# Europe's constitutional momentum and the search for polity legitimacy

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## 1. Introduction

To suggest that the European Union (EU) in 2004 possesses constitutional momentum may not seem a particularly audacious claim. It might appear self-evident, in fact, that an entity going through a high-profile, self-styled constitutional experiment is imbued with constitutional momentum—witness the busy sequence of events leading from the Treaty of Nice,[1] to the Laeken declaration,[2] to the Convention on the Future of Europe and its draft Treaty Establishing a Constitution for Europe,[3] and, finally, following the failure in Brussels in December 2003,[4] to the agreement on a text by the intergovernmental conference (IGC) in June 2004[5] to be put to the member states for ratification according to their domestic constitutional requirements.

But first impressions would be deceptive. The delivery of an agreed-upon text demonstrates that there is, indeed, a thin if tautological truth implicit in the proposition that the EU has constitutional momentum. But there are harder and more important questions to ask about constitutional momentum that distinguish between the short-term, event-framed horizon and its specific product,

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[1] TREATY OF NICE AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, 2001 O.J. (C 80) 1 [hereinafter TREATY OF NICE]. Annex IV, Declaration on the Future of the European Union (Feb. 26, 2001).

[2] Laeken Declaration on the Future of the European Union, Annex I to the Conclusions of the Laeken European Council (Dec. 14–15, 2001) SN 300/101 REV 1.

[3] Draft Treaty establishing a Constitution for Europe, 2003 O.J. (C 169) 1 (Aug. 18, 2003).

[4] Negotiations broke down in the European Council in Brussels in December 2003, apparently over the proposal in art. I-24 of the draft treaty to eradicate the system of national weighting in the context of qualified majority voting in the council. At that point, Poland and Spain, both of which had received favorable treatment in the reallocation of weighting provided under the Treaty of Nice in 2000, were not prepared to sacrifice their recently won advantage.

[5] Treaty establishing a Constitution for Europe, 2004 O.J. (C 310) 1 (Dec. 16, 2004) [hereinafter CT].

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on the one hand, and a longer-term horizon and the general constitutional aspiration to polity legitimation, on the other. Only by taking a longer view—by looking beyond the present constitutional phase and considering the possibility that, far from exhausting constitutional momentum, the present phase may act as a stimulant to a more sustained constitutional dynamic—can we address not only immediate legal outputs but also more general social and political outcomes. And primary among the latter is the generic objective of polity legitimation. By *polity legitimation* is meant the fundamental acceptance of the entity in question as a legitimate political community—as one possessing the authority to subject matters that significantly affect the life chances of the putative community's members to collective decision making. At the same time, such legitimation must inspire, in a related fashion (since the authority of legal and political power is inseparable from its social acceptance), a sufficient sense of social identity or "we feeling"[6] as to induce compliance with and thus to render effective the collective decisions made on its behalf and in its name.[7] However modest or ambitious the threshold of common attachments may be, without it, there will be no polity at all, much less a legitimate one.

This article is concerned with the prospects for that longer-term constitutional impetus toward polity legitimation.[8] Its purposes are both explanatory and normative. The essay is explanatory in seeking both to investigate the question of constitutional momentum more closely and to understand why it remains difficult to imagine the present phase as triggering a constitutional dynamic that will impact significantly on the question of polity legitimation. The article is normative in outlook, if one assumes that the window of opportunity for the EU's display of such constitutional momentum remains open, even if that window is narrow and elusive, and this, in turn, suggests there is something of value in the projection of EU constitutionalism in terms of its long-term effects on polity legitimacy. In concentrating on the holistic question of such legitimacy and on the contribution of constitutionalism, the article does not suggest that other forms of legitimacy—such as the legitimacy of the EU's general institutional regime or the legitimacy derived from successful performance and associated with the actual policies pursued in accordance with institutional norms—are unimportant, or that the proposed

[6] Karl W. Deutsch et al., Political Community and the North Atlantic Area 36 (Princeton Univ. Press 1957).

[7] *See, e.g.*, Neil Walker, *Constitutionalizing Enlargement, Enlarging Constitutionalism*, 9 Eur. L.J. 365 (2003).

[8] For other treatments of polity legitimacy, see Jo Shaw & Antje Wiener, *The Paradox of the European 'Polity'*, *in* State of the European union, Volume 5: Risks, Reform, Resistance and Revival 64–88 (Maria Green Cowles & Michael Smith eds., Oxford Univ. Press 2000); Richard Bellamy & Dario Castiglione, *Normative Theory and the European Union: Legitimising the Euro-Polity and its Regime*, *in* After National Democracy: Rights, Law and Power in the New Europe (Lars Trägårdh ed., Hart 2004).

constitution's contribution to these other forms of legitimacy would be insignificant.[9] Indeed, it is central to my argument that these other forms of legitimacy are inseparable from polity legitimacy. However, it is precisely because of this inseparability—the fact that polity legitimacy underpins political legitimacy more generally—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. 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 (that is, the explanatory question) is the very reason why it may also be *desirable* to conceive of the constitutional moment in these terms (that is, the normative question). That common reason may be found by referring to a more fundamental paradox—a paradox applicable to all processes of constitution making, or, indeed, 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 that basic paradox; second, explain why it takes such an acute form in the EU; and, third, consider how the paradox has colored the present debate around the draft treaty and, in significant respects, impeded the prospect of addressing the secular problem of polity legitimacy through constitutional means. In the final section I suggest why the present constitutional process and product may nevertheless provide the seeds and supply the momentum for a more constructive—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 the metaphor of a pyramid where the constitutional framing of the polity occurs at the apex. The pyramid structure embraces five levels of pluralism of perspective, with each of the lower orders necessitating recourse to a higher order of debate, which, in turn, contains its own pluralism of perspective. Let us start at the bottom, as it were, and work our way up. The first order of pluralism is concerned with the forms of difference and contestation that rest on the basic diversity, first, of interests; second, of ideologies or values; and, third, of the social and political

[9] For discussion of the variety of bases of EU legitimacy, see Walker, *supra* note 7; *see also* David Beetham & Christopher Lord, Legitimacy and the European Union (Longman 1988); *see also* Bellamy & Castiglione, *supra* note 8; Gráinne de Búrca, *The Quest for Legitimacy in the European Union*, 59 Modern L. Rev. 349 (1996); Christopher Lord & Paul Magnette, *Ex Pluribus Unum? Creative Disagreement about Legitimacy in the EU*, 42 J. of Common Mkt. Stud. 183 (2004).

identities to which different individuals and groups adhere and which these individuals and groups, in descending order of amenability to negotiation and reconciliation,[10] necessarily bring with them to the political process.

The second order of pluralism concerns the nature of the institutions of justice necessary and appropriate to resolve these first-order differences. These would be the institutions that address the division and interrelationship of decisional competences among different organs of government, together with whatever negative and positive rights the citizen can claim against these same government organs and combined with whatever duties are deemed (whether presumptively or categorically) to be prior to and protected from the vicissitudes of political decision. Famously, Rawls specified "reasonable pluralism" over first-order preferences, along with moderate scarcity and limited altruism, as constituting the elementary "circumstances of justice."[11] These circumstances provide the basic framework of constraint and opportunity within which we seek second-order agreement—an agreement often crystallized in the norms of a constitutional document or in other undocumented or differently documented provisions of the "material constitution."[12] However, in endeavoring to provide just and effective ways of resolving first-order differences, the second-order institutional framework itself is never safe from controversy. Whether 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 practice we invariably find a residue of irreducible disagreement about what constitutes a just framework for dealing with first-order differences.[13]

This area of contestation, therefore, leads to a third level of debate, which Waldron describes as framed by the elementary "circumstances of politics." He identifies these as the "existence of . . . disagreement [over the politics of justice] and the *felt need* for a common decision notwithstanding the disagreement [emphasis mine]."[14] Yet this framework, too, in seeking to rescue and give effect to a generic sense of politics as standing behind the second-order institutional framework, also begs key questions. Although there may exist relatively settled mechanisms for channeling engagement in the deeper

[10] *See* Claus Offe, *'Homogeneity' and Constitutional Democracy: Coping with Identity Conflicts through Group Rights*, 6 J. of Pol. Phil. 113, 119–124 (1998).

[11] John Rawls, Political Liberalism 66 (Columbia Univ. Press 1996).

[12] Hans Kelsen, General Theory of Law and State 258–259 (Harvard Univ. Press 1945).

[13] *See, e.g.*, Jeremy Waldron, Law and Disagreement 149–208 (Oxford Univ. Press 1999); Frank Michelman, *Constitutional Authorship*, *in* Constitutionalism: Philosophical Foundations 64–98 (Cambridge Univ. Press 1998); James Tully, *The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy*, 65 Mod. L. Rev. 204 (2002).

[14] *See* Waldron, *supra* note 13 at 159.

contestation that this more elemental level of politics implies, ranging from formal constitutional amendment procedures to judicial and other presumptively authoritative interpretations of disputed second-order provisions, this third order of contestation involves, in turn, certain presuppositions whose questioning points us to a fourth order or level of debate. New questions therefore arise: 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"[15] 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 answers to these fourth-order questions are deeply embedded and presupposed in an existing institutional complex that conforms to a recognized template, namely, that of the state. To the extent that the world order remains a "states system,"[16] the state defines both the relevant subjects of political community and the relevant sphere of their collective decision-making capacity—a sphere that, under the sign of state sovereignty, knows no juridical (as opposed to political) limitations other than those resolved by the political community itself. Precisely 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 very taken-for-grantedness does not mean that it is free from difficulties or potential controversy. These may arise from within or from without. Internal claims and pressure may stem from constituencies that believe their interests and values are being subordinated,[17] and from minorities that feel their identities have been marginalized.[18] Other difficulties come from without, deriving from the external claims and pressure of those who, whether they are states or other communities of practice or interest, are affected by but do not contribute to state decisions or who are, conversely, capable of influencing or compromising the effective decision-making capacity of the state in spite of not being its subjects. (In a globalizing world, externalities of state decisions are increasingly significant.) But whether arising from within or without, these challenges bring to the surface deeper questions about the appropriate "subjects" and forms of subjective representation and about the effective domain of the state as a political community.

At this point, then, we may sum up the continuum so far articulated. Disagreement over the subjects and proper domain of the "felt need" to put

[15] *See* Bellamy & Castiglione, *supra* note 8.

[16] *See, e.g.*, Richard Falk, Predatory Globalization: A Critique 35–47 (Polity 1999).

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

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

things in common (the fourth order) stems from consideration of the legitimate basis for remaking, monitoring, or interpreting (the third order) the framework of just institutions (the second order) that were put in place to resolve basic differences over interests, values, and identities (the first order). Insofar as this sequence displays a logical flow—with each gradation entailing recourse to the next level or order—so it is raised to the level of discursive awareness and political consciousness and is no longer simply assumed or imposed as a default framework; it is at this point, finally, that we reach the apex of the pyramid and so may conceive of a fifth order that offers a further framework to address this controversy regarding the effective domain of the state.

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"[19] question either succumbs to infinite regress—to an irresolution leaving 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 viability of political community depends on this matter being addressed and a line being drawn across the 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 will have particular implications for the resolution of lower-level disagreements and will, perforce, fail to accommodate all the specific disagreements implicit in the various other levels of contestation—the very situation that had pushed 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 regression should not continue to infinitude. There can be no final and decisively fair manner, and certainly no method, guaranteeing acceptance by all affected, of deciding who gets to decide (and in accordance with what procedures) who are the proper subjects and what is the proper scope of a political community. And the same must be said regarding which defining criteria of authorship and domain should shape the establishment and oversight of the institutions through which the diversity of primary interests, values, and identities are politically articulated and negotiated.

## 3. The paradox of the EU constitutional polity

Politics, even constitutional politics, does not often consciously operate on the fifth level but, rather, is implicitly framed, however contingently and partially, by the prior resolution of that highest-order question. The stuff of everyday politics is the set of concerns articulated at the first level and negotiated within the second-level framework. Even the stuff of what is commonly conceived of

[19] Miguel Maduro, *Where to Look for Legitimacy?*, *in* ARENA REPORT No.5/2003, CONSTITUTION MAKING AND DEMOCRATIC LEGITIMACY (Erik Odvar Eriksen et al. eds., Arena 2002).

as constitutional politics typically does not go beyond the specific questioning of elements of that second-order institutional frame, and usually only by resort to mechanisms—whether of judicial interpretation or the explicit procedures of constitutional amendment—that provide already institutionalized 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. In other words, constitutional politics usually does not put into question who are the appropriate authors and what is the appropriate extent of the felt need to put or 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 existing second-order solutions are disputed. In sum, constitutional politics typically takes place at the level of the second-order institutional operation of the polity, with occasional, institutionally-framed resort to the third level.

Only rarely in the context of state politics are the higher-order questions at the fourth level squarely at issue in a fifth-order constitutional context, although short of these framing moments there may be an undercurrent of discontent or instability due to the internal or external forces mentioned above—either through the claims posed by indigenous constituencies that believe their interests and identities receive insufficient recognition and articulation or through external pressures on legitimate or effective state capacities. The framing moments happen when the entirety of the constitutional order becomes the object of political (re)consideration, whether in the context of renewal of political community or at first beginnings.[20]

Take, first, the case of renewal. This may occur more or less simultaneously with the demise of the old constitutional order and without significant discontinuity in the life of the polity, as when, for example, a particular second-order institutional regime has failed and/or a particular, dominant political configuration has been ousted by internal revolution or external force. Or renewal may come subsequently, where the polity has reformed after an interruption, as with many of the post-Soviet states of Central and Eastern Europe.[21] However, we should not exaggerate the degree of higher-order debate that takes place in either context. Certainly, a new constitution may be important as a symbolic endorsement of the continuation or revival of the polity or of a change in political leadership and/or second-order institutional regime. But precisely because we are dealing with an already existing political community, with a discernible historical lineage of authority and self-identification as a political community, that endorsement will often come without much reflection on the proper subjects and forms of subjective identification and representation or on the appropriate domain of that political community. Indeed, the very point of such constitutional endorsement,

[20] On the different forms and contexts of constitution making, see ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION AND LEGITIMACY 229–258 (Rowman & Littlefield 2000).

[21] *See, e.g.*, JAN ZIELONKA, DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE (Oxford Univ. Press 2001).

and a large part of the motivation behind constitutional renewal—often to the frustration and disillusionment of minority communities and subordinate constituencies—may be to project a settled and presumptively legitimate definition of the subjects and domain of the polity.[22]

There is, of course, more scope for fifth-order deliberation at first beginnings, where the proper subjects and domain of the political community cannot have been settled definitively in advance. Here, too, however, we should not overstate what is put at issue. Often, a prior sense of "we feeling"—of a national or protonational[23] community of attachment—will be appealed to and re-presented.[24] Commonly, where some mobilization of political community is nevertheless required, this is facilitated by a catalytic event; for example, in the U.S. or, in a modern postcolonial context, a war or struggle for independence. Thus it is frequently the case that, because of these factors, a first constitution will be more primarily a ratification and vindication (at least as far as the preferences of those who succeed in asserting themselves as its framers are concerned) of the prior claimed sense of community or of the legitimacy of the struggle through which the sense of community was begun or deepened. Similarly, a constitution in this context will be more a working out of the second-order institutional details, through which the "felt need" to put things in common should be legally articulated, than it is a reflection on the need for, the viability of, and the appropriate boundaries of political community. Furthermore, often there will have been some degree of institutional autonomy in advance of independent statehood, and prototypes of many of the second-order institutions will already exist; thus, even lower-order institutional design will not take place in a vacuum.[25] Finally, to recall an earlier point, it is *always* the case, if we are dealing with the foundation of statehood, that there will be a *general* template for 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 a *particular* state.

If we turn to the European Union, we find, ironically, that its very existence as a supranational order is linked to the problems of collective action arising

[22] *See* Chambers, *supra* note 17.

[23] As Rosenfeld indicates regarding the founding of the United States, this sense of nascent community may be based as much upon a common immigration source and experience among the framers and those they represent as upon indigenous factors. *See* Michel Rosenfeld, *The European Convention and Constitution Making in Philadelphia*, 1 INT'L J. CONST. L. (I•CON) 373 (2003).

[24] On the active or *re*presentative character of any constitutional recognition of prior political community, see Hans Lindahl, *Sovereignty and Representation in the European Union*, *in* SOVEREIGNTY IN TRANSITION 87–114 (Neil Walker ed., Hart 2003).

[25] One can find examples where there has been a degree of self-government prior to independence, in the Baltic states, say, prior to the breakup of the USSR, or in Slovenia in the case of ex-Yugoslavia, or the Czech Republic and Slovakia in the succession to Czechoslovakia.

when the interdependence and reciprocal externalities of state decisions reach a certain pitch of intensity. The European Union is both the product and a reinforcing cause of the external pressures on states faced with intense transnational circuits of economic power, communicative capacity, cultural diffusion, and political influence that render increasingly problematical the received Westphalian model of constitutional statehood. The Union is a product of these globalizing pressures, inasmuch as a series of decisions by European states to deem various matters apt for common resolution, where their interests appeared increasingly interlocked, was initiated partly on account of the aforementioned strengthening of transnational circuits of influence. At the same time, the Union is a reinforcing cause of external pressures in that the very creation of the new supranational order, with all the self-perpetuating concentration of power in a new institutional framework of authority it brings, adds to the external challenges to individual state authority. Be that as it may, the immediate point is that, although its very existence reflects and reinforces the erosion of the template of authority that traditionally has allowed for a relatively settled set of answers to the higher-order questions of the constitutional polity at the state level, the EU itself is confronted with even more acute problems of authority. We can tease this out by comparing the EU, first, with a state in a process of constitutional renewal, and, second, with a state at first beginnings.

Certainly, the European Union—with its extensive decision-making jurisdiction over first-order issues, with its sophisticated second-order institutional complex for deliberating on and resolving first-order differences, and with its self-assertion of the principles of supremacy and direct effect to ensure the superiority and bindingness of the norms legislated, executed, and adjudicated upon within this institutional complex—already covers much of the ground that the "material constitution" of an existing constitutional polity would cover. Indeed, this is reflected in the EU's long if sketchy history of constitutional self-regard prior to the present documentary constitutional phase.[26] Yet for all the lower-order similarity to constitutional norms and practice and the familiar presupposition of a prior constitutional tradition, this does not mean that the EU, in its present constitutional phase, is engaged in a process of polity renewal analogous to that of states in the phase of constitutional renewal. For the EU clearly lacks a settled sense of its subjects and of their ties to the political community and of the domain of that political community, all of which, taken together, would form the higher-order credentials of a preestablished state as a constitutional polity. Neither is the absence of these credentials simply due to the lack of any prior, explicitly constitutional document to resolve or confirm the resolution of these higher-order questions. To illustrate

[26] This is not restricted to the European Court of Justice, but it has been the most influential (if only occasional) pronouncer on the constitutional status of the Union prior to the current phase, starting with Case 294/83, *Parti Ecologiste 'Les Verts' v. Parliament*, [1986] ECR 1339.

this: if, as the last remaining developed state to lack one, the United Kingdom were to establish a written constitution, then, unlike 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 this polity's domain of authority was the potentially unlimited jurisdiction associated with all states.

Accordingly, although there are lower-order similarities between the EU in its constitutionalizing phase and a continuing but renewing state, at the higher-order level it is more akin to a polity at the stage of its first constitutional beginnings, for in neither case has the question of the political identity of the subjects and the proper domain of the polity been resolved definitively. Nevertheless, the starting position of the current EU remains distinct from that of the new constitutional state in four respects.

First, unlike many founding states, the EU lacks strong unifying traits or sources of "we feeling" such as a common language or the traditions and affective symbols of a developed civil society to which the claim to form a political community could appeal, and so it cannot count upon the active endorsement or even acquiescence of its putative subjects in the existence of a proper domain where the need to put things in common would find its realization. Second, unlike many founding states, it lacks the mobilizing dynamic of some obvious and immediately catalytic event, whether a struggle for independence or a political revolution, to help forge that sense of political community.[27] Third, unlike all founding states, the type of political community a constitutionalized EU seeks for its members does not claim to be already exclusive of or dominant over other forms of mature and independent political communities at the moment of foundation; neither does it seek, by the founding act, to become the exclusive or dominant source of a mature and independent political community for its members. For the EU is entering its phase of documentary constitutionalism at a point where its citizens also remain citizens of its sovereign member states, and, except on the most ambitiously statist projection of the European Union,[28] it is not intended that the documentary constitution replace these states as the source of political community for their citizens or reduce these states to a subordinate status—downgraded to provinces of a federated EU. Rather, insofar as autonomy is sought for the EU polity, it is "autonomy without territorial exclusivity"[29]—namely, an independent claim to authority over a territory that is co-extensive with the territories of original (state) political communities and over populations that continue to understand

[27] *See* Rosenfeld, *supra* note 23.

[28] *See* Giuseppe Federico Mancini, *Europe: The Case for Statehood*, 4 Eur. L.J. 29 (1998).

[29] *See* Neil Walker, *Late Sovereignty in the European Union*, *in* Sovereignty in Transition *supra* note 24, at 3, 23.

themselves also as members of these original political communities. Fourth and finally, therefore, because the EU is added to a map of political authority already colored, without remainder, by states and their populations this means that, unlike all states in their original phase, it also lacks the critical standard and background presumption supplied by the idea of a potentially unlimited and so self-limiting domain as a general template for its proper sphere of action. There are many examples of failed states,[30] of states that lack or lose the capacity to harness effectively the reins of authority, but in this situation, at least, there is a model against which success or failure may be assessed. The EU, by contrast, has no general model to guide or vindicate its way of accommodating whatever so-called felt need it possesses to put things in common. There is, in short, no genus of the polity of which it can identify itself as a species.

If we bring all these points together, the singular paradox of the European Union constitutional polity lies in its mix of epistemic and motivational problems, which correspond to the "authority" and the "community" dimensions of political authority, respectively. And 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 is struggling to acquire a basic grammar for the new language of political authority it must speak. If it is situated, as a constitutional polity, alongside and overlapping other state constitutional polities without being either superordinate or subordinate to them, how and on the basis of whose legitimate authority and active support is the EU to conceive of the nature and limits of its own authoritative domain in relation to the continuing authority of the other states? Similarly, what is the nature of its relationship with its citizens, all of whom are also prior members of existing states? Motivationally, it seems that, looking backward, the EU lacks the solidarities on the basis of which it could put things in common, while, looking forward, it seems to lack an urgent sense of shared predicament to supply this omission and so provide a sense of the legitimate domain of the polity. But if this is the case then how else is it to find and nurture the sense of common engagement necessary for identifying that legitimate domain and mobilizing political effort within it?

Moreover, not only are the epistemic and motivational problems two sides of the same conceptual coin of polity legitimacy but, in practical terms, too, they are locked in a relationship of mutually reinforcing cause and effect. If we return to the epistemic problem of conceiving 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 no predominant membership and the ensuing prevalence of absent, weak, reluctant, subordinate, and, in any case, collectively disputed ties of membership is not only a constituent element of the epistemic puzzle to be solved but

[30] *See, e.g.*, ROBERT JACKSON, THE GLOBAL COVENANT: HUMAN CONDUCT IN A WORLD OF STATES 1–24 (Oxford Univ. Press 2000).

also the political cause and effect of that puzzle—both a reason why this puzzle is not easily brought to common engagement and resolution and the reinforced outcome of that irresolution.

This complex state of affairs is why constitutional momentum is both elusive and vital in the EU constitutional context. It is elusive precisely because the epistemic and motivational problems at the heart of the EU constitutional paradox are mutually reinforcing, and so reveal no clear starting point for building constitutional momentum. It is vital because there exists in that very intimacy of the epistemic and motivational issues positive as well as negative potentials. Just as the problems are mutually reinforcing, so, in theory, might be their solutions. The key to reversing the process—transforming the vicious circle into a virtuous circle—lies in establishing a dynamic whereby the epistemic and motivational problems are treated in a cumulative and mutually supportive manner. It depends, in short, 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, one situated alongside states whose members are all dual citizens, is a question that these dual citizens 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 prove the basis for overcoming these dilemmas? Can the constitution be the solution as well as the problem? First, let us examine, more concretely, why the constitution may be persuasively viewed as merely the reflection or repository of the problem of polity legitimacy in the EU context, and then let us address how it might, nevertheless, be the source of the solution.

## 4. The constitution as the problem: The diversity of polity-oriented constitutional strategies

### 4.1. 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 resolved in different ways at various moments of constitutional foundation or renewal. But those involved in constitution making do not approach their task as a disinterested exercise in the nature and limits of political theory. They have their own agendas, their own lower-order and/or higher-order reasons for addressing in particular ways the question of the subjects and domain of the political community, and their polity-oriented constitutional strategies will reflect these agendas.

In the present section, I explain why the polity-oriented constitutional strategies in the EU debate are particularly diverse and, thus, particularly resistant to the development of an ongoing constitutional momentum that would facilitate the emergence of a dominant and reasonably consensual answer to the higher-order polity question. But before this argument is made,

something must be said about polity-oriented constitutional strategies and the social meaning and symbolic implications of constitutionalism generally.

By polity-oriented constitutional strategies I mean the range of strategic roles that may be accorded the proposed EU constitution, and EU constitutionalism in general, as a way of sustaining or realizing a particular overall vision of the EU's legitimacy as a political community. Each polity-oriented constitutional strategy contains an implicit or explicit answer to two questions. First, there is the question we have concentrated on so far. What kind of polity could the EU possibly become, what kind of polity would be appropriate? Second, in the realization of this vision, or "structural ideal,"[31] what kind of contribution is possible for and appropriate to constitutionalism in the EU, including, most urgently, the contribution of a written constitutional settlement? Just as we can break the strategic question down into two parts, so also conflict and disagreement over the relationship between the constitution and polity legitimation may occur at two levels—both over the fourth-order polity vision and the fifth-order constitutional means of realizing that vision.

Conflict regarding means is intimately related to conflict concerning ends, and the latter may reflect the former. Yet, to complicate matters, the possibilities of disagreement over the *constitutional* framing of the debate and the instrument of its resolution are not exhausted by the different polity ends toward which the debate is directed. For what is at stake in the constitutional debate is an entire register of meanings about the relationship between politics and society. Political thought and rhetoric in modern societies, once it rises above the bare articulation of interests, values, and identities and becomes concerned with the making or presupposition of a political community, is suffused with constitutional symbolism. Constitutionalism in modern societies provides a key "condensing symbol,"[32] a modality of thought, affect, and discourse enabling individuals and groups within a political community to make sense of and to articulate a notion of their common past, to form and pronounce judgments about their common present, and to plan and project various imagined common futures. Three points of immediate significance follow.

First, there is the open-endedess of what may be denoted under the constitutional sign. All the questions that citizens and politicians may have about how to do politics, jointly as it were, while they can be framed in a variety of discourses, are also capable of being condensed under the broad umbrella of a constitutional register. Just as in the analytical pyramid, described earlier (section 2), where we see connections between the various levels, so, too, in the world of social and political meanings citizens and politicians often do

[31] Neil Walker, *Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism*, *in* Sceptical Essays on Human Rights 139 (Tom Campbell et al. eds., Oxford Univ. Press 2001).

[32] Victor W. Turner, Dramas, Fields and Metaphors: Symbolic Action in Human Society (Cornell Univ. Press 1974).

not make general category distinctions between questions concerning the particular meaning of a specific right or competence, delimited under an existing framework of just institutions, on the one hand, and questions concerning the legitimacy of constitutional amendment procedures or the general foundations of the polity's legitimacy on the other. All are seen as constitutional questions, as issues amenable to debate "in the name" of a particular constitutional norm or framework of general constitutional aspirations.

Second, social meaning is also historically constructed and mediated meaning. The current meaning of constitutionalism, or, indeed, of any condensing symbol, cannot be divorced from the sense of constitutionalism that the participants bring from other situations or from their earlier understanding of constitutionalism.

Third, the fact that, like all condensing symbols, constitutionalism speaks to the possibility of a widely shared and a broadly communicated semantic register means that the symbolic implications of constitutionalism will be as much ideological as ideational. Constitutionalism is both a way of making sense—individually and socially—of the relationship between politics and society and a means of conveying that sense persuasively to others. It is a form of social power as much as a code of social understanding. Again, the 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 mechanisms and authoritative "voices" (judges, constitutional councils, legislatures, executives, and the like), but what we are primarily concerned with is how a constitution, conceived of 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, organize or affirm in certain ways plausible images of the general nature of the society comprised of those whose allegiance to the constitution is required."[33] Holistic interpretations, accordingly, seek to present the constitution as conveying an image of society (popular republic, monarchy, and so forth), which, if accepted, will create a receptive audience for just the kind of authoritative claims the constitution makes.

Each of these three points has important resonance in the EU context. First, the 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 the EU already has a developed second-order institutional framework, it is 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." Second, because the social meaning of constitutionalism is grounded in a set of historical experiences

[33] Roger Cotterrell, *Some Aspects of the Communication of Constitutional Authority, in* LAW AS COMMUNICATION 129 (David Nelkin ed., Dartmouth 1995).

and memories the state tradition of constitutionalism provides an inescapable backdrop for the constitutional understanding of the EU. Many general categories of constitutional thought, from sovereignty, fundamental rights, and representative democracy to the federal layering of competences and the separation and balancing of the organs of government, have been honed in a state context, and this casts a long and sometimes distorting shadow over attempts to apply constitutionalism at the supranational level. Third, in the EU context—regardless of the content of the particular constitutional projection of political community—the very fact that the projection takes place in a *constitutional* frame is not innocent of meaning. The constitutional framing conveys the idea that the EU is the kind of entity suitable for constitutional treatment. And since, historically, the paradigmatic entity suitable for constitutional treatment is the state, this may relay the controversial message that the EU has or aspires to statelike qualities, or at least that it is a political community of standing equivalent to or comparable with a state.

### 4.2. Strategic diversity

With these points in mind, let us briefly examine the depth of the diversity of polity-oriented strategies brought to the current EU constitutional debate.

First, there is the strategy of constitutional denial—the default attitude of the constitutional skeptic. A fundamentalist version of skepticism holds that the EU is just not the kind of entity worthy of characterization in constitutional terms.[34] A more contingent skepticism, often shading imperceptibly into the fundamentalist variant,[35] holds that while we should not rule out the possibility of a "truly" constitutional status and a genuine constitutional moment for the EU in the future, that time has not yet come. These attitudes are associated with a state-centered view of constitutionalism, in which states are both the exclusive or dominant bearers of the constitutional tradition and its rightful heirs. Because the EU lacks key legitimacy and the functional prerequisites of polity status, in particular, a demos—that is, a prior political community identifying itself as such and having a sufficient sense of shared attachment to make decisions and to commit resources in matters of common interest—it is disqualified from constitutional status. The formal rituals of constitutionalism—documentary or otherwise—are just that, mere 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, is nothing more than an ersatz constitutionalism, a text that falsely frames a state-derived configuration in autonomous terms and fails to see itself for what it is, as an event that recognizes or initiates a *pouvoir constituant* for the EU.

[34] *See, e.g.*, Dieter Grimm, *Does Europe Need a Constitution?* 1 Eur. L. J. 282 (1995).

[35] For example, the famous decision in *Brunner v. The European Union Treaty* [1994] 1 C.M.L.R. 57 is ambiguously poised between contingent and deep skepticism, amenable to either interpretation.

Notwithstanding the success with which a constitutional process in Europe has been initiated, the skeptical approach should by no means be written off. It explains, at least partly, the modest extent to which the work of the constitutional convention penetrated popular consciousness. A Flash Eurobarometer Poll from the very weekend that the convention's fruits were laid before the European Council, in June 2003, reported that 55 percent had not heard of the convention, and that only 32 percent could accurately characterize its product as a draft constitution.[36] It is difficult not to view these and similar subsequent figures[37]—and, indeed, the perceived distance from or at least ambivalence toward[38] the constitutional process among various organized political groupings—as an indication that denial of the viability of a European political community or disengagement from the legitimacy of its constitutional settlement persist among many members of that supposed community.

Constitutional skepticism also provided some of the motivation behind the convention and its product, and this points toward a second polity-oriented constitutional strategy that remains opposed in principle but finds pragmatic grounds for taking part, namely, constitutional truncation. Constituencies opposed to the idea of the European constitution as an inspiration tending toward as well as a mark of European political community became, in the preconvention phase, converted to the constitutional process *not* as a polity-making or polity-consolidating device but as a polity-limiting device. The German *Länder* with their commitment to a strong roster of competences[39] or the various Euroskeptic voices, which supported a charter of rights[40] as power constraining rather than power enabling, became reconciled to constitutionalization simply as a way of freezing integration.

A third strategy, while not sharing the in-principle hostility of the first two toward the proposed EU constitution as a claim to full polity status, is, at best,

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

[37] Such figures would include the results of the European Parliament elections in June 2004, just one week before the Brussels summit which agreed on the draft treaty. These elections produced both a record-low turnout and a record-high support for parties committed to withdrawal from the European Union.

[38] For example, the attitude of many European regional groups and umbrella organizations toward the convention was ambivalent, torn between a desire to have their voice heard and a wish not to underscore the authority of a process about whose legitimacy they were highly skeptical. This ambivalence was reflected in the attitude toward the convention taken by the Committee of the Regions. *See, e.g.*, Michael Keating, *Regions and the Convention on the Future of Europe*, 9(1) S. Eur. Soc'y & Pol. 192 (2003).

[39] *See* Uwe Leonardy, *Kompetenzabgrenzung: Zentrales Verfassungsprojekt fur die Europaische Union, in* The Post-Nice Process: Towards a European Constitution? (Peter Zervakis & Peter Cullen eds., Nomos 2002).

[40] *See, e.g.*, The Economist, Nov. 4, 2000. The conversion of the traditionally Euroskeptic *Economist* newspaper to a European Constitution was contingent upon the endorsement of a power-constraining version of the Charter of Rights.

indifferent to that claim and, at worst, sees it as a distraction from or impediment to the treatment of questions of true constitutional substance. Here, two variants of constitutional materialism may be identified.[41] On the one hand, there are 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. The test of constitutional relevance should be functional or dynamic rather than formal, and any activity and any form of reflection that is concerned with the overall legitimacy of the European juridico-political order should be seen in a constitutional register. General constitutional foundings, doctrine, and institutional arrangements are seen as only the tip of the iceberg, and it is the constant microregulatory movement beneath the surface that supplies the real dynamic.[42]

A second variant of materialism we may term constitutional serialism. Here, constitutional development through general second-order rules is cast in more positive terms. The reservation of the serialist, unlike that of 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 and difficult thresholds for reform. For the serialist, institutional redesign, as has been the recent and increasingly intensive pattern in the EU,[43] is best done in an iterative series rather than in rare and axiomatic moments of reconfiguration. The present process, therefore, should be viewed as merely the latest in a long sequence, one which should not be treated with special reverence or preserved with special care.

Alongside those approaches, which decline to endorse the present constitutional phase as a polity-defining event, we find strategies that do seek to cash the larger symbolic dividend of constitutionalism. One such strategy is constitutional stealth. This strategy was largely exhausted before the constitutional convention was in full swing, but it remains of interest for the bridge it provided to other approaches. Constitutional stealth embraces but does not acknowledge an inclination to achieve full constitutional status. In this regard, the drive toward consolidation of the treaty texts in recent years has been an important ongoing consideration. One factor in keeping constitutionalism on the political agenda in a relatively uncontroversial manner in the years

[41] *See* Neil Walker, *After the Constitutional Moment, in* THE DRAFT CONSTITUTIONAL TREATY (Ingolf Pernice ed., Nomos 2004).

[42] For an excellent assessment of the dangers and potential irrelevancies of top-down constitutionalism from a bottom-up democratic experimentalist perspective, see Oliver Gerstenberg & Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe? in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 289–341 (Christian Joerges & Renaud Dehousse eds., Oxford Univ. Press 2002).

[43] Bruno De Witte, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process, in* CONVERGENCE AND DIVERGENCE IN EUROPEAN PUBLIC LAW 39–57 (Paul Beaumont et al. eds., Hart 2002).

between Amsterdam and Laeken, and one of the four themes in the 2000 Nice declaration, was the commitment to the reorganization and simplification of the treaties.[44] This is also an idea worth considering on its own merits—providing a more legible and accessible framework for the EU's labyrinthine "print community"[45]—but that does not exhaust its strategic significance. The notion that mere consolidation and a commitment to rationalization and reorganization should provide a significant rationale for a *constitutional* instrument (rather than a more modest device) provided a convenient pretext for those with more ambitious objectives; a low-key, "lawyerly" mechanism for gradually maneuvering a larger project into the political frame. The same attitude of stealth, or at least prudence, continued to animate the preparatory stages of the convention. We witness a cautious widening of the agenda from consolidation at Nice, to the protoconstitutional in the Laeken text, and then to the fully constitutional only once the convention was underway. The final product may not have been an "accidental constitution," as one commentator suggested,[46] but the obliqueness of the decision-making sequence suggests that some were happy for it to look like an accident.

The significance of the stealth strategy becomes clearer when we turn to a fifth and dominant polity-oriented constitutional strategy, namely, constitutional vindication. The present phase, on this view, represents a kind of constitutional coming-of-age for the EU polity, an affirmation of its hard-won maturity. Constitutionalization announces a symbolic break with the past, an earnest of the member states' express commitment to "attain objectives they have in common."[47] Not only does this symbolic discontinuity stand in contrast to substantial material continuity with past practice but it is precisely from this contrast that the symbolism draws its potency. For the meaning conveyed in the vindication approach (as in making good on one's pledge) is that the main added value of the constitutional process is the act of constitutionalization itself rather than its material consequences. "Europe" has confirmed its identity as a polity by its very capacity to endorse what it already has held and achieved in common, thus providing all the answers required to the higher order question of the epistemic and motivational basis of that political community.

Again, we can identify two overlapping variants of this strategy. First, and most obviously continuous with the stealth or prudential approach, there is a historical contextualist approach that points to the gradual development of a

[44] *See, e.g.*, Bruno De Witte, *Simplification and Reorganization of the European Treaties*, 39 Common Mkt. L. Rev. 1255–1287 (2002).

[45] Andrew Williams, *Mapping Human Rights, Reading the European Union*, 9 Eur. L.J. 659, 666 (2003).

[46] Peter Norman, The Accidental Constitution (EuroComment 2003).

[47] CT art. I-1(1), *supra* note 5.

constitutional discourse by the European institutions over the past thirty years, as well as to the basic material continuity of the institutional architecture of a council, commission, parliament and court, as evidence that the EU already has its own constitutional heritage. On this view, the constitutional treaty should be and, indeed, has been concerned mainly with ratification of the status quo ante. Part III of the constitution is committed to *droit constant*. Part II, on fundamental rights, formalizes the legal status of another event, the Declaration of the Charter of Fundamental Rights of 2000[48]—itself a restatement of existing principles. Even part I, dealing with the major institutional and authority-generating provisions, may be largely viewed as a distillation of existing practices and arrangements. The constitutional text, then, as emphasized by key figures commenting on the conclusion of the convention's work,[49] is much more a repository of existing practice than a source of something new. Implicit in this, moreover, is a normative caution—that if there already is a conception of practical reasoning distinctive to supranationalism, it is one we would dismantle at our peril.

A less conservative vindication strategy, highlighted in an influential preconvention speech by the German foreign minister Joschka Fischer,[50] understands the constitution as an emblem of commitment to *finalité politique*.[51] On this view, the task of the constitution is not mere consolidation. Rather, it is to ensure that the EU makes the reforms necessary to its institutions and to its legitimating foundations for it to capitalize on its progress to date and to achieve a final political form appropriate to its maturity. The constitution itself is not a vindication of the polity status of the EU but is more in the nature of a final step toward that vindication. This thinking directed attention to the introduction of measures into the constitutional treaty calculated to provide the "final push" for the EU to meet its "destiny" as a fully fledged polity in the context of enlargement, whether through the capacity and efficiency gains of streamlined legislative procedures,[52] increased use of qualified majority voting,[53] a stronger and more continuous

[48] 2000 O.J. (C 364) 1 (Dec. 18, 2000).

[49] This conservative theme was prominent 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). In an even more conservative vein, see the views of Sir John Kerr, the secretary-general of the European Convention, in his preface to *Prospect* magazine's publication of the CT, *at* www.prospect-magazine.co.uk.

[50] Joschka Fischer, *From Confederacy to Federation: Thoughts on the Finality of European Integration*, *reprinted in* WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? RESPONSES TO JOSCHKA FISCHER (Christian Joerges et al. eds., Robert Schuman Centre 2000).

[51] *See, e.g.*, Neil Walker, *The Idea of European Integration and the 'finalité' of Integration, in* THE EMERGING EUROPEAN CONSTITUTION (Bruno De Witte ed., Oxford Univ. Press forthcoming).

[52] CT arts. I-33–34, *supra* note 5.

[53] CT pt. III, ch. IV (pertaining to the area of freedom, security and justice).

European Council leadership,[54] a dedicated institutional capacity in external affairs,[55] a single legal personality,[56] and the like, or through the citizen-accountability gains of a stronger European Parliament,[57] greater involvement of national parliaments,[58] a clear catalogue of justiciable rights,[59] and so forth. The emphasis, however, remains on the fulfillment of a historical mission, with the constitution marking a point of arrival rather than a new departure.

This brings us, finally, to those polity-oriented constitutional strategies that do, in fact, understand the constitution as a point of departure—to strategies of *constitutional projection*. Constitutional projection does not simply take for granted the existing polity frame and purpose and seek to build a reinforcing constitutional framework. It invites a more radical role for the constitution in which its approach to the polity question—the nature of the polity's relations with its subjects and the extent of its domain of action—is transformative, and in which second-order institutional provisions reflect and steer that transformation. Such a strategy surfaced only fitfully within the convention, and where it emerged more emphatically in debate outside the convention, it tended still to be dominated by a statist template, supplying a vision of a social democratic European federation.[60] This reflects the sustained influence of a kind of thinking about Europe that cannot imagine its solving its relative incapacity for collective action—especially with regard to the distributive problems that follow in the wake of the enhanced steering power of transnational capital and the EU's own market-making strategies of negative integration—without the regulatory wherewithal and legitimacy akin to that of a welfare state, however committed to subsidiarity the EU might be.[61] Whatever the merits of this approach, it, too, ultimately commits one to a form of *finalité*, to a vision of how things should end up, even if the eschatological exercise here reaches toward a different future rather than consolidating what already exists.

If we consider the range of policy-oriented constitutional strategies in the round—denial, truncation, materialism, stealth, vindication, and projection—then the prospects for the present constitutional phase to establish the

[54] CT art. I-22.

[55] CT art. I-28.

[56] CT art. I-7.

[57] CT arts. I-20 and I-27(1).

[58] CT Protocol on the Role of National Parliaments in the European Union.

[59] CT pt. II.

[60] *See* Jürgen Habermas, *Why Europe Needs A Constitution*, 11 New Left Rev. 5 (2001); also *available at* www.newleftreview.net/NLR24501.shtml.

[61] *See* Claus Offe, *The European Model of "Social" Capitalism: Can It Survive European Integration?*, 11 J. Pol. Phil. 437 (2003).

momentum that will address and overcome the motivational and epistemic problems associated with the European polity seem unpromising. This is due not just to the diversity of the strategies in play but, crucially, to the fact that each is engaged in an exercise of constitutional closure. Thus, the strategy of denial forecloses the very option of a European constitution because it links it to what it sees as an illegitimate aspiration toward polity status. The strategy of truncation, although tactically reconciled to engagement, also closes off the wider polity-generating potential of constitutionalism. The strategies of materialism limit themselves to the lower orders of constitutional debate, sealing themselves off by default or design from the higher polity questions. The strategies of vindication glorify past or continuing achievements, so marginalizing other options. Even the strategy of projection is 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

If we concede the apparent lack of possibility for mutual engagement among the deeply divergent, polity-oriented strategies brought to the present constitutional phase, does not this phase, through the very act of bringing these diverse perspectives together under a single explicitly constitutional frame, nevertheless raise the prospect of a new gathering of collective momentum around the question of polity legitimacy? As the success of the constitutional debate, in triggering a constructive debate over polity legitimacy, can by definition only be judged retrospectively, this question can be addressed only tentatively and provisionally. Let us proceed, then, to explore this speculative vein by examining afresh the epistemic and motivational problems at issue in the question of polity legitimacy and investigating how, if at all, it is possible, on the basis of the new constitutional frame, to reimagine their relationship other than as a stalemate of mutual prejudice.

### 5.1. The epistemic problem and the authority dimension

In the Kelsenian hierarchy of norms, all state constitutions confer, confirm, or presuppose their independent and ultimate authority over what they constitute. As the historical-contextualist would remind us, the European legal order from the outset has—through its judicially developed doctrines of supremacy, direct effect, and implied powers, also presupposed and confirmed *its* own autonomy as a legal order. Yet because the legal system of the EU, unlike the legal tradition of a state, cannot be conceived of as an institutional monad with exclusive and unlimited formal authority but, instead, is located within a heterarchical constellation of polities, where the questions of the boundaries of its domain

and its relation with other authorities are controversial and contested,[62] so the ground for the claim to authority remains insecure.

Does the new constitutional treaty advance understanding and agreement about the nature of the EU's domain of authority? Arguably, it does so, if modestly. The very fact of a self-proclaimed constitutional document, whose authors are representatives not only of state governments but also, for the first time under the convention structure, of national and European parliaments,[63] has a symbolic import and weight, suggesting that whatever solution is arrived at is necessarily an authoritative one. Furthermore, given that any answer, even with that constitutional imprimatur, to the historically divisive question of the EU's authority vis-à-vis the member states will stray into politically sensitive territory, it is noteworthy that the answer the constitution *does* provide manages to be neither dogmatic nor deeply controversial. Nevertheless, it does set the boundaries within which the authority of the EU as a political community must henceforth be negotiated. In the past, when following the regressive logic of the five orders of constitutional pluralism, the lack of agreed outer limits to the authority question has meant that EU politics has frequently and notoriously threatened to become a kind of metapolitics, with questions of policy and other lower-order constitutional questions entangled with and sometimes hostage to unresolved issues regarding overall authority.[64]

Here, the proposed constitution represents a cautious step forward. On the one hand, the "primacy" principle in article I-6, confirming the priority of EU law over national law within the proper domain of the former, may gradually silence arguments that the EU can still be construed as no more than a massive delegation of state authority. On the other hand, the principle of "conferral" in article I-11(1), 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 article I-5, may gradually dispel fears and quiet debate about whether the Union's impetus is toward a federal state. Between the two poles of intergovernmental delegation and federal superstate, there remains an array of options among the forms of mutual recognition available to the member states and the EU, but at least in excluding these two outlying positions, at a minimum, the new settlement seeks to overcome an unhelpful dichotomy with a destabilizing heritage. In the future, debate regarding the relational principle on which the EU is founded will doubtless remain fierce. However, the proposed constitutional settlement does provide a framework within which this principle may at least be recognized *as* a subject of common debate, with manageable boundaries and with the polar options excluded,

[62] *See* Walker, *supra* note 29.

[63] Seventy-two of the 105 members of the convention were national (fifty-six) or European (sixteen) parliamentarians.

[64] *See, e.g.*, Joseph H. H. Weiler, The Constitution of Europe ch. 2 (Oxford Univ. Press 1999).

rather than being left as a deep fault line that could undermine the very ground on which debate might take place. The participation of those who might otherwise refuse to do so, in order to avoid recognizing and dignifying an extreme view, is thereby encouraged.

### 5.2. The motivational problem and the community dimension

While the constitutional text provides a set of stabilizing margins for approaching the problem of authority, any candidate answers that may emerge within these margins will still lack effective mobilization, widespread endorsement, or practical vindication without the backing of a wider constituency that has begun to understand itself as a political community. In what ways, then, if at all, can the constitution help to supply this motivational thrust, and so address the second dimension of the paradox of the polity?

That question requires that we see the significance of the convention and, indeed, the entire present constitutional phase, as a process—understanding it 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 EU context, this prospect may be viewed as a "self-fulfilling"[65] prophecy to confound the skeptic; to suggest something of the constitutional potential *of the whole*, beyond the processualist's preoccupation with the parts or the serialist's preoccupation with iterative reform; and to challenge the historical-contextualist's and finalist's assumptions that the benefits of the gradually evolved *acquis* preclude fundamental renewal. The Habermasian gambit, or, more generally, the constructivist gambit,[66] suggests that to the extent the European demos remains underdeveloped so the constitution-making act itself may provide a catalyst for its deepening and strengthening. This possibility must be taken seriously by all concerned with whether the EU can establish self-authorizing social foundations sufficient to overcome the problems of collective action it confronts and achieve the kinds of objectives its various overlapping coalitions of public support might want it to achieve,[67] *whatever these objectives might be*.

It is tempting to dismiss the constructivist gambit on two grounds; first, that it is implicitly tied to a particular and partial teleology of integration, and, second, that it displays a foundational naïveté in thrall to an unrealistic conception of the mobilizing power of text. As to the first criticism, recalling our critique of the strategy of projection, it may be objected that only those with a strong conception of European integration—imagining an entity with rules and resources akin to the social democratic state—are interested in

[65] *See* Habermas, *supra* note 60, at 17.

[66] *See, e.g.*, Lars-Erik Cederman, *Nationalism and Bounded Integration: What it Would Take to Construct a European Demos*, 8 Eur. J. Int'l Rel. 139–174 (2001).

[67] For a magisterial exploration of the EU's collective action problems, see Fritz W. Scharpf, Governing in Europe: Effective and Democratic? (Oxford Univ. Press 1999).

pursuing the constructivist solution. Certainly, the correlation between the constructivist approach and a political vision of Europe as capable of putting redistributive as well as other regulatory questions in common is undeniable, with Habermas himself a prominent instance. However, the connection, ultimately is merely contingent. Social democracy can also point in a Euroskeptic direction, as testified by the long history of the left's ambivalence toward supranationalism. This connection is as likely to be vilified as the destroyer of the social protection systems of the European welfare state as hailed as a potential savior.[68] Further, regardless of the political agenda brought to the task of constitutional constructivism, the very dynamics of that constructivist process 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 naïveté.

Does not the idea of the constitution as a catalytic event involve false assumptions, both about the originating power of constitution making generally as a matter of sociological significance, and about the particular priority of the EU constitution in polity building as a matter of contemporary historical causation? Arguably, the constructivist case need not involve foundational assumptions in either sense. In his own conception of how constitution making contributes to European political community Habermas is decidedly *not* a foundationalist. Rather, he locates the wellsprings of European political community in the circular development of three features—transnational civil society, a European public sphere in which a discursive context emerges for arguments and proposals to be fed into the formal political process, and a common political culture to provide some kind of shared normative frame of reference.[69] 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 priority. The constitutional lawmaking process is not located within this circular process, nor is it treated as foundational of it. Rather, its catalytic potential lies in its capacity to connect with each element simultaneously. Thus, the constitution-making process itself, in particular the more outward-looking and inclusive activities of the convention, should encourage the mobilization of civil society movements with interests and aspirations transcending national boundaries. And the publicity and debate generated by the convention, especially its simultaneous and interlinked discussion in various national media and associational contexts, however muted, should provide some stimulus toward a European public sphere. Finally, the debate over values in the convention, which finds textual expression in the preamble and early sections, should assume importance not as a means of guiding the polity toward preestablished ends, still less as a set of justiciable principles, but as a

[68] *See* Offe, *supra* note 61.

[69] *See* Habermas, *supra* note 60, at 16–21.

way of grounding and generating deliberation about what a common European public culture might mean, thereby encouraging the creation of that very sense of a common public culture. On this view, in response to the prompts of the self-consciously constitutional debate, the circular reinforcement of civil society and of the public sphere and common culture should gradually take over, develop its own separate momentum, and so 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 backward and forward within a dynamically conceived framework of constitutional tradition.[70] Looking back, this first EU constitution is patently not *the* first constitution but gains much of its initial resonance from the cumulative symbolic legacy of modern constitutionalism in general (thus the preoccupation with the Philadelphian imagery in the pronouncements of the convention's chairman Valéry Giscard d'Estaing,[71] among others), and from the common ground to be found with the member states' own 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 as a whole, thus providing a resilient reference point for the mobilization of argument and opinion about the significance of the European polity. In this way, the symbolic value of the constitutional process does not expire with the process itself but provides a continuing historical resource for the very discursive process which it has generated.

Of course, the fact that a European constitutional event *might* engage the circuit of community mobilization and *might* have this kind of deep and lingering historical resonance does not mean that this particular event—the convention, the draft treaty and the subsequent process of intergovernmental confirmation and national ratification—*did* or *will*, in fact, have that effect. First, one could argue that the moment has simply failed to engage and mobilize sufficiently to have the impact the constructivists would wish. To the extent that this is true, it speaks to self-fulfilling prophecies other than the one Habermas would endorse. The hostility or indifference of the skeptics and the materialists to the constitutional legacy has contributed its own particular types of limiting effects. And even though they were more favorably disposed toward the convention, and, indeed, were 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 and present achievements over a more open, long-term vision was the key to setting a disciplined timetable of text production in a convention whose

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

[71] For example, see Valéry Giscard d'Estaing, Henry Kissinger lecture, Washington, (Feb. 11, 2003), *available at* ue.eu.int/pressdata/EN/conveur/74464.PDF.

original terms of reference had committed it to no such definitive text, and this discipline limited the breadth of participation and discussion deemed possible and appropriate.[72]

Second, and relatedly, perhaps the moment was simply unripe. Perhaps the objective conditions for a constitutional event to have a catalyzing effect were not in place, with the presence of skeptical, pragmatic, and cautious attitudes at the constitutional table one manifestation of this. From this perspective, regardless of the theoretical merits of the constructivist dynamic, actual conditions have simply militated against its operation.

Third, 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 toward a more fully mobilized political community. If the procedural imperative implicit in the idea of the treaty as a community-mobilizing event is that of active participation by 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 democratic engagement. And if that is the test, although the text makes some gestures toward "enhancing the democratic life of the Union,"[73] overall it may have done little to correct the various dimensions of the Union's long acknowledged "democratic deficit."[74]

These are powerful objections. They explain why the emerging constitution is a largely "unsung"[75] achievement, one that hardly begins to probe the various mutually exclusive closures impeding higher-order debate. Yet the objections raised and the low-key reception are not decisive against transformative momentum. For ultimately the constructivist gambit rests on a conviction that the meaning of the constitutional moment is not fatally compromised by the conditions of its origin. What we are witness to here is that—for all the diversity of the polity-oriented strategies brought to the constitutional table—the potential "performative meaning"[76] of these diverse European representatives, taken in toto and willing to sit at that table, is 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 forums of self-government. If we take seriously the idea that the present constitutional phase involves the forging of a new tradition as much as it is the continuation of the old, then the force of objections—that the motivations were too mixed, that

[72] *See, e.g.*, Jo Shaw, *What's in a Convention? Process and Substance in the Project of European Constitution-Building*, Institute for Advanced Studies, Political Science Series No. 89 (2003). The article is also available *at* www.ihs.ac.at/index.php3?id=450&more=10.

[73] CT pt. I, tit. VI (arts. 45–52) *supra* note 5. Much is merely consolidation, but see CT art. 46(4), which for the first time provides for legislation by citizen's initiative.

[74] *See, e.g.*, WEILER, *supra* note 64, ch. 8.

[75] Andrew Moravcsik, *The Unsung Constitution*, PROSPECT, Mar. 2004, 80–82.

[76] *See* Habermas, *supra* note 70, at 193.

the time was not ripe, that the convention lacked the courage of its democratic form and convictions—is notably reduced.

The test of the document's long-term credentials must lie, instead, in the capacity of the shared performative meaning implicit in the constitutional moment to provide historical anchoring for the efforts of "later generations [to] critically appropriate the constitutional mission and its history"[77]—to understand and vindicate their "felt need" to engage in a common polity through the prism of a historical record of just such felt need. The founding conditions are surely not irrelevant to the possibility of future generations making the confident shared investment in the performative meaning of the original act necessary for this process of self-reflection to unfold; nor are they irrelevant to the likelihood of such a process being a broadly inclusive or consensual one. Neither, however, are the founding conditions decisive against such prospects. In this regard, the ratification debate as it unfolds between 2004 and 2006 may be as important for its quality and quantity of engagement as for its outcome.[78]

In conclusion, we can but reiterate that the idea of the present constitutional phase as a community-mobilizing moment holding 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—remains

[77] *Id.*

[78] At the time of this writing (March 2005), following a change of mind by U.K. Prime Minister Tony Blair in May 2004, as many as ten countries have chosen the referendum option, and one, namely Spain, has already successfully negotiated that hurdle. For both legal (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, were to follow the usual permissive formula of ratification in accordance with domestic constitutional requirements (CT art. IV-447). If the aim and consequence is to mobilize public discussion around the constitution, the shift toward the referendum option can only be applauded. Yet the lateness and unevenness of the trend toward referendum on the part of proconstitution forces may play into the hands of the anti-European parties who recorded unprecedented levels of success at the June 2004 European parliamentary elections, and who thus gained an early advantage in their efforts to frame the debate in all or nothing terms (either Constitution or dissolution). Therefore, notwithstanding the early success at the Spanish vote and parliamentary ratifications in Lithuania, Hungary, and Slovenia, there can be no guarantee that the constitution will be duly ratified in all twenty-five member states, in which case it may fail (*but see* Declaration No. 30 on the ratification of the Treaty Establishing a Constitution for Europe). One view, forcefully expressed by Philip Pettit in his written commentary on my earlier draft (*see* Jean Monnet Working Papers Series 04/05, *available at* www.jeanmonnetprogram.org/papers/04/ 040501.html) was that such failure, even if it did not threaten the overall future of the EU, could suspend constitutional innovation for a generation. Another view is that the present initiative might be deemed merely an early phase in the process of the mobilization of the European political community, and, depending on the quality and level of engagement and debate, even failure might advance the conditions for a more successful subsequent initiative. *See also* Neil Walker, *The EU as a Constitutional Project*, Federal Trust Online Papers 19/04, *available at* http://www.fedtrust.co.uk/uploads/constitution/walker.pdf.

a long-term gambit. It might for some considerable time after the constitutional event (even if the perilous path of national ratification is negotiated) simply be too early to predict its direction or assess its prospects for success. Yet precisely because it retains the potential to be more than a naked reflection of the diversity around the convention and IGC tables (or an inventory of whatever modest degree of common ground was discovered during their deliberations), we should not too easily dismiss the constitution and all its works as a fleeting moment of change when it could be seen, after all is said and done, as a momentum-building event in the search for polity legitimacy.