# Contemporary European Constitution-making: Constrained or reflexive?

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# Abstract

The overarching question that informs this chapter is whether the Laeken process (after the Laeken Declaration of 2001 that gave the Convention its mandate) has managed to come up with a solution to the EUs legitimacy deficit. My focus here is on the Convention and I seek to establish which legitimation strategy the Convention exercise is reflective of. In the chapter I present and evaluate the Convention exercise in relation to four legitimation strategies. The strategies are all based on deliberative theory, but vary with regard to the deliberative virtues that they privilege, i.e., epistemic, transformative, and moral. Each strategy is developed so as to yield a diagnosis of the EUs legitimacy deficit, which serves as a focal-point for assessing the purpose of the reform; a depiction of how the strategy envisages the reform body and the reform process; and a characterization of the constitutional nature of the output. I find that the Convention was able to tap the virtues of democratic deliberation to an unprecedented degree in EU constitution-making, and the draft also moved the process of constitutionalization forwards, as it holds numerous provisions that will strengthen the EUs democratic quality. The EU has adopted an approach to constitution-making that has become increasingly reflexive, although its gradualist approach is still embedded in a framework with strong built-in safeguards for member states, so that the results are curious mixtures. Reflexivity constrained is the most appropriate label for this.

# Introduction

The European integration process is still, after five decades, a highly contested terrain. The EU in its present state is generally held to suffer from important legitimacy deficiencies.[1] In response to this (and in preparation for large-scale enlargement), the Union, in late 2000, embarked on a comprehensive process of reform. A central element here was the Convention on the Future of Europe. It forged the Draft Treaty establishing a Constitution for Europe (European Convention 2003d) that the specially convened Intergovernmental Conference (IGC) adopted in Brussels in June 2004 (which now awaits ratification in the 25 member states).[2]

This process was launched by an EU that had consistently abstained from spelling out the *finalité* of the integration process. The academic and political debate that had sought to fill this lacunae, had thrown up very different conceptions of the EU, such as: Common Market; Regulatory State; Value-based Community; and Federal Union (state-based as well as non-state based). These conceptions are grounded on distinctly different notions of the EU's constitutional character, and of its basis of legitimacy.

The question is whether the Laeken process (after the Laeken Declaration of 2001 that gave the Convention its mandate) has managed to come up with a solution to the EU's legitimacy deficit. If we look at the Convention's draft, some analysts claim that it merely dresses up the EU's existing legal structure in constitutional cloth and garb. To some this means that it does little to rectify the Union's legitimacy deficit, whereas to others it holds out the promise of preserving the Union's unique structure and achievements.[3] Others claim

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[1] See for example Abromeit 1998; Beetham and Lord 1998; Eriksen and Fossum 2000; Weiler 1995, 1999.

[2] The draft was eventually adopted by the IGC, after an initial round where it was rejected. The basic structure of the draft survived the IGC, although there were several important substantive changes. See European Council 2003, 2004a and 2004b which provide overviews of all the changes.

[3] For more on these achievements see Weiler 2001a, 2001b, 2002.

that it represents a further step in the gradual constitutionalization of the Union.[4] What this entails is also disputed. It raises questions about the presuppositions behind as well as the effects of constitutionalization. In one reading, the issue is whether such a process can contribute to forge a European demos, as a vital prerequisite for democracy. In another reading the issue is whether it contributes to constitutional reflexivity, in that it makes issues of social order and democracy itself open to deliberative decision-making (Bohman 2005).

It is not only the constitutional dimension that is contested. So is also the nature of the Convention exercise itself. Was it a body initially set up to examine best ways of extending the Common Market to the new members, but which was subsequently redirected? Was it rather a body that established the functions of a *European regulatory entity* and entrenched this in a Constitutional Treaty, with the member states as the constitutional stalwarts? Was it instead a *value commission* that embarked on a hermeneutic process of self-examination, so as to ascertain the character of Europe's value foundation? Or was it a *constitutional assembly* that forged the Constitution for Europe?

The range of positions reflects not only different interpretations of the process and the draft, but also different underlying conceptions of what is and what should be a legitimate EU. With the aid of normative theory, these positions can be formalized into a set of legitimation strategies, each of which yields an explicit set of principles, institutional-constitutional arrangements and modes of allegiance that the EU's legitimacy can be based on. The first strategy is that of efficient problem-solving. This strategy does not envision the EU as a polity, but rather as a Single Market.[5] The second is the *problem-solving* strategy, which conceives of the EU as made up of a range of relatively independent regulatory institutions, whose powers and prerogatives have been delegated to them. It envisages the EU as a partial polity, labelled a *problem-solving entity*, and whose

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[4] See Bernhard Peters 2005; Fossum 2004; Fossum and Menéndez 2005; Kokott and Rüth 2003.

[5] Cp. Mestmäcker (1994), cited in Gerstenberg 1997. This position was also reflected in debate, in particularly espoused by some UK tories and euro sceptics, but also some East Europeans.

democratic legitimacy is derived from the member states.[6] The third, *value-based,* strategy speaks to the EU as a value-based *community,* founded on a common European identity and conception of the European heritage and value-basis.[7] The fourth, *rights-based*, strategy highlights the role of civil and political rights as critical vehicles in the development of a constitutionally entrenched *democratic political union*.[8]

This paper addresses the following question: Which legitimation strategy is the Convention exercise reflective of? I present and evaluate the *Convention exercise* in relation to these four legitimation strategies.[9] This assessment does not include the IGC and the changes it made to the draft (European Council 2004c). The strategies are all based on deliberative theory, but vary with regard to the deliberative virtues that they privilege, i.e., *epistemic*, *transformative*, and *moral* (see Eriksen 2005). Each strategy is developed so as to yield a diagnosis of the EU's legitimacy deficit, which serves as a focal-point for assessing the purpose of the reform; a depiction of how the strategy envisages the reform body and the reform process; and a characterization of the constitutional nature of the output.

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[6] Cp. Majone 1996. This conception was well reflected in the debate.

[7] The Pope pressed hard to have a reference to Christianity in the draft. Several members in the debate also spoke of the need for the Union to develop a clearer value foundation.

[8] This position is held – with many shades – by most of the federalists in the Convention. See for instance Lamassoure and Duff. See also contributions by Jo Leinen, president of Union of European Federalists.

[9] On the strategies, see Fossum 2000, Eriksen and Fossum 2004, and Eriksen 2005. The evaluation of the Convention is based on personal attendance at six Convention plenary sessions, attendance at a range of Convention-related meetings in the European Parliament, personal interviews with Convention members, secretariat member, European ombudsman, and civil society representatives. I also have drawn on 23 structured interviews with Convention members conducted by CIDEL-funded staff in Brussels. Documents used include plenary debates, Convention submissions (to the plenary and to all the working groups and discussion circles), constitutional draft proposals from Convention and non-Convention members and attendance at various seminars and workshops with Convention-related membership and academic analysts working on the Convention.

*Table 1*     Legitimation strategies for the European Union

|  | **Market problem-solving** | **Regulatory problem-solving** | **Value-founding** | **Rights-entrenching** |
| --- | --- | --- | --- | --- |
| **Polity type** | Common market | Derived regulatory entity | Value community | Federal-democratic union |
| **Deliberative merits** | Epistemic | Epistemic | Ethical/transformative | Moral/transformative |
| **Purpose of reform** | Extend the Common Market to the new members | Extend the 'regulatory state' to the new members | Hermeneutic self-clarification | 'Fuse' Europe's constitutional horizons |
| **Type of body envisaged** | Expert body | Stake-holder body | Value Commission | Constituent assembly |
| **Anticipated output** | Proposals for extending the Common Market | Member-state-based constitutional treaty | Assurance of the Union's value foundation | Constitutional proposal |

In the following pages, each strategy is outlined and applied to the Convention exercise in a sequential manner. The concluding section provides a brief summary of the overarching implications we can discern from this for the EU's legitimacy.

## The legitimacy of the Convention exercise

Although some continue to cling to the notion that the Union is a Common Market, and some at the outset also thought that the Convention would confine itself to deal with market extension, the Convention exercise clearly demonstrates that the first strategy (as outlined in Table 1) has very limited applicability.

**Extending the 'regulatory state' beyond Western Europe**

The second legitimation strategy (as the first) is based on a consequentialist notion of legitimation. It conceives of the EU as a problem-solving entity, but which has taken on a wider range of functions than those of market making and maintenance. The EU is often considered as a regulatory state – made up of a wide range of specialist agencies and regulatory bodies (Majone 1996, 1998). Its remit of action is limited to certain critical problem-solving tasks. It offloads and compensates for the declining problem-solving ability of the nation-state in a globalizing context within areas such as for instance environmental and social regulation (not redistribution), migration and cross-border crime.

The strategy posits that the EU's legitimacy relates to its performance, i.e., the EU's ability to produce substantive results (Wallace 1993: 100). This strategy highlights the epistemic value of deliberation.[10] The idea is that deliberation increases the rationality of decision-making and thus contributes to problem-solving. To this strategy, support for the EU is highly conditional. When expectations are not met, support is withdrawn. The types of issues that such an entity can handle are generally confined to those associated with weak

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[10] Cohen and Sabel (1997) and Gerstenberg (1997) are deliberationists but do not think of the EU in explicit derivative terms. Majone does not work from an explicit deliberative perspective but highlights the epistemic value of deliberation (cp. Majone 1996: 292).

evaluations (Taylor 1985). Accordingly, the institutional apparatus operates on an intergovernmental, not a supranational, logic. This mode of legitimation is also often referred to as output legitimation (Scharpf 1999). In democratic terms, the EU is *derived from* the European nation-states – hence indirect legitimation is sufficient. This line of reasoning is consistent with Robert Dahl's (1999: 21) view that beyond a certain scale, and the EU is beyond this, representative democracy cannot work.

This strategy sees the legitimacy deficit as an expectations-performance gap, and as a hollowing out of national democracy. Each nation-state faces risks and challenges that it no longer can handle alone in a manner consistent with citizens' needs and expectations. Union action is often ineffective, as it is constrained by the member states. Barring such constraints, Union action could undermine national democracy, through untrammelled juridification.

To address this dilemma, the strategy posits that the Union set up a body to clarify its remit of problem-solving within an enlarged Europe, so as to ensure the best match possible between expectations and performance. The mandate would contain a set of issue-areas or substantive matters that the body would address. It would also offer a set of guidelines to help the body in its assessments of which tasks should be allocated where, so as to ensure effective problem-solving. The mandate would underline that the Union's democratic legitimacy is derived from the member states. It would ask the body to justify that its recommendations do not threaten or undermine the democratic legitimacy of the member states, and instruct it to consider solutions to the Union's hollowing out of national democracy.

The type of body most consistent with this strategy would be an *expert committee* or a corporatist body (with representation from the main affected interests). The body's composition would reflect the nature and range of issues: the more salient, the more broadly based (experts, affected interests, and representatives from the member states). A broadly based body set up to deal with issues of vital importance to national democracy

could be subdivided into expert committees that handle pragmatic issues and make recommendations to an overarching body, and with national representatives who would have a special obligation to protect national democracy. The output would be in the form of proposals or recommendations (even in the form of a constitutional treaty) that would be put to the member states for final acceptance.

**The applied strategy assessed**

There is some support for this strategy in the Laeken mandate (Lenaerts and Desomer 2002: 1224). Several of the participants, notably the British government, started out from this position (European Convention 2002c). At Laeken, the European Council instructed the Convention to discuss a wide range of substantive issues and stressed the practical nature of European cooperation. 'Practical' also referred to type of polity: 'What they [citizens] expect is more results, better responses to practical issues and not a European superstate or European institutions inveigling their way into every nook and cranny of life.' (European Council 2001) The Laeken Declaration also expressed concern with the remit of Union action:

> There is the question of how to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States and, where there is provision for this, regions.
>
> (European Council 2001)

But the declaration did not confine itself to substantive issues; neither did it cast the Union as a mere instrument of the member states. The mandate is 'surprisingly wide' (Lenaerts and Desomer 2002: 1213) and framed as a *response to citizens' demands and expectations*, which relate not only to practical issues but also to democracy, transparency and fundamental rights. In line with this, the Laeken Declaration instructed the Convention to consider (but not determine) the fundamental issue of a constitution for Europe, including its value-basis, the rights and obligations of citizens, and the role of the member states.

The Convention was not composed of experts, neither was it set up as a corporatist body.[11] As with the Charter Convention, it was mainly composed of representatives from the Union's (including member states') institutions, and a majority of the Convention members were parliamentarians (46 out of 66 voting members, and 26 out of 39 from the candidate countries). The broad national representation (through national parliamentarians, government representatives and to some extent also EP parliamentarians) meant that no single actor could legitimately claim to reflect the national position in case of conflict. Such conflicts would also be highly visible, as the Convention was instructed to conduct its affairs in public, and to make the debates and documents available to the public. Its composition and the very use of the term 'Convention' to designate the body are evocative of something more and different than can be assumed from this strategy.

The Convention format, as a method of treaty reform, was distinctly different from the EU's well-established, bargaining approach to treaty change (Curtin 1993; Moravcsik 1991, 1998), the Intergovernmental Conference (IGC), which consisted of member state officials and was the body formally in charge of treaty change. However, the Convention was not set up as a free-standing vehicle. Instead, the Convention was set up to prepare proposals for the subsequent IGC, where each member state would retain its veto. Given this structure, an important issue is whether the member states would seek to determine what the Convention would propose to the IGC, or whether they would permit it to come up with its own proposals. Even if left relatively free-standing, the Convention, to ensure that its proposals would go through the IGC, would have to anticipate or enlist the support of the member states. This way of structuring the process could therefore leave the member states in control of the process.

The Convention was not given a free rein. The European Council appointed its leadership. Each Member (and candidate) State had a government representative who was personally

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[11] Representatives of civil society and Committee of the Regions were present as observers. It was also set up with several outreach functions, such as a Forum, and a Youth Convention.

appointed by the respective head of state or government, so as to ensure a measure of control. The Convention leadership was instructed to inform the Council at regular intervals, and the Council determined its time-frame of operations.[12] But neither the Council, nor any member state, could place restrictions on the Convention's access to information or expertise,[13] or regulate its interactions with other actors.

But although faced with strong external controls, Valéry Giscard d'Estaing, at the opening meeting, spelled out an ambitious vision for the Convention and its work, which by underlining the essential constitutional character of the undertaking also suggested that it might take on a more independent role than set out in the mandate, a role that would take it farther away from the type of body prescribed by this strategy. This role conception was consistent with the view of a great majority of Convention members (Magnette 2004a: 213). Giscard, in his opening speech, underlined the importance of the undertaking, a point further amplified through the invocation of the Convention spirit (European Convention 2002a; Magnette 2004a: 214, 2004b: 212). The stakeholders were *all Europeans*, and the Convention was a unique body, distinctly different from an IGC. This difference was reflected in its working methods. It would work as a deliberative body, according to an argumentative rather than a bargaining style, and was devised to emphasize the power of argument over that of the status and position of the speaker, so as to de-legitimate situated interests (Magnette 2004a: 216).[14] It would abstain from voting, and its purpose would be to reach agreement on a common proposal. This provision on voting also directly affected the representatives from the applicant countries, whose status was that of observers, and who did not have the right to vote. In the absence of voting, force of argument would count more than status as applicant.

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[12] See Schönlau (2004) for a more detailed assessment of the role of time and timing in the Convention process

[13] This was the case at IGCs, cp. Beach 2003 and the Council Secretariat's central role.

[14] What Magnette here refers to as situated interests is similar to Elster's (1992, 1998) notion of bootstrapping.

These decisions went well beyond the Laeken mandate, but they were not consistently adhered to. The Presidium and the President made proposals,[15] whose origins were not based on the Convention's deliberations. Members also detected a strong bias in the President's portrayal of issues, and the President and the Presidium at times appeared as mere extensions of the member states.[16]

The Convention's initial rules of procedure were similar to the Council's standard procedures[17] and were not consistent with an open deliberative assembly. Their introduction sparked great uproar and opposition, and they were subsequently changed.[18] This shows that the members of the Convention early on came to see it as an independent body, which should not only formulate its working methods, but also operate in accordance with the norms of a deliberative body.

The many and strong levers that the member states had to influence the Convention with could confine the endeavour to that of narrow problem-solving, to ensure subsequent acceptance by the IGC. If we look more closely at the Convention's work, its initial phase was a sounding-out phase, which lasted for several months, and dealt with central issues of principle. The second phase, the working-group one, was far more practical. Here three rounds of working groups dealt with substantive issues (such as defence, economic governance, freedom, security and justice and social Europe), as well as with institutional-procedural ones (subsidiarity, the Charter, legal personality, national parliaments, complementary competences, and simplification). Members could choose which working group to join. This process was not strictly orchestrated by the member states. The

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[15] See Zanon 2003 who cites numerous examples. The origins of the skeletal draft (European Convention 2002e) remains somewhat mysterious but came from the close circle around Giscard. Interview with Convention observer.

[16] Consider in particular their handling of the Franco–German proposal (European Convention 2003a) on the Council presidency, where it chose to disregard the majority position and support the large states. See Zanon 2003.

[17] Interviews with Convention member and staff.

[18] See Closa 2003. Interview with secretariat official. See also Lenaerts and Desomer 2002.

discussions were intended to cover all aspects of the mandate, and although there was no explicit group on legitimacy and democracy, these issues crept into most of the discussions. Members generally found the working groups useful, as their smaller format helped foster more open deliberation, and their work helped provide suggestions and inputs to the final phase, the proposal phase, where the draft was produced. Through these three phases, the Convention combined attention to principles with detailed examinations of specific issues and sought to fuse these together into a draft proposal.

The Convention's (Presidium excepted) deliberations were open and public, with thousands of documents available. In addition to its final draft, the Convention produced a comprehensive body of descriptions and assessments of virtually all aspects of the EU; political visions; assessments of its normative quality; and concrete constitutional proposals. Through a system of rapid and updated translation and publication of almost all available documents, the participants and the public had information on all actors' views and positions throughout the process. These traits testify to the epistemic quality of the process, a point which participants also stress.

But there were limits to this, as well. The draft was developed in a piecemeal fashion, with batches of articles released at a time, and with very little time to respond to each set.[19] Participants lacked an adequate overview of the process – what the end product would be and how the different parts would fit together. Since the Council refused to extend the time-frame of the Convention's work, when requested by Giscard to do so, there was not enough time for the participants to establish with any degree of certainty whether the structure in place properly reflected their views and stances.

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[19] This is evident from the sequencing of articles, and was confirmed in interviews with participants, as well as was often stated by the same in plenary debates.

**Beyond problem-solving?**

The Convention operated as a deliberative body. But it *did not confine itself* to the handling of substantive problems. At the same time, the fact that it was inserted into the IGC structure did affect its work. The Council was not only tightly consulted; it also used its power to direct the Convention's work. Albeit many political leaders had held low expectations of the Convention at the beginning,[20] over time, they realized that they had to take it more seriously and did so through inserting politically accountable, central government figures (13 such changes took place, Closa 2004: 199). Some of the government representatives at times took on the role of 'national fire-walls' or 'red-line drawers'.[21]

The Council's strong influence – through forward linkage of the Convention to the IGC – helps explain how the Convention – stimulated by its President – sought to reach settlements that had a chance of gaining acceptance in the IGC (Closa 2004; Eriksen and Fossum 2004; Magnette 2004b). This orientation was revealed in its working quite close to the text of the treaties, so that much of its work revolved around assessing the provisions in place (adding, revising, embracing and slashing such). The forward linkage orientation also served to ensure tight links to the respective governments and served to shift some of the inevitable intergovernmental bargaining unto the Convention in the final stages of its work. The Convention, less from its own design, and more from its being inserted into the IGC, came to place special onus on member state concerns. It conducted its deliberations 'under the shadow of the veto' (Magnette 2004a: 220).

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[20] Proponents of a delimited EU, based on intergovernmental cooperation generally opposed a Convention. The Swedish government initially opposed the idea of a Convention (Petersson et al. 2003: 75) and so did the UK one, which initially did not have a clear strategy in relation to the Convention. Interview with Convention member, 22 January 2003.

[21] The British government representative, Peter Hain spoke frequently of 'red lines', i.e., British positions on issues that could only go so far. Other similar instances of red-line drawing were by the Polish, Spanish and Benelux countries (Closa 2004).

The result of the Convention's deliberations, the Draft Treaty establishing a Constitution for Europe, should therefore be expected to reflect member state concerns. The draft does contain protocols on subsidiarity and national parliaments, both of which can protect the member states from EU encroachments, and also preserves national veto in the amendment procedure.[22] But the Convention's deliberations had shown that national positions differed greatly. There was no agreement on what the Union's remit of action should be, neither on how national democracy should be protected. Further, the Convention opted for a flexible approach to division of powers and competences, which could weaken national preponderance (Craig 2003).

Magnette argues that the result can best be summarized under the heading of *simplification*. This ambiguous term helped unite integration-friendly federalists and Euro-sceptics, who otherwise disagreed on many fundamental issues, to strike a compromise, or what Magnette (2004b: 210) labels an 'ambivalent agreement'. This is an 'agreement based on preference differences and belief differences that cancel each other… It implies that when deliberation reduces disagreement either about ends or about factual matters, it may increase disagreement about the decision to be taken.' (Elster 1998: 101)

This depiction of the result as an ambivalent agreement reveals first that the process of deliberation revolved around far more than pragmatic issues; it came to touch on core normative issues that pertain to what is good and what is right. Second, it also suggests that the process of deliberation served to increase dissidence and stimulate greater variation in opinions and views (see Peters 2005). But this is not the whole story, as an agreement emerged to *frame the issues in explicit constitutional terms*. Kokott and Rüth note that although Joschka Fischer gave a vital impetus to such a framing in his 2000 speech,

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[22] Giscard was cited to the effect that 'The substance of the text under discussion is a constitution, but one which takes the legal form of a treaty since, in contrast to a national constitution, the powers conferred on the Union derive from the States which conclude the Treaty.' (European Convention 2003c: 1)

not even the most daring would have imagined that only three years later a general consensus could be reached to adopt a Treaty, in the title of which the word 'Constitution' figures. In fact, it was widely believed that those Member States which were rather critical towards further integration, would never agree to such a step, as the idea of giving a Constitution to the Union was often equated to completing the decisive step towards a Federation or at least perceived as an allusion to a federal future of the Union. The term 'constitution' was therefore, especially for the British, as much a taboo as the term 'federal' itself.

(Kokott and Rüth 2003: 1319–20)[23]

This change in framing suggests that there might be a greater contraction in the range of positions than what is implied in the notion of ambiguous agreement. Further, simplification, as understood by the Convention, did not amount to scaling down, but could actually lead to more integration. The structure that was to be simplified was also already more comprehensive than what this strategy envisages.

We can therefore conclude that the Convention exercise was only partly reflective of Strategy Two. The issue is how different it was. That the Convention succeeded in framing its work in explicit constitutional terms, requires us to go beyond assessing its epistemic role to also consider it as a body capable of *transforming* opinions and view-points. Its constitutional orientation and inclusive conception of its stakeholders also requires assessment of how well it harnessed the *moral value* of deliberation.

## Value-based self-clarification

The third strategy is based on a contextual mode of rationality and presents the EU as an emerging value community. The EU is not a state, but is clearly more than an international organization. It makes collective decisions, with deep implications for values and

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[23] A Convention member also noted in interview that few of the representatives from the applicant countries had though about the EU as a constitutional order before they came to the Convention.

identifications in Europe. The critical challenge facing the Union, the strategy posits, is to clarify the Union's value basis, through a collective process of self-interpretation. This presupposes clarification, both of who the peoples of Europe are, as well as who they want to be. This process must reach back in time and establish that there is a set of common traditions and memories that can be seen as constitutive of Europe. These must then be revitalized and drawn upon to support and sustain further integration and to foster a common identity. This means that the process has to extend beyond institutional reform. It has to reach into people's hearts and passions, and turn them into compatriots, who are willing to embrace those collective obligations that are important to each other's well-being.

A common identity does not only help to stabilize the Union's goals and visions, it is also necessary for securing *trust*. Trust is an essential condition for deep and binding cooperation and for the settlement of conflicts by neutral procedures (see Eriksen 2005; Schmalz-Bruns 2005). A critical source of trust is a common cultural substrate, which can help foster allegiance and respect for laws.

This strategy presupposes a constitution, but this is a 'rooted' constitution, i.e., it is a body of laws and norms with deep roots in a pre-political community of values and a common identity. The constitution is the legal embodiment of a community of values, where Europeans address and see themselves as fellow compatriots (and not as market actors). The constitution emanates from these socio-cultural roots, over a considerable period of time. Thus, 'the juridical presupposition of a constitutional *demos* [coheres] with political and social reality.' But the *conditions* have to be present. 'In many instances, constitutional doctrine presupposes the existence of that which it creates…' (Weiler 2001b: 56)

The reform process, according to this strategy, has to take as its point of departure that the EU's legitimacy deficit stems from an underdeveloped constitutional support structure: the lack of a truly European identity and a sense of community (Grimm 1995, 2004; Guéhenno 1996; Offe 1998). Necessary ingredients for ensuring the requisite trust are lacking. In the

absence of such, institutional reforms would amount to reforming empty shells. From this perspective, the questions currently facing the EU are:

- Does the legal-institutional structure that has been established by a set of elites and which has emerged almost through stealth actually rest on a set of European values?
- Does it cohere with and can it sustain a European identity?
- Is it conducive to further constitutionalization in Europe?

Applied to the Convention, for it to play such a hermeneutic self-clarifying role, its mandate would have to instruct it to go beyond the universal principles that the Union already appeals to.[24] The Convention would need to establish, not only that a set of European values exist, but also that they are sufficiently deep and delimiting so as to serve as a foundation for a genuine European community and identity. Only then could they serve as the requisite leitmotif for Europe's constitutional development within the framework of the EU. The assessment would also have to serve as a test as to whether the EU has progressed *further than warranted* in value and identity terms.

Such a 'value commission' could be composed of those best equipped to define and rediscover the EU's value foundation: its most authentic *value articulators*. These could be Europe's intellectual leaders (poets and journalists and academics – all of those with an alleged special ability to capture 'Europe's soul'), under the assumption that they would be best equipped to clarify and articulate the values. Such a body could also include a significant contingent of religious leaders and movements. Those selected would be required to articulate the idea of Europe, and the notion of a Europe of values, in a language that all would understand. Given Europe's diversity, however, no constellation can readily

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[24] These are liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. <http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.000501.html>

be found that would reflect a set of distinctive and Europe-defining values. For this reason, the Convention would have to be set up to tap the *transformative* aspect of deliberation.

But in this complex setting, transformation without proper community authorization would not be enough. The process of self-clarification could not be undertaken by the Convention alone, but would require assurance through consultation with the relevant intermediary bodies (parties, social movements and interest groups and other stakeholders) that the values amplified by the Convention are the ones that Europeans cherish and endorse. This body would come up with recommendations; as its role would be preparatory only.

**The applied strategy assessed**

The Laeken mandate asked the Convention to discuss what value foundation a future European constitution could be based on. This hardly adds up to seeing the Convention as a body whose *main task* would be to undertake a hermeneutic self-clarification of the EU as a value community, as the Convention was asked to address a wide range of questions, and was not required to come up with a constitutional proposal. The Laeken mandate (forged by the then fifteen members) further left to the Convention to establish the relevant *scope* of the community of values: should it refer to the values of the community of present members, or also to those of the expanded Community? If the latter, the exercise would not simply be one of looking backwards to the present community, but would also have to be future-oriented so as to establish the values that a greatly reconfigured EU *post-enlargement* would embrace, with all the ambiguities that this entails in terms of the Union's scope and character, as the debate on Turkey amply demonstrates (Sjursen 2002). The Convention, as noted, had decided to include the voices of the applicants; therefore the process of hermeneutic clarification revolved around an enlarged, ambiguous and other-regarding self, which also meant that the Convention exercise went beyond the core tenets of this strategy.

This is further reflected in the Convention's composition. It was not made up of value articulators (no special procedures for the Convention to interact with and consult with such

existed either). It included some of the most strongly institutionalized divisions in Europe, but far from all, of the most important of Europe's divisions.[25] Of notable importance was the absence of representatives from Europe's numerous religious communities.

It was nevertheless so broadly composed as to contain widely different conceptions of what a legitimate Europe entails in value terms. But whereas the Laeken mandate at most asked it to reach a common understanding of the requisite value foundation, Giscard's and the majority's intention went further: to foster consensus on a common proposal. Hence the need for members to distance themselves from those who appointed them: 'This Convention cannot succeed if it is only a place for expressing divergent opinions. It needs to become the melting-pot in which, month by month, a common approach is worked out.' (European Convention 2002a: 12)

The question was how such a composite body could foster agreement. Would this not amount to overtaxing the body's ability to foster the transformative aspects of deliberation? To understand this we need to distinguish between two critical aspects of transformation: common understanding vs. common agreement. Deliberation can foster common understanding, without this leading to agreement through changed preferences.

Giscard spoke of the need for the Convention to forge an agreement of a strong kind: 'We must ensure that governments and citizens develop a strong, recognized, European "affectio societatis", while retaining their natural attachment to their national identity.' However, what was underlined was *not* unity as such, but a more complex, inclusive and essentially *federal*, sense of commonality, one imbued with respect for difference and diversity. This was not a vision of the Union as one community, but is better thought of as a 'community of communities'. The onus was on the need for participants to enlarge their positions and stances, so as to include a European dimension in their sense of self. Such an enlarging did

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[25] Percentage share of women was very low. It also failed to even faintly reflect the increasingly multicultural nature of many of its member states (Shaw 2003).

not require explicit shifts in loyalties and allegiances. The requisite transformation was more of a *morally inclusive* character.

A significant contingent of the Convention's members nevertheless wanted to go further than what Giscard had encouraged, in value-terms. They argued that the European constitutional edifice not only rested on a set of pre-political values, but also that these were of a religious kind. The Convention's task, to them, was to make sure that these were sufficiently well articulated and represented in the text so that Europeans would associate the constitution with them.[26] A considerable number of Convention members, strongly supported by the Pope, and much of the European People's Party (EPP), sought to have a reference inserted to Europe's religious foundation. The way in which this was to be done differed. Some sought a reference to God modelled on the Polish Constitution, others to Christianity, others again to Europe's Judaeo–Christian roots, and others again to Europe's Greco–Roman roots (European Convention 2003b: 18).

No agreement could however be found on a common European religious value foundation. Those who wanted a reference to Christianity were met with strong opposition and failed to convince the majority of Convention members. The preamble has no reference to Christianity, but does refer to Europe's religious inheritance.

Some members of the Convention still wanted to include religious criteria in the membership requirements, which would exclude Turkey. The EU's established membership requirements have been based on universal principles (confined to Europe), not Europe-specific values (Sjursen 2002). Giscard, outside the Convention, recommended against Turkish membership, and sparked a lot of uproar. The draft retains the present membership requirements.

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[26] There were some suggestions to insert them in Article 2. This was closely associated with Article 45 which sets out the procedure for initiating procedures against a member states which breaches the Union's principles and values (European Convention 2003c: 5).

**Beyond a value-community?**

The debates revealed that there was no consensus on a set of Europe-specific and exclusive Europe-defining values, neither at the outset of the Convention's work nor at its concluding debates. Rather, the Convention's debates brought out the complex configuration of values that we find in the EU. The debates touched on at least four dimensions: the EU as made up of universal and secular values; the EU as a harbinger of religious values, but without this being confined to a specific religion; the EU as a bearer of Christian values; and the EU as made up of national (and regional) communities. The conceptions of Europe ranged from cosmopolitan to communitarian. There were appeals both to the need to forge a European constitutional patriotism and to protect the deep diversity of Europe (Fossum 2004).

The resultant Draft portrayed the Union's values (as expressed in Article I–2 on the Union's values) in largely the same morally inclusive way as were found in the Treaties. Consensus was reached on the same universal values as were presented in Amsterdam, and reiterated at numerous occasions, namely human dignity, liberty, democracy, the rule of law and respect for human rights. The notion of equality had been added to the final draft, after considerable pressure. There was also agreement on the need for the Union to respect Europe's rich cultural and linguistic diversity (cp. Article I–3.3). The notion of a Europe of nation-states, so well-entrenched in the Treaties, was also clearly evident in the debates and in the resultant draft (cp. Article I–5). This brief recapitulation reveals that the Convention had a limited transformative effect in narrow ethical terms. But despite its highly composite nature, the Convention confirmed the morally inclusive values that were entrenched in the treaties. The draft underlines the highly inclusive nature of the community of values that the Union embraces.

The Laeken mandate had not set the Convention up to foster a deep value transformation. The deep sense of *trust* that this strategy presupposes probably also requires a different, smaller and more intimate body, where people work closely together over a lengthy period of time so as to ensure proximity, and close and continuous interaction. Then participants can reciprocally establish their mutual truthfulness and trustworthiness. The very size of the

Convention (de facto 207 persons, as the substitutes were very active) was too large to ensure such familiarity. This was exacerbated by the Convention operating as a part-time body. The format of the plenary debates was not very conducive, either to authentic expressions of individual views, or to *exchanges* among the interlocutors, as the presidium set the order of speakers in advance and left very little opportunity for responses to interventions, as well as for clarifying questions.[27] Further, of even more importance was the short length of each intervention (generally 3–4 minutes), which was enough to make one or several points, but not enough to provide adequate justifications for these. It was certainly not enough time for each participant to delve into the past, conjure up evocative images, and crystallize that person's view of what constitutes a common vision of Europe.

At the same time, an assessment of the deliberative quality of the plenaries only, would greatly distort the comprehensive deliberative process that the Convention exercise fostered. This consists of other officially established Convention-related forums, as well as was carried into numerous other official forums, both of which spawned a range of more spontaneous encounters, through networks and contacts. Among the official forums, the working groups provided a more conducive atmosphere, and participants found them very useful, both to clarify issues and to establish consensus. But they were devised so as to respond to limited aspects of the mandate, none of which explicitly dealt with the issue of a European identity or Europe's value foundation.

In sum, the Convention was not instructed to recreate the set of European values that are designative of a value-community, in its communitarian-replication trapping. The Convention, as a deliberative body, permitted a thorough examination of the Union's value basis. This included efforts to establish a set of more specific *European,* in the sense of Europe-confined, values. But rather than getting bogged down in struggles over competing visions of what precisely it means to be a European, the Convention agreed on a set of values that are universal in orientation and that correspond to the values that can be

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[27] This arrangement was subsequently supplemented with the so-called blue-card system which opened for interventions from the floor and sparked a more open debate (European Convention 2002b).

discerned from the *common* constitutional traditions of the member states. The general thrust that runs through the debates and the draft is the need for reconciling universal values with Europe's diversity. 'These [universal] values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination' (European Convention 2003d: Article I–2).

The Convention exercise, rather than forging significant *shifts* in values, nevertheless confirms Peters' (2005) notion of a contraction of the range of views. This is reflected in the endorsement of the Union as based on universal principles, and in the framing of the exercise as one of constitutional importance. We here see both elements of agreement and of a shared understanding of the exercise. The question is how far this agreement carried in terms of what is meant by constitutional; in terms of its specific character; and in terms of reflecting the interests of the main stakeholders, the citizens of Europe.

## Developing a rights-based federal union

The fourth strategy rests on the moral value of deliberation and propounds a rights-based, procedural notion of legitimation. It envisages a European Union based on a wider, cosmopolitan conception of democracy, and which embodies the core principles of the constitutional democratic state, but with a *post-national* vocation. Its support resides in a *constitutional patriotism*, where a set of legally entrenched fundamental rights and democratic procedures are embedded within a particular socio-cultural context so as to make for political affect and identification (Habermas 1994, 1998, 2001). This strategy therefore also speaks to the shaping of a European *demos*, but this process occurs through different means than those presented in the third strategy.

The strategy is critically dependent on the EU harnessing the normative essence of the modern democratic constitution: the respect for the individual – its integrity and dignity. These are also critical conditions for constitutional reflexivity, upheld by the following conditions: a political culture based on tolerance of difference; a set of rights that protect

the integrity of the individual – private freedom – and that also enable participation in the opinion- and will formation processes and make for public freedom – political rights (Habermas 1996); a set of institutions that enable the citizens to consider themselves not only as the subjects but also as the authors of the law; and a viable public sphere. In this view, democracy is not only an organizational arrangement – parliamentary or presidential democracy – but also a legitimation principle. In other words, democracy is a procedure that sets the terms for reaching legitimate decisions.

This strategy would take as its point of departure that the EU's legitimacy deficit stems from the following aspects. First, whilst the EU has a material constitution, this amounts to juridification bereft of adequate democratic controls and absent a proper democratic justification. Second, whereas the EU is a granter of rights, the citizens have not given the rights to themselves.

The strategy presupposes that a *democratic* constitution is forged through a constitutional moment,[28] i.e., through a process that has an explicit democratic sanction, permitting citizens to be seen as, and see themselves, in normative terms, not only as the addressees, but also as the authors of the laws that affect them. But the Union is *not* involved in constitution-making from scratch. It might be *m*ore appropriately to think of what is happening as a 'fusion' of Europe's constitutional horizons. Such a fusion builds on the justified principles already entrenched in the national constitutional traditions. For this process to comply with democratic requirements, the Convention's deliberations and results would have to comply with the basic interests and concerns of its stakeholders, the citizens of Europe: with the general requirements of democratic constitutionalism, pertaining to basic rights, democracy and the rule of law.[29]

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[28] For this notion consider Ackerman 1991, 1998.

[29] A critical issue is whether this conception of the EU has to be state-based. For incisive accounts of this issue consider Schmalz-Bruns (2005), who works from this strategy perspective. See also Brunkhorst 2004.

Such a process-oriented approach can be consistent with constitutional reflexivity, which speaks to a dynamic notion of the constitution, rather than a notion of the constitution as a contractual arrangement that is established and fixed *at a particular point in time*. This might also be more relevant to the highly complex and contested EU, which as we have seen, does not rest on and cannot draw on a set of pre-political values or a clearly developed European identity. This also suggests that the constitutional agreement that is struck might not rest on a rational consensus but might instead be a working agreement, i.e., 'an agreement which has come about argumentatively, but where the actors may have different but still reasonable and acceptable grounds for their support.' (Eriksen 2003) Working agreement is an intermediary category, between compromise and consensual agreement. Such an agreement is more a temporary resting point, than a fixed-for-all agreement, and therefore also presumes procedures that do not throw up overly high thresholds against subsequent change.

If this is a more adequate description of the EU case, it is important to underline that the strategy presumes *further EU constitution-making* so as to ensure that the principles and institutional arrangements do provide the EU with the democratic legitimacy that this strategy requires. The critical issue is how far this process needs to go. Here opinions differ. Bohman argues that two elements are critical (see Bohman 2005). The first is to ensure the basic conditions for constitutional reflexivity. Secondly, these need to be entrenched in a transnational structure. This line of argument is premised on the EU as distinct from and as not having the vocation to become a state. This both means that it can not rely on a hierarchical system of authority, and further that its poly-centric structure is conducive to reflexivity, in that it stimulates democratic experimentation. The substantive and procedural requirements for constitutional reflexivity that Bohman lists are significantly weaker than those that for instance Schmalz-Bruns (2005) finds necessary. The latter argues that the only way in which constitutional reflexivity can be ensured is through basic democratic requirements, which to be effective, *also* presuppose a kind of hierarchical structure. At issue is therefore whether the Convention exercise does take the EU closer to the requisite

conditions, and further what kind of structure these are embedded within: poly-centric, poly-cephalous (as a type of intermediate arrangement) or hierarchical.

This difference in positions would also be reflected in different views of the Convention exercise, as Bohman's position would be compatible with the Convention as a preparatory body only and where the IGC remains as the formal proposing body. Schmalz-Bruns' position would instead presuppose that the Convention and not the IGC be the formal proposing body. The Convention would then be a *strong public*[30] – a body which embodies both deliberation and decision-making. This also entails that the Convention is not foremost responsible to the European Council or to the member states, but is directly responsible to and must answer to the public.

**The applied strategy assessed**

As noted, the mandate asked the Convention to consider core constitutional issues. But the Convention was *not* set up to serve as a constituent assembly. Such a constitutional moment was not now, but might be precipitated by its work.[31] The Laeken mandate however portrayed the Convention as an *extension of the public debate* on the future of the European Union. The Convention's rationale, from this perspective, was to give structure to, and to take this debate further. The mandate sought to build on and continue, but also to open up and render more transparent, the Union's established process-oriented approach to constitution-making. But it did so within a framework that privileges states, not citizens.

The Laeken Declaration's attempt to institutionalize the public debate through the Convention conceived of it as a preparatory body and not as a strong public. The

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[30] *Strong public* refers to institutionalized deliberations 'whose discourse encompasses both opinion formation and decision-making…' – as different from *weak public* (or what has elsewhere been termed as *general public*, cp. Eriksen and Fossum 2002) and which refers to public spheres 'whose deliberative practice consists exclusively in opinion formation and does not also encompass decision making' (Fraser 1992: 134).

[31] 'The question ultimately arises as to whether this simplification and reorganization might not lead in the long run to the adoption of a constitutional text in the Union.' (European Council 2001)

Convention, nevertheless, decided to go further and produce a Draft Constitution. Thus, its resolve to forge a consensual decision on a common constitutional text effectively redefined the Convention into an 'as if' strong public.[32] The Convention claimed to have popular authorization for this decision to proceed beyond that of a mere preparatory body. Thus, it in effect appropriated a democratic mandate. This means first that we should evaluate the body according to the same deliberative-democratic standards as were set out above. Second, it also means that we should evaluate the outcome in relation to the process-oriented approach rather than the standards of a fully-fledged democratic constitution, as the Convention was *not* in a position to ensure democratic authorization. The draft should therefore be assessed in terms of how well it complies with the requirements for constitutional reflexivity: a set of procedures and rights that ensure an ongoing process of discursive validation of the structure in place, as well as provisions that permit its change in response to reflexively fostered future agreements.

When the Convention is considered in relation to the first point, we have seen that it did comply with many of these deliberative requirements, and this is also confirmed by numerous analyses (cp. Magnette 2004a, 2004b; Maurer 2003; Lenaerts and Desomer 2002: 1240; Fossum and Menéndez 2005; Eriksen and Fossum 2004). The process was open and quite transparent and did permit different views to come to the fore. There is also evidence to show that opinions and positions have changed.[33] The Draft was accepted by a very large majority of Convention members. But it was also shown that the full power of

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[32] It might be added that the Laeken Convention did use the Charter experience as a reference point – including the consensus method that had been implicit in the Cologne mandate and which became explicit in the Laeken mandate.

[33] Twenty-three members of the Convention were asked if they had changed their minds in the course of the debates in the Convention, and whether they saw the Convention exercise foremost as a bargaining or as a learning experience and what their main lessons were. The results show considerable movement on a number of issues. Many said they had changed their minds during the work of the Convention. The participants generally confirmed the epistemic value of this form of deliberation. None reports of any great personal transformations, although many point out that the views of the representatives from the applicant states changed and also underlined the importance of fully including them.

deliberation was not unleashed. This was particularly the case during the final stages of the process, when it started to resemble an IGC, in that there was both bargaining and brinkmanship.

With regard to the second point, the title 'Draft Treaty establishing a Constitution for Europe' is evocative of the process-approach to constitution-making. Its title reflects what many of the participants expressed, namely that this was as far as could be got, but that the draft can serve as a vehicle to foster the Constitution for Europe. The question is what this amounts to in constitutional reflexivity terms.

The draft reflects the majority of the Convention's great concern with citizens' rights, as reflected in the inclusion of the Charter of Fundamental Rights (2000). On this issue there had been a change in positions, in particular on the part of the British government, which initially did not want to have the Charter as a fully incorporated part of the draft (European Convention 2002c: 13; 2002d). The Convention did not consider the substantive contents of the Charter, as this had already been agreed upon by the Charter Convention (2000). But this also means that the draft carries forth the limitations in the Charter as a vehicle to ensure self-legislating citizens (Eriksen et al. 2003; Fossum 2003).

What is also important to recognize is that the draft (if adopted) would move the EU from a poly-centric to a poly-cephalous entity, through the formal abolishment of the pillars (portions of which are nevertheless retained in various provisions), the instituting of legal personality and numerous other unifying and simplifying provisions. The early warning system for national parliaments would for instance pull them into the Union's ambit of operations and thus further entrench this comprehensive multi-level institutional structure. It would be a structure with two heads (poly-cephalous) framed on top of one common legal body (but with certain issue-areas still outside it). The two-headed structure would emanate from the retention of a Council-led decision-making system within a number of issue-areas that are still subject to unanimity provisions. This structure is further entrenched in the amendment provisions which provide for national veto. The draft thus takes the

Union closer to statehood by consolidating the legal-institutional structure, but this process does not extend all the way. This unifying thrust serves to underline that the draft will move the Union further beyond that of a poly-centric structure (which is the conception of the EU that Bohman's position rests on).

The draft also contains a number of institutional proposals that will increase the democratic quality of the EU, through provisions that strengthen the European Parliament as a legislative body, albeit still not to a par with the Council.[34] Greatly strengthened transparency requirements (Articles I–49, III–304, 305) will also improve individual and inter-institutional lines of accountability. The popular right of initiative (Article I–46.4) will improve citizens' access to the system. The draft moves the EU closer to a parliamentary model, but this thrust is modified by a number of provisions, such as those that will likely strengthen the Council and entrench a poly-cephalous structure. The draft can be seen as equipping the Union with a dual basis of legitimacy: a Union of citizens and of states (European Parliament 2003). But although the Constitution is seen to emanate from both, there are numerous provisions that will place the member states in a privileged position.[35]

Participants and analysts have presented the draft as a compromise,[36] or an ambiguous agreement, but it is closer to a *working agreement.*[37] The draft was the result of a long preceding argumentative process, where different reasons had been presented, sought justified and assessed and tested. This procedure had made a final settlement possible,

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[34] Such provisions are: co-decision as the main legislative procedure (Article I–33, with reference to Article III–302); far more use of qualified majority voting in the Council (cp. Article I–24); and the formal abolition of the pillar system (not quite so in practice, though).

[35] See Fossum 2004.

[36] Cp. Plenary debate 12 June 2003. Convention members when asked whether the Convention exercise was a bargaining process or a learning process generally came up with responses to the effect that it was both but they all (23) also stressed the learning aspect.

[37] For this category, see Eriksen 2003 and Schmalz-Bruns 2005.

although the settlement was supported by different reasons.[38] There were shortcomings in the process, but it had permitted a rather thorough vetting of arguments. Further, standpoints and positions had changed. The results were also acknowledged to amount to more than what would have been achieved in an IGC,[39] which testifies to the importance of this process.

A working agreement that entrenches citizens' rights can foster or sustain constitutional reflexivity. In the above it was pointed out that this agreement contains provisions that will likely limit the reflexive character of certain of its rights and institutional procedures. Two further elements require mention. First, although the draft held different parts, with constitutional and normal legislative acts, respectively, this difference was not reflected in differentiated amendment procedures.[40] The draft was a seamless web, which could be construed either as over-constitutionalization or as de-constitutionalization. The former, over-constitutionalization, occurs when the detailed provisions in Part III become intrinsic parts of the constitution. This could make the constitution into a straitjacket and serve as an important constraint on the democratic decision-making process.[41] However, this assessment is also a matter of which evaluate standard is chosen. From a normative perspective (drawing on the notion of revolutionary constitution, see Brunkhorst 2004), the relevance of the term over-constitutionalization hinges on the constitution's compliance with basic constitutional norms (basic rights, egalitarian organizational and procedural norms, and a viable public sphere) in the first place. The Union's Constitutional Treaty does not comply with such, given its democratic deficiencies (Fossum 2004; Menéndez 2005; Peters 2004). Further, when the constitutional provisions proper are not superior to the non-constitutional ones, which applies when the non-constitutional and democratically

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[38] There was no final vote but most likely 195 out of 207 members and substitutes supported the draft, whereas eight signed the so-called minority report.

[39] Participants' accounts. See also Kokott and Rüth 2003: 1317, Fossum and Menéndez 2005.

[40] But note that Articles IV–444 and 445 of the final IGC version do envisage simplified revision procedures for limited aspects (after a unanimous vote by the Council) of part III (European Council 2004c).

[41] For a more detailed description of this problem, see Menéndez 2005.

deficient provisions in Parts III and IV regulate and determine the operation of the constitutional provisions in Parts I and II, then, from a normative perspective we may talk not of over-constitutionalization but of de-constitutionalization. Whichever reading is most relevant, either way, the problem would be exacerbated by a second element, the retention of national veto in amendment. In a Union of twenty-five this would likely mean a high threshold against further constitutional changes. This combination (draft as seamless web with high thresholds) could render the entire structure – constitutional and non-constitutional provisions alike – highly resilient to change, with negative effects on reflexivity.

## Conclusion

This paper has assessed the question of the EU's legitimacy with particular attention to the Convention. It has shown that the Convention took on the role not only of staging a constitutional discussion, but also took this process further and came up with a Draft Constitutional Treaty. This exercise has moved the Union closer to the fourth strategy. The Convention was able to tap the virtues of democratic deliberation to an unprecedented degree in EU constitution-making, and the draft also moved the process of constitutionalization forwards, as it holds numerous provisions that will strengthen the EU's democratic quality.

The Convention adopted an 'as if' it were a constitution-making body approach, as it had not been authorized to serve as one. It appropriated a democratic mandate, and thus greatly raised the stakes of the undertaking. But this appropriation could not be democratically authorized, as it had to carry out its deliberations under the shadow of the veto in the IGC. A process which the Convention thus sought to stage within the framework of strategy four was reined in and made subject to several of the core constraints inbuilt in strategy two.

This analysis provides us with three more general conclusions pertaining to the EU's legitimacy. First, the EU has adopted an approach to constitution-making that has become

increasingly reflexive. The Convention exercise is the most explicit manifestation of this, but closer analysis of previous instances has revealed a certain built-up momentum. The approach adopted has been one of constitution-making as ongoing process. The legitimacy of the process and its products depends on the EU's ability to draw on justified norms and to entrench these in institutional form and practice, with a concomitant strengthening of the conditions that safeguard and promote reflexivity.

Second, this gradualist approach is still embedded in a framework with strong built-in safeguards for member states. These are justified in the need for retention of nationally based democracy (albeit these arrangements offer weak such safeguards in practice).

Third, the results are curious mixtures. On the one hand, in terms of overarching principles, the EU draws on those that mark the *common* constitutional traditions of the member states. But as the Convention exercise showed, although it could draw on justified norms, its work continued the Union's unique blending of creative consolidation of the common constitutional traditions of the member states with the effort to distil out a constitution from the *acquis*, which would highlight the unique features of the Union. The draft's poly-cephalous character underlines this careful blending.

The Constitutional Treaty can best be seen as a working agreement, which sought to forge a balance between a Europe of states and a Europe of citizens. It has moved closer to citizens' concerns than before, but nevertheless ends up privileging states. Its main shortcoming, however, is its overly high thresholds against change. It risks ossification and could threaten the constitutional reflexivity that has thus far been the hallmark of the Union's emerging post-national constitutionalism. 'Reflexivity constrained' is thus the most appropriate label for this.

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