it *may* fail (but see Art. IV-7(4) DCT). On one view, forcefully put to me by Philip Pettit in his commentary on my earlier draft, such failure, even if it did not threaten the overall future of the EU, could put back the cause of Constitutional innovation for a generation. On another view, the present initiative might be viewed as merely an early phase in the process of the mobilization of European political community, and, depending upon the quality of engagement of debate, even its failure might advance the conditions for a more successful subsequent initiative.

success. Yet it is precisely because it retains the potential to be more than a naked reflection of the diversity round the Convention and IGC tables, or an inventory of whatever modest degree of common ground was discovered during their deliberations, that we should not easily dismiss the Constitution and all its works as a fleeting moment of change rather than as a momentum-building event in the search for polity legitimacy.